M.L.A.A. - 4th Annual Meeting - 1977.

(viii)

THE IMPACT OF THE HAGUE-VISBY RULES WITH REFERENCE TO THE UNCITRAL DRAFT CONVENTION ON THE CARRIAGE OF GOODS BY SEA

Prepared on behalf of the N.S.W. Committee of the Maritime Law Association of Australia.

PART 1.

The amendments made to Article 3 of the Hague Rules by the Visby Rules with reference to relevant provisions of the Uncitral Draft Convention by S.W. Hetherington M.A. (Cantab).

PART 2.

The amendments made to the limitation of liability provisions of the Hague Rules (Article 4) by the Visby Rules with reference to the limitation of liability provisions of the Uncitral Draft Convention by I.R. James B.A. LLB. Solicitor of the Supreme Court of N.S.W.

PART 3.

The defences and limits of liability available to the Carrier under the Hague Rules as extended by the Visby Rules to the Carriers servants and agents with reference to relevant provisions of the Uncitral Draft Convention.
by. J. F. Emmott B.A.

THE AMENDMENTS MADE TO THE LIMITATION OF LIABILITY PROVISIONS OF THE HAGUE RULES (ARTICLE IV) BY THE VISBY RULES WITH REFERENCE TO THE LIMITATION OF LIABILITY PROVISIONS OF THE UNCITRAL DRAFT CONVENTION

By I.R. James B.A. LL.B Solicitor of the Supreme Court of New South Wales

It is perhaps desirable to start by outlining the present provisions of the Hague Rules relating to limitation of a carrier's liability which is to be found in the schedule to the Commonwealth Sea Carriage of Goods Act, 1924. Article IV(5) provides as follows:

> "(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.
>
> This declaration if embodied in the bill of lading shall be prima facie evidence but shall not be binding or conclusive on the carrier.
>
> By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure abovenamed.
>
> Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading."

Reference will also be made to decided cases during the course of this paper.

Although there is some confusion regarding the meaning of "100 pounds", it is suggested that it should be construed as meaning "100 pounds gold" because of the provision in Article IX that "the monetary units mentioned in these Rules are to be taken to be the gold value".[1] However, this amount will be treated as "200 pounds sterling lawful money of

1. Scrutton on Charterparties and Bills of Lading, 18th ed. at p.441.

the United Kingdom" pursuant to clause 2 of the Gold Clause Agreement. This agreement has no application in Australia, and accordingly, we are left with a limit of $200 per package or unit.

The words "per package or unit" have been the subject of considerable controversy in recent years. The purpose of the per package limitation is to retain a proper balance between the rights and responsibilities of the carrier on the one hand and the rights and responsibilities of the shipper on the other (see Pannell v. S.S. American Flyer 1958 AMC 1428 at p.1433).

As there are no direct English or Australian authorities which deal with the question as to what is a "package" or "unit", reference will be made to U.S. and Canadian decisions on the subject. However, these decisions should be treated with some caution when considering their applicability to our Rules, as, apart from the fact that different policy considerations may be involved, the wording of the relevant Sea Carriage of Goods Acts differs materially in some respects. For instance the U.S. Carriage of Goods by Sea Act, 1936 s.4(5), first paragraph reads:

> ".... per package lawful money of the United States or in case of goods not shipped in packages, per customary freight unit ...."

Further, it should be borne in mind that the U.S. cases follow a different line of approach to that adopted in the Canadian decisions, and neither line of approach should be treated as authoritative when interpreting the limitation provisions of our own Act.

The meaning of and distinction between the words "package" and "unit" is of considerable importance to the carrier who will want to ascertain the likely extent of his liability so that he can insure accordingly.

Definition of Package

The word "package" means articles which are packed or crated (see Whaite v. Lancashire and Yorkshire Railway Company 1874 L.R. 9 EX.67 where the Court considered the meaning of the words "parcel or package" under the English Carriers Act).

The purpose of the words ".... per package ...." in s.4(5) of the U.S. Act was described by Lumbard C.J. in Standard Electrica S.A. v. Hamburg Sudamerikanische Dampschiff Fahrt - Gesellschaft 375 F.2d 943 at 945 to provide:

> ".... a unit that would be fairly uniform and predictable in size, and one that would provide a common sense standard so that the parties could easily ascertain at the time of contract when additional coverage was needed, place the risk of additional loss upon one or the other, and thus avoid the pain of litigation."

However, the difficulty is that -

> ".... few, if any, in 1936 could have foreseen the change in the optimum size of shipping units that has arisen as the result of technological advances in the transportation industry."

It appears that what is a package is a question of fact to be determined by the court according to the facts of the particular case at hand.[1] However, a distinction appears to have been drawn between a covering which facilitates the handling and transportation of goods, which constitutes a "package" and a covering which is solely for protection which does not (see Aluminios Pozuelo Ltd. v. S.S. "Navigator" 1967 277 F. Supp 1008) and in this regard it appears that the size of a covering will not necessarily prevent it from being treated as a package. The following

1. Per Goddard J. in Studebaker Distributors Limited v. Charlton Steamship Co. 1938, IKB 459.

have been held to be packages:-

(a) a wooden case containing a roll of steel weighing 32½ tons (Mitsubishi International Corporation v. S.S. "Palmetto State" 1963 AMC 958).

(b) a refrigerated semi-truck trailer (United Purveyors Inc. v. "New Yorker" 1965 250 F. Supp 102).

(c) a crated machine (Carle & Montanari Inc. v. American Export Isbrandtsen Lines 1967 275 F Supp 76).

(d) a pallet loaded with goods (Standard Electrica S.A. v. Hamburg Sud-Amerikanische D.G. supra).

(e) a container (Encyclopaedia Britannica Inc. v. The "Hong Kong Producer" and Universal Marine Corporation 1969 2 LlR 536).

There is authority for the proposition that the word "package" must be given its normal or dictionary meaning, namely a bundle or parcel wrapped or made up so as to enable it to be transported (per Goddard J. in Studebaker Distributors Ltd. v. Charlton S.S. Co. Ltd. supra also see Pannell v. S.S. "American Flyer" supra at p.1434). However, the fact that the covering does not fully enclose its contents does not necessarily prevent the article from constituting a package (see Whaite v. Lancashire and Yorkshire Railway Co. 1874 supra where it was held that a railway wagon with wooden sides was a "package" within the meaning of the Carrier's Act, 1930 which contains a provision similar to Article IV Rule 5).

The following have been held not to be packages:-

(a) a motor car placed on a ship without a box, crate or any form of covering (see Studebaker Distributors Ltd. v. Charlton Steamship Co. supra).

(b) an uncrated yacht (see Pannell v. S.S. "American Flyer" supra).

(c) an unboxed Tractor (Middle East Agency v. S.S. "Waterman" 1949 AMC 1403).

(d) a tractor weighing 43,319 lbs shipped without skids, but with superstructure partially encased with wooden planking (Gulf Italia Co. v. American Export Lines Inc. (SS. "Exiria") 1959 AMC 930).

Definition of Customary Freight Rate in the U.S. Carriage of Goods by Sea Act. This term is peculiar to the U.S. Act and it appears to have been inserted to clarify rather than to amend the Rules. Tetley expresses the opinion that it is a more explicit term than "unit".

Definition of Unit under the Hague Rules

A unit would seem to be some unpacked object.[1] However, the authorities indicate that such object may be either:-

(a) a "freight unit" i.e. the unit of measurement applied to calculate the freight, or

(b) a "shipping unit" i.e. the physical unit received by the carrier from the shipper.

Regardless of which approach is correct, it has been suggested that the word "unit" has a wider meaning than the word "package" and for this reason should be relegated to a subordinate roll.[2] This interpretation would appear to be consistent with the majority of decided cases on the question of limitation of liability in respect of a consolidated cargo, which have been determined on the basis of a package limitation rather than a unit limitation.[3]

1. See Tetley - Marine Cargo Claims, at p.236
2. See H.G. Rohreke - Combined Transport and the Hague Rules, in European Transport Law, Vol. 10 at p.625. But c.f. Carver, Carriage of Goods by Sea, 12th ed., 1971 at par. 300.
3. But see Shinko Boeki Co. v. Pioneer Moon 1975 AMC 49 where the unit limitation was applied.

The expression "per customary freight unit" in the U.S. Act has led to difficulties where the customary freight unit differs from the freight unit actually applied, or from the freight unit enumerated in the bill of lading (see "The Edmund Fanning" 1953 AMC 86; "The Sea Roads" 1964 AMC 2646, "The Overseas Joyce" 1966 AMC 66).

The "freight unit" has been rejected in Canada in favour of the "shipping unit" at least as far as individual articles such as automobiles not shipped in packages are concerned (see Anticosti Shipping Co. v. St. Amand 1959 1 LlR 352). Although there appears to have been no difference between the freight unit and the shipping unit in that case, it has nonetheless been treated as an authority in favour of the shipping unit in Sept Iles Express Inc. v. Tremblay 1964 Ex.C.R. 213 (Canada) and Falconbridge Nickel Mines Ltd. and Janin Construction Ltd. v. Chimo Shipping Ltd., Clarke Steamship Co. Ltd. and Munro Jorgensson Shipping Ltd. 1969 2 LlR 277 (Canada).

In the latter case, Ritchie J. expressed the view that the words "per package or, in case of goods not shipped in packages, per customary freight unit" constitute a departure from the Hague Rules as adopted in the United Kingdom and Canada, and were not of great assistance in deciding the meaning of the words "per package or unit" as they appear in Article IV Rule 5.

The approach in the Anticosti case is supported by Temperley and Vaughan in their text on the Carriage of Goods by Sea Act, 1924 (4th ed. 1932) at pp.81-82 where it is said:

> "1. The word "unit" connotes one of a number of things rather than a thing standing by itself, and with reference to goods carried

> by ship, it does not seem appropriate to describe the whole of a cargo or parcel of cargo in bulk. Further the natural interpretation of the word "unit" in the phrase "package or unit" appears to be that it has been added in order to cover parts of a cargo similar in a general way to a package, but not strictly included in that term, which properly implies something packed up or made up for portability and would therefore not include such a thing as a log of wood or a bar of metal. The word "unit" has, it is suggested, been added in order to embrace such things and not to extend the scope of the Rule to bulk cargoes or parts thereof. Moreover, the whole purpose of Rule 5, which is directed against excessive claims for things of undisclosed abnormal value supports this limited interpretation of the word."

The authors, while indicating a clear preference for the view expressed above, went on to deal with the alternative view, which they expressed as follows:

> ".... inasmuch as the term "unit" is commonly used to mean a standard of measure or enumeration, or one of a series of things split up either physically or notionally for the purpose of enumeration or measurement the phrase "package or unit" here used must refer back to the particulars of enumeration or measurement which must be shown on the bill of lading as provided by Article 111, Rule 3 ...."

This latter rule provides that the bill of lading must show, inter alia, "either the number of packages or pieces or the quantity of weight as the case may be ....". The former view is further borne out by the note to be found in Halsbury's Laws of England, 3rd ed. Vol. 35 at p.535 and by the editors of Scrutton on Charterparties 7th ed. 1914 at p. 427.

There is some authority in England in favour of adopting the "shipping unit" approach - see Studebaker Distributors Ltd. v. Charlton S.S. Co. Ltd. supra.

However, if the "shipping unit" approach is to be adopted, it is a little hard to understand why the Rule treats "package" as an alternative to "unit" since "shipping unit" would include a package. Further, as was pointed out by Goddard J. in the Studebaker Case supra, the concept of the "shipping unit", unlike the "freight unit", is inappropriate when applied to bulk cargo. A possible solution would be to apply the "shipping unit" to individual articles not in packages and the "freight unit" to bulk cargo. On this basis, if one adopted the "freight unit" it should only be applied to goods which are not packaged because otherwise difficulties would arise whenever the freight is not calculated on a "per package" basis. However, the authorities indicate that anomalies will arise, regardless of the solution adopted.

Relevant package or unit defined

The crux of the problem is whether a container with its contents should be considered as the relevant package or unit or whether each individual item packed separately within the container should be the relevant consideration for the purposes of limitation of liability. (see per Collier J. in J.A. Johnston Co. Ltd. v. The Ship "Tindefjell", Sealion Navigation Co. S.A. and Concordia Line A/S 1973 2 LlR 253 at p.257). It is submitted that what is the relevant package or unit falls to be determined by looking at the intention of the parties at the time of entering into the contract of carriage. There are conflicting streams of thought (based in part on the individual facts of each case) as to how the intention of the parties can be ascertained.

In dealing with the decided cases, H.F. Rohreke has referred to the following tests:

(i) The "course of dealings" Test - the intention of the parties to the contract of carriage is to be inferred from their course of dealings; that is, who chose the means of and controlled the packing, who knew of the nature of the goods in the package, the wording of the bill of lading and the consequences to be drawn from the knowledge of the parties. This approach was adopted in the U.S. decision of Leathers Best Inc. v. The "Mormaclynx", Moore - McCormack Lines Inc., Tidewater Terminal Inc. and Universal Terminal and Stevedoring Corporation 1971 2 LlR 476 where a container which was supplied by the carrier, packed by the shipper and described in the bill of lading as "one container said to contain 99 bales of leather" was to be treated as 99 bales, each of which was the relevant package.

The Federal Court of Canada arrived at the same result in the case of J.A. Johnston Co. Ltd. v. The Tindefjell and Sealion Navigation Co. S.A. and Concordia Line A/S 1973 2 LlR 253 where the Court held that each carton of shoes was the relevant package and not the container. Further, it held that a container was not to be considered a "unit" of goods or an "item of cargo" for the purpose of applying the limitation. Collier J., after analysing the Leathers Best case, stated as follows:

> "It seems logical to me that the Plaintiff intended to have the benefit of the minimum monetary responsibility laid down in the Rules by putting the carrier on notice as to the number of packages being carried, though for convenience and other reasons, they were grouped together in one large receptacle. The carrier could have refused to issue the bill with such a description .... and in any event adjusted its charges to meet the situation."

His Honour held that the owner of the goods had no reason to declare a value in the bills of lading as each carton did not exceed in value the $500 per package limitation prescribed by the U.S. Carriage of Goods by Sea Act. He stated that:-

> "Where the shipper knows his goods are to be shipped by container and specifies in the contract (usually by means of the bill of lading) the type of goods and the number of cartons carried in the container, and where the carrier accepts that description and that count, then in my opinion, the parties intended that the number of packages for the purposes of limitation of liability should be the number of cartons specified. I hasten to add that the intention must be ascertained from consideration of all the facts and not merely the words used in the bill of lading. The type of container, who supplied it, who sealed it and if it was sealed on delivery to the carrier, the opportunity for count by the carrier, the previous course of dealings - all these matters and many others which I have not enumerated may be relevant in arriving at what the parties by the particular contract intended."

His Honour also considered the U.S. District Court decisions in Royal Typewriter Co., Division Litton Business Systems Inc. v. M.V. "Kulmerland" and Hamburg - Amerika Linie 1973 2 LlR 428 and Rosenbruch v. American Export Isbrandtsen Lines Inc. 1974 1 LlR 119 (discussed below) but distinguished both cases on the basis of the wording in the respective bills of lading which he said provided for carriage of "1 container with no indication of the number of cartons or the intention of the shipper".

(ii) The "functional economics" Test

This was propounded in the U.S. Court of Appeals decision in Royal Typewriter Co., Division Litton Business Systems Inc., v. M.V. "Kulmerland" and Hamburg - Amerika Linie 1973 2 LlR 428. This case concerned a shipment of 350 adding machines delivered by a German manufacturer in Berlin to its freight forwarder which, along with 700 other machines were each packed in a single wall carton. The cartons were in turn placed in 3 containers. The judgment in this case opts for a decision based on whether the contents of a container could easily have been shipped overseas in the individual packages or cartons in which they were packed by the shipper. Here they could not and it was pointed out that in the days before containers they were shipped in wooden crates or cases each containing 12 to 24 individual packages or cartons of typewriters. The judgment likened the containers in which the cartons were shipped in lots of 350 to the wooden crates or cases used in the past. It distinguished the Leathers Best case by pointing out that the bales in that case could have been shipped individually, rather than in the container ultimately held not to be a package. The judgment concludes by saying:-

> "The 'functional package unit' test we propounded today is designed to provide in a case where the shipper has chosen the container, a 'common sense test' under which all parties concerned can allocate responsibility for loss at the time of contract, purchase additional insurance if necessary, and thus avoid the pains of litigation."

This approach was subsequently followed by the same Court in Cameco Inc. v. S.S. "American Legion" 1974 AMC 2468.

The Royal Typewriter decision has been attacked as unsound on the ground that the 'functional economics Test' has "unrealistically and one sidedly ignored the predominant functions of the container as an essential appurtenance of the carrier's containership operations resulting in huge economies by the carrier and instead seized upon the shipper's trivial economy in packaging materials as the sole determinating factor of the case".[1]

While the circumstances of shipment and loss were generally similar to those which arose in Leathers Best, the following distinctions are of some importance:-

(a) In Royal Typewriters, the bill of lading did not specify the number of cartons said to be stowed in the container whereas in Leathers Best it did.

(b) In Royal Typewriters, the container was supplied by the ship's freight forwarder abroad, whereas in Leathers Best it was supplied by the carrier's representative.

1. See S. Simon - "The Law of Shipping Containers" in Journal of Maritime Law and Commerce, Volume 5 at p.531.

(c) In Royal Typewriters, the physical appearance of the container was unlike that of the metal containers which were in widespread use, whereas in Leathers Best the metal container was 40 ft. long and of the usual type.

However, regardless of the distinctions, it is submitted that the approach adopted in Leathers Best is to be preferred as any other decision would appear to place upon the carrier the burden of looking beyond the information in the bill of lading or beyond the outer packing to investigate the contents of each shipment (see the Standard Electrica case supra).

(iii) The "single shipping package" Test

This test implies that where a container has been packed by a single shipper, the container is to be regarded as the relevant package in the absence of strong evidence to the contrary.

The test appears to have been derived from the decision in the Standard Electrica case supra. In that case, the Court asked two questions:-

1. Did the shipper choose the use of the pallet or container as a package?
2. Did the bill of lading describe the pallet or container as a package?

Hays C.J. (min.) in Encyclopaedia Britannica Inc. v. The "Hong King Producer" supra expressed the following view:-

> ".... each individual container (was) to be considered as the functional packing unit, that

considering the containers as packages promotes uniformity and predictability and, accordingly, that the $500.00 package limitation applies to the containers ...."

This view was followed in the case of Rosenbruch v. American Export Isbrandtsen Lines Inc. 1974 1 LlR 199 where the bill of lading showed the figure "1" in the column entitled "Number of containers or other packages" and the cargo was described as "said to contain household goods". The Court in holding that the container was the relevant package for the purposes of the limitation provisions emphasized the need for predictability.

Rohreke comments that this test does not always give a conclusive result, as it leaves room for individual conclusions given different fact situations.[1]

It is submitted that none of the above tests are in themselves conclusive. For instance, it appears that they may not be able to provide a satisfactory solution to the problem which arises when a container is packed by the shipper and shipped as a single piece of cargo and the bill of lading acknowledges receipt of "one container said to contain" a number of packages or units. However, it is submitted that the following points are relevant to determining the intention of the parties in each particular case:-

(i) Is the container closed or open?

If the container is entirely closed, then it appears as oneparticular piece and its covering appears as a protective wrapping

1. Rohreke, opp cit, at p.630.

against theft and the incidents of weather. In this case it is submitted that the container would be the relevant package or unit.

On the other hand, a container which is only like a pallet with a certain superstructure (perhaps with open top) is more likely to be construed as a cargo handling appliance for the purpose of assembling and carrying different parcels. In this case there is no protection from theft and it is submitted that it would be inappropriate to consider the container as one unit.

(ii) <u>The size of the container</u>

If the container is no bigger than a parcel of normal size then it may be quite natural to treat it as a single unit for the purposes of limitation (see the Standard Electrica case supra and c.f. the Leathers Best case supra). However, if the container is equipped with special appliances it may be more difficult to apply the unit limitation to its overall contents.

(iii) <u>Ascertain who makes the container available for carriage of the cargo</u>

If the container is provided by the carrier, then it is more likely to be regarded as a means of handling cargo, and it would appear to be unrealistic to treat such a container and its contents as one unit. However, if the shipper tenders a fully loaded and sealed container ready for shipment then this may cast a different light on the situation, particularly when the size of the container does not surpass the normal size for a standard parcel.

(iv) <u>The contents of the container</u>

The contents of the container may be of different kinds - for example, a container with 100 bottles of whisky is no different to a box containing 100 bottles of that whisky, and such a box would normally be considered as a unit in the sense implied by the Rules. However, a container with a general cargo of different kinds and in separate parcels would not appear to constitute such a unit.

(v) <u>The handling of the cargo</u>

For instance, a container sent direct from the shippers factory to the warehouse of the receiver and which is sealed and locked, would normally be handled as one unit and may possibly be considered as such in the sense implied by the Rule. However, this may not be the case where the container is used for consolidated shipments and is loaded at various places on land while in transit to the vessel for loading on board. In this case, the general cargo within the container becomes of prime interest and the container is simply regarded as an appliance for handling cargo.

(vi) Method of calculating the freight

If the freight is determined in the form of a lump sum applicable to the container as such then the character of the container as the relevant package or unit is accentuated.

(vii) The description of the cargo in the Bill of Lading and the manner in which the container is tendered to the carrier

Where the bill of lading specifies the type of goods and the number of packages in the container, it is submitted that the limitation of liability should apply to each of those packages and not to the container as a whole (see Inter-American Foods Inc. v. Co-ordinated Carribean Transport Inc. and Ors. 1970 AMC 1303), particularly where the carrier accepts that description and count (see per Collier J. in the Tindefjell case supra).

THE VISBY RULES

As it was considered desirable to amend certain of the Hague Rules, the Diplomatic Conference on Maritime Law produced a Protocol in 1968 which became known as the Visby Amendment. It amended, inter alia, Article IV paragraph 5 to provide as follows:-

"(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 Frs. 10,000 per package or unit or Frs. 30 per kilo of gross weight of the goods lost or damaged, whichever is the higher.

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

The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

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

(d) A franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900'. The date of conversion of the sum awarded into national currencies shall be governed by the law of the Court seized of the case.

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

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

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

(h) Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the Bill of Lading."

The amendments to Article IV do not affect the limitation provisions to be found in s.503 of the Merchant Shipping Act, 1894-1906. However, they have amended the package limitations set forth in the Hague Rules as follows:-

1. The sterling limit (coupled with the Gold Clause Agreement in the U.K.), is replaced by a limit expressed in "Poincare Francs".
2. The limit "per package or unit" itself is increased.
3. Provision is made for an alternative limitation based on weight, which would eliminate the controversy then existing under the present Rule regarding the application of the "unit" limitation to bulk cargoes.
4. Sub-rule (b) contains a new provision relating to the calculation of damages. There are at least two views as to the purpose of this provision:-
   (a) it is designed to provide an additional upper limit to the amount recoverable which would have the effect of eliminating claims for consequential loss, and the words "the total amount recoverable" would appear to support this construction.
   (b) it may have been intended to provide a guide to assist in calculating the question of damage without going as far as to provide that the sum recoverable consists only of the damages so calculated. In this regard, it is suggested by the learned authors that the words "calculated by

reference to" seem scarcely strong enough to create a limit.

5. Sub-rule (c) solves some of the limitation problems which then existed in relation to container transportation.

The most significant aspect of this clause is that the number of packages or units must appear on the face of the bill of lading in order to constitute the basis for calculation of the limitation. Accordingly a carrier receiving a closed container is not forced to pay compensation on the traditional package basis when he does not know the contents of the container. Further, a person who acquires a bill of lading can readily ascertain from looking at it the type of cover under which the goods have been shipped. For Example, if a forwarding agent consolidates goods and describes them in the bill of lading as "1 container said to contain general merchandise" then it is submitted that the container itself is the relevant package or unit. However, if the bill of lading states "100 cases each containing 12 bottles of whisky", it is submitted that the cases and not the bottles form the relevant unit. If on the other hand, the container is loaded with "20 cases of T.V. sets and general merchandise", it is submitted that the 20 cases would form separate packages for the purposes of limitation, and that the rest of the cargo would come within the weight limitation.

However, the authors of Scrutton on Charterparties have drawn attention to the following potential problems:-[1]

1. Scrutton <u>opp. cit.</u> p.463.

(a) what articles of transport are "similar to" containers and pallets? It is submitted that "roll on - roll off" lorries and trailers do not fall within this description.

(b) what is the precise meaning of the words "used to consolidate"? The learned authors suggest that the most obvious interpretation is "used to carry" or "used to contain". However, they refer to the fact that the word "consolidate" is often used in a maritime context as meaning to "treat as one consignment for the purposes of calculating freight". Difficulties are most likely to arise when a forwarding agent ships the goods of several different consignors in a single container.

(c) In what circumstances is the number of packages "enumerated in the bill of lading as packed" in the container? The learned authors submit that where the bill is "said to contain" a certain number of packages, then this is sufficient for the purposes of sub-rule even though it would probably not create an estoppel under Article III Rule 3. On the other hand, it appears that both parties are bound by an incorrect enumeration which is rather unsatisfactory.

6. Sub-rule (e) provides that misconduct by the carrier will deprive him of the right to limit his liability in the following circumstances, namely where:-

(a) the damage resulted from an act or omission of the carrier, and

(b) (i) it was done with intent to cause damage or

(ii) it was done recklessly and with knowledge that damage would probably result.

However, the carrier retains the benefit of the defences outlined in Article 4 and the time limit provided for in Article 3 Rule 6.

The learned authors submit that the words "the carrier" are confined to the carrier himself and do not include his servants or agents except so far as they would be regarded as constituting part of the alter ego of the carrier.

Sub-rule (e) would appear to leave no room for the doctrine of deviation to deprive the carrier of the right to limit his liability particularly where the act relied on is committed by the carrier. However, the doctrine may still operate in relation to the exceptions contained in earlier Rules and perhaps in respect of the unit, where the act relied upon as constituting a deviation is committed by the crew and not by the carrier himself. The learned authors submit that since specific provision has been made by the draftsmen to the effect that serious misconduct shall deprive the carrier of his right to limit then it may be implied that the other protective provisions of the Rules were not intended to be vitiated by such misconduct.

Sub-rule (a) is very similar to Article IV (5)(a) of the Hague Rules and may conveniently be considered with sub-rule (c). De Gurse refers to these as the "unless clause" and the "container clause" respectively.[1] The "container clause" introduces an entirely new concept to the Hague Rules. It has the effect of putting the carrier on notice that his per package or unit liability extends to each package or unit enumerated in the bill of lading and he is thereby afforded an opportunity to take such care of the container, pallet or similar article of transport as he deems necessary.

So far as the "unless clause" is concerned, De Gurse comments that "the long standing practice of the ocean carrier industry has been to charge a higher or ad valorem rate in all cases where the shipper exercises his option under the unless clause of Article IV (5) and declares the nature and value of the goods before shipment, inserting such a declaration in his bill of lading.[2] However, he went on to say that a strict reading of the wording of the Article did not appear to authorise such a practice, and that regardless of the established practice the purpose of the unless clause was by no means clear.

The practice of charging higher rates has tended to discourage shippers from declaring the nature and value of their goods in the bill of lading. Instead, they have tended to rely on supplementary cargo insurance as a means of protection against loss, which is, for the most part, less expensive than paying a higher freight rate.

After tracing the history of the "unless clause" De Gurse concludes by submitting that there is nothing in the "container clause" which indicates that the carrier is entitled to charge

1. J.L. De Gurse - "The 'Container Clause' in Article IV(5) of the 1968 Protocol to the Hague Rules" in 2 Journal of Maritime Law and Commerce 131-146 at p.132.
2. J.L. De Gurse, *ibid*, p.133.

a higher freight rate as a result of the individual enumeration of each package or unit in the bill of lading. This interpretation accords with that of the U.S. delegation to the Conference which produced the Visby Rules. However, the British delegation interpreted the clause as permitting a carrier to charge a higher freight rate where the number of packages in the container is enumerated by the shipper.[1] This latter interpretation of the "container clause" was supported by the chairman of the Commission established to consider the limitation of liability in his address to the Conference on the Commission's work.

If the British interpretation is to be accepted, with the result that an additional freight rate is quoted by the carrier which proves unacceptable to the shipper, then it is quite probable that the shipper will not so enumerate, thus restricting him to a maximum recovery of 30 francs per kilo of gross weight, which, it is submitted, may be unrealistically low in some cases.

Despite this, it is submitted that the Visby Rules have clearly improved the position of the shipper. For instance, if 100 boxes of cargo, valued at $60,000 and weighing 10 tons are stowed in 1 container which is lost overboard during sea transit and those 100 boxes are enumerated in the bill of lading, then the appropriate calculation for limitation of liability would be 100 x 10,000 poincare francs. If the boxes have not been listed in the bill of lading, with the result that the container becomes the relevant package or unit, then the shipper can avail himself of the benefit of the weight limit, the appropriate calculation for which is 10 x 30 poincare francs x 1000.

1. This view is also taken by Lord Diplock in a paper entitled "Conventions and morals - Limitation Clauses in Maritime Conventions" in 1 Journal of Maritime Law and Commerce 526-536 at p.532.

UNCITRAL

The United Nations Conference on Trade and Development (UNCTAD) published a report in 1970, the terms of reference for which were as follows:-

> "To review the economic and commercial aspects of international legislation and practices in the field of bills of lading from the standpoint of their conformity with the needs of economic development in particular of the developing of countries and to make appropriate recommendations."[1]

The Report insofar as it is relevant to the subject of limitation, may be summarized as follows:-

(i) UNCTAD considered that the Hague Rules were inequitable and unfair to cargo interests because the exceptions and limitations therein contained protected shipowners and carriers from liability for loss of or damage to cargo in circumstances where one would not expect such protection.

(ii) UNCTAD considered that the Hague Rules were, uncertain and ambiguous in their application because:-

(a) there are significant departures from the Rules in the Carriage of Goods by Sea Acts of many countries.

(b) it is not clear whether "unit" should mean a unit of goods or the weight or volume unit by which freight is calculated.

(c) the term "package or unit" does not always fit the wide variety of forms

1. This has been extracted from a paper prepared by A. Diamond Q.C. entitled "The Division of Liability as between ship and cargo (insofar as it affects cargo insurance) under the new Rules proposed by UNCITRAL".

in which goods may be shipped, and in some cases the number of packages may differ from the number of units.

(d) it is not clear whether a "container" or "pallet" constitutes a single "package".

(iii) It considered that the practice of issuing bills of lading which incorporated the Hague Rules led to unnecessary economic cost in the form of overlapping insurance. UNCTAD considerated that:-

> "Ideally, cargo owners should not need to insure against the risk of loss or damage to their goods, which is covered by the liabilities falling upon the carrier under the contract of carriage."

If this were done, then cargo owners would have less need to insure their goods and the burden of insurance would be shifted to the shipowner, with little likelihood of an overall rise in costs.

As a result of the report and due to the technical problems involved, it was decided to entrust the preparation of a new set of Rules to the United Nations Commission on International Trade Law (UNCITRAL).

The UNCITRAL rules have the effect of transferring some of the relevant risk from the goods to the ship. For example, the UNCITRAL proposals have abolished two exceptions to a shipowner's liability for loss due to the negligence of his servants.

1. The first exception is in respect of any "act, neglect or default of the servants of the carrier in the navigation or in the management of the ship". The view taken by UNCTAD and UNCITRAL is that the

exceptions of negligent navigation and negligent management are an anachronism. Further, Mr. Diamond has pointed out that these exceptions often produce unsatisfactory results in practice in that they often lead to fine distinctions being drawn when dealing with claims. For instance, he draws a distinction in the Hague Rules, between loss caused by negligent navigation and loss caused by an incompetent or an insufficient crew. In the former case the ship is not liable, whereas in the latter case it is. As regards the exception of negligent management, one must first ascertain whether the failure to exercise due care occurred prior to or during the voyage. If it occurred prior to the voyage, then it constitutes negligence in making the ship seaworthy for which the owner is liable. If it occurred after the voyage began, then one must ascertain whether the negligence occurred in the course of managing the ship or in the context of looking after the cargo.

2. The second exception is in respect of "fire unless caused by the actual fault or privity of the carrier" Mr. Diamond submits that the abolition of this exception will not have any far reaching consequences, as:-

(a) a fire on board ship is very often found to have been caused by initial unseaworthiness in which case the shipowner is not protected under the Hague Rules unless he exercised due care in making the ship seaworthy;

(b) the UNCITRAL Rules propose a reversal of the burden of proof to provide that in the case of fire the owner of the goods must prove that the fire arose from some fault or neglect on the part of the carrier, his servants or agents.

In view of the above, it is submitted that the UNCITRAL proposals are remarkably conservative, given the conclusions stated in the UNCTAD report. The test proposed by Article 5 in relation to goods which are lost or damaged is as follows:-

(i) Was the loss or damage caused by an occurrence which took place while the goods were in the carrier's custody?

(ii) If so, was that "occurrence" due to the fault of the shipowner, his servants or agents?

(iii) If this question is answered in the affirmative, then a liability arises under the Rule.

The UNCITRAL proposals by virtue of Article 4, extend to the period during which the carrier is in charge of the goods while at the port of loading, during the voyage and at the port of discharge. This is slightly wider than the Hague Rules which deal only with the period from the commencement of loading to the completion of discharge.

However, by virtue of Article 2, it would appear that the proposals apply only to a contract of carriage of goods by sea from one port to another. Thus, it would appear that a combined transport operation involving despatch of goods from one inland depot to another would not come within the ambit of the Rules even where part of the carriage takes place by sea.

The UNCITRAL proposals relating to limitation of liability are contained in Article 6 and are largely based on the Hague-Visby Rules, which have been dealt with above. Article 6 reads as follows:-

> "1.(a) The liability of the carrier for loss or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to (...) units of account per package or other shipping unit or (...) units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher.
>
> (b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed (...)[1] the freight (payable for the goods delayed) (payable under the contract of carriage).
>
> (c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.
>
> 2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 of this article, the following rules shall apply:
>
> (a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading as packed in such article of transport shall be deemed packages or shipping units. Except as aforesaid the goods in such article of transport shall be deemed one shipping unit.
>
> (b) In cases where the article of transport itself has been lost or damaged that article of transport shall, when not owned or otherwise supplied by the carrier, be considered one separate shipping unit.
>
> 3. Unit of account means ...[2]
>
> 4. By agreement between the carrier and the shipper, limits of liability exceeding those provided for in paragraph 1 may be fixed."

1. The question as to whether the limit should be the freight or a multiple of the freight is to be determined at the conference of plenipotentiaries which will consider the Draft Convention.
2. The unit of account is to be determined at the conference of plenipotentiaries which will consider the draft Convention.

The monetary limit has not yet been determined. However, an alternative limitation based on weight has been introduced, so that the right to limit liability is extended to cover bulk cargoes whereas there is probably no right to so limit under the Australian Sea Carriage of Goods Act.

Article 8 of the UNCITRAL proposals deprives the carrier of the right to limit his liability where the loss results from an act done by the carrier or his servants and which "is done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result". Diamond makes the point that it is difficult to distinguish a loss caused by the negligence of an employee from a loss caused recklessly by an employee with knowledge that such loss would probably result.

The UNCITRAL proposals do not affect the provisions of the English Merchant Shipping Acts, 1894-1906, relating to a shipowner's liability and his rights to limit such liability. S.502 provides that the owner of a British sea-going ship shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases:-

(1) where any goods on board his ship are lost or damaged by reason of fire on board the ship or

(2) when any gold, silver, diamonds, watches, jewels or precious stones on board his ship, the true nature and value of which has not, at the time of shipment been declared by

the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement making away with or secreting thereof.

The relevant parts of S.503 as amended by the Merchant Shipping (Liability of Shipowners) Act, 1900 are as follows:

"(1) the owners of a ship, British or foreign shall not where all or any of the following occurrences take place without their actual fault or privity:

(a) ....

(b) where any damage or loss is caused to any goods, merchandise or other things whatsoever on board the ship.

(c) ....

(d) where any loss or damage is caused to any other vessel or to any goods, merchandise or other things whatsoever on board any other vessel by reason of the improper navigation of the ship."

The section also makes provision for the extent to which damages may be limited, as follows, namely:-

"I ....

II In respect of loss of or damage to vessels, goods, merchandise or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight (English) pounds for each ton of their ship's tonnage."

The effect of S.503(1)(c) and (d) was extended to "all cases where .... any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or movable, by reason of the improper navigation or management of the ship" by the Merchant Shipping (Liability of Shipowners and others) Act, 1900 S.I.

The provisions of the Merchant Shipping Act outlined above, indicate the ultimate totallity of liability in respect of a single occurrence. The Hague Rules are still available to the cargo owner in the event of loss or damage to his goods and it is quite possible that he will continue to avail himself of these rules particularly where he can get a better result. However, a shipowner or carrier is entitled to the benefit of the limitation provisions in the Merchant Shipping Act, and in certain circumstances this may work to his advantage, particularly where there are numerous claims for large amounts of money.

So far as the question of monetary limitation of liability is concerned, it has been suggested by Lord Diplock that the relationship between the limitation figure and the actual value of the goods is unimportant from the commercial point of view, so long as it is high enough to act as an inducement to the carrier to take proper precautions to descrease the risks associated with carriage.[1] He submits that the relevant relationship is between the limitation figure and the cost of precautions. Subject to this, it may be more economical to keep the limitation figure low and to spread the risk of loss or damage to the cargo among a large number of cargo insurers rather than letting it fall on a single P & I insurer and his reinsurers, which would normally be a more expensive way of insuring such a risk.

1. Lord Diplock, opp. cit., at p.529. However, he also expresses the view that the limitation provisions of the Visby Rules may be an insufficient inducement to a carrier when applied to a container as constituting the relevant package or unit.

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BACKGROUND

The Hague Rules have been with us for over 50 years and the Hague Visby Rules are the first amendments which have been made to the original Hague Rules. They are not intended to be a detailed revision, but are to be seen as amendments to certain provisions which experience has shown are either unjust or anachronistic. Previous papers in both 1975 and 1976 have discussed the UNCITRAL Draft Convention which is to be viewed as a much more detailed and comprehensive reappraisal of the whole question of the basis of the carrier's liability. It is not the intention of this paper to go over that ground again, but it is intended to examine the provisions of the UNCITRAL Draft Convention insofar as they touch on the provisions of the Hague Visby Rules. Before looking at the provisions of the Hague Visby Rules and the UNCITRAL Draft Convention, it might be useful to recall the background to the introduction of the Hague Rules themselves and to consider the present position of the UNCITRAL Draft Convention.

During the course of the 18th century shipowners bore most of the risk but by the late 19th century they had, to a large extent, succeeded in exempting themselves from liability in much the same way as transport hauliers and road carriers have done in Australia at the present time. This led to discontent in States which were considerable trading nations but which did not own sufficient shipping to carry all their imports and exports. One such nation was the United States of America and that country passed the Harter Act in 1892, which severely limited the circumstances in which shipowners could limit their liability in respect of goods carried to and from the United States. The first Australian Sea Carriage of Goods

Act was passed in 1904. New Zealand passed its Carriage of Goods by Sea Act in 1908 and the Canadian Water Carriage Act was passed in 1910.

The Harter Act, which led the way in this new legislation aimed at the protection of cargo interests, prohibited clauses exonerating the carrier or his agents from liability for faults in the care and custody of the cargo, but at the same time the Act provided that the carrier was not to be held liable for results of unseaworthiness if he had exercised due diligence to make the ship seaworthy, and if the damage caused to the cargo resulted from faults and errors in the navigation or management of the vessel. The Harter Act established an important principle which later inspired the Hague Rules and Brussels International Convention in that it settled the problem of the carrier's liability by making a distinction between faults in the navigation and management of the vessel, and faults in the care and custody of the cargo. The Acts of the Dominions were broadly similar to the Harter Act.

As might have been expected, this legislation engendered considerable opposition from the shipowners and from the Governments of countries with large merchant fleets. A draft convention was prepared under the auspices of the International Law Association and the Comite Maritime International (C.M.I.) in order to attempt to resolve the differences and achieve a compromise. The convention was adopted by a diplomatic conference in Brussels in 1924 and became part of the law of Australia and all its states and territories in 1924.

The next major development was the adoption by a number of carrier and cargo interests in the United Kingdom of the 1950 Gold Clause Agreement which had been sponsored by the British Maritime Law Association. By this agreement carriers voluntarily undertook to raise the limit of liability to 200 pounds sterling lawful money of the United Kingdom. The Agreement also provided for the extension of the one year time limit for claims to two years, subject to certain conditions.

Until the early 1960s, many divergent views were expressed as to the desirability of amending the Hague Rules. Two House of Lords decisions, however, inspired C.M.I. to undertake a revision of the Rules. The first case was that of Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd. 1961 A.C. 807 ("The Muncaster Castle") in which it was held that shipowners were liable for the negligence of a ship repairer's fitter, although the shipowners had argued that they had "exercised due diligence to make the ship seaworthy". The other case was that of Scruttons Ltd. v. Midland Silicones Ltd. 1962 AC 446 which held that stevedores could not rely on the exemption clauses contained in the bill of lading to limit their liability. The House of Lords reaffirmed that only parties to a contract could sue upon it.

In 1963 the Stockholm Conference of the C.M.I. on the matter of the revision of the Hague Rules reached an agreement on the text of the amendments to the Hague Rules that should be submitted to the Diplomatic Conference on Maritime Law. It was decided to proceed by way of Protocol so as not to upset the general scheme of the Rules. The main recommendation of the Conference was, in effect, the over-ruling of the two British judicial decisions. Diplomatic Conferences were held in 1967 and 1968 but by then the most important issue was not either of the two House of Lord's decisions, but the question of the limitation, both its quantum and its applicability to containers. It was the Diplomatic Conference in Brussels in 1968 which adopted the Brussels Protocol on the 23rd February, 1968. The amendments became known as the Visby Rules.

There is no question but that the Hague Rules are undoubtedly far more favourable to carriers than are the International Conventions governing other modes of transport, for example, the Warsaw Convention on Air Transport (as amended by subsequent conventions) and the C.M.R. Convention governing carriage of goods by road. This fact together with a view that the nations of the third world had not been involved in the preparation of the Brussels Protocol of 1968, led to a discussion of international legislation on shipping at the second meeting of UNCTAD (The United Nations Conference on Trade and Development) in 1968. UNCTAD invited UNCITRAL (The United Nations Commission on International Trade Law) created in 1966 to review international shipping legislation. The present stage of development is that a draft convention has been prepared by UNCITRAL and will be the subject of a diplomatic conference in March, 1978 at Hamburg.

It is only recently, in fact on the 23rd of June this year, that the Protocol was brought into effect, when a sufficient number of countries with a sufficient tonnage ratified the Protocol. It is fair to say that the work of UNCITRAL had made a number of developing countries refrain from ratifying the Protocol.

The following countries have ratified the Protocol:-

Singapore, Norway, Syrian Arab Republic, Sweden, Lebanon, Denmark, Switzerland, Great Britain, Ecuador, France, and Libya.

Australia has not ratified the Protocol and it is understood that the Government does not intend to become a party to the Protocol at this point in time. It is understood that the Government will await the outcome of the diplomatic conference on the UNCITRAL Draft Convention before assessing the appropriate instrument for implementation for Australia and in making that assessment will take into account the degree of acceptability of the convention and the number of contracting parties at that time to the Protocol. The Hague Visby Rules will, however, be relevant insofar as Australia is concerned in circumstances where a bill of lading has been issued, for instance, in the United Kingdom, and is the subject of litigation in Australia. That litigation will involve a consideration of the Hague Visby Rules since the United Kingdom has had the necessary legislation on the statute book since 1971. The United Kingdom Carriage of Goods by Sea Act, 1971, which came into force on the 23rd June, 1977, repeals the 1924 Act and gives effect to the Hague Rules as amended by the Protocol.

It is worth noting that opposition to some aspects of the UNCITRAL Draft Convention does not rest solely with shipowning interests. In an address to the I.C.H.C.A. (Sydney Branch) on the 8th March, 1977, Mr. C.D. Henri, who it will be recalled, presented a paper to the Annual Meeting of this Association last year, expressed the view that the proposed changes would "involve complicated arguments seeking to prove or disprove nautical fault in the event of casualties to the ship and with lengthy and expensive delays in determining the precise cause of the casualty". Mr. Henri also said in relation to the developing countries:

> "The cargo insurance in respect of the trade of such countries is to an ever increasing degree, placed in the domestic cargo insurance markets of the countries concerned".

If, however, the UNCITRAL Draft Convention is given widespread support, it is possible that the Australian Government will never give effect to the amendments made by the Hague Visby Rules and will introduce legislation which gives effect to the UNCITRAL Draft Convention. With this in mind, I will now turn to the provisions of the Hague Visby Rules.

HAGUE VISBY RULES

A copy of the Visby Rules is attached to this paper. Briefly, it will be seen that the following amendments are made to the Hague Rules by the first three articles of the Protocol:

1. Article III Rule 4 of the Hague Rules is amended by providing in effect that a carrier is stopped from disputing the particulars of the goods given in the bill of lading where the bill has been transferred to a third party "acting in good faith". However, if the particulars have been incorrectly furnished by the shipper, the carrier still has a right of action for an indemnity under a following rule.

2. The suit period of one year provided for in Article III Rule 6 of the Hague Rules can be extended by agreement "after the cause of action has arisen".

3. Article III of the Hague Rules is amended by adding a new paragraph 6 dealing with limitation time for claims for an indemnity against a third party and introduces for the first time in the Hague Rules an element of local law.

4. Article IV of the Hague Rules is amended by introducing weight (kilo) as an alternative to "package or unit" as a basis for limitation.

5. Limitation is increased from 100 pounds to 10,000 gold (poincare) francs per package or unit or 30 gold francs per kilo of gross weight of the goods, whichever is the higher.

6. 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 or should have been discharged.

7. Where a "container, pallet or similar article of transport is used to consolidate goods" the question as to whether limitation is to be assessed on a "package or unit" or weight basis is to be decided by reference to the bill of lading itself. If the contents are enumerated in the bill of lading, the unit basis is to be adopted in respect of each package or unit, otherwise the container itself is to be regarded as the "package". In the latter event, the weight basis will normally apply since the container will undoubtedly weigh more than 333 kilos (333 kilos x 30 gold francs = 10,000 gold francs which is the "package or unit" Limit).

8. The right to limit is lost if it is "proved" that the damage was done with intent or recklessly and this also applies in the case of the carrier's servants or agents, to whom limitation is extended (but see paragraph 10 below).

9. The defences and limits of liability provided for in the Convention, as amended, are to apply whether the carrier is sued in contract or tort.

10. The defences and limitations of liability which are commonly found in bills of lading and which are designed to extend to the carrier's servants and agents, when personally sued, the defences and limits under the Hague Rules and bill of lading which would have been available to the

carrier had suit been brought against him, have been adopted but extend only to servants and agents and not to independent contractors.

In conclusion, it should be pointed out that Article 10 of the Hague Rules, which provides that:

> "the provisions of this Convention shall apply to all bills of lading issued in any of the Contracting States,"

has been amended so that a wider variety of voyages are covered. Article 5 of the Visby Rules applies the amended Rules to every bill of lading relating to the Carriage of Goods between ports in two different States if:

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

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

(c) the Contract contained in or evidenced by the bill of lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the Contract.

Whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

THE AMENDMENTS MADE TO ARTICLE III OF THE HAGUE RULES BY THE VISBY RULES WITH REFERENCE TO THE UNCITRAL DRAFT CONVENTION ON THE CARRIAGE OF GOODS BY SEA

Article III of the Hague Rules provides:-

"1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

a. Make the ship seaworthy;

b. Properly man, equip and supply the ship;

c. Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception carriage and preservation.

2. Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

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

b. Either the number of packages or pieces, or the quantity, or 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 3 a, b and c.

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 loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, 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.

   If the loss or damage is not apparent, the notice must be given within three days of the delivery of the goods.

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

   In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

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

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 3 of Article 3, 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 connexion with, goods arising, from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such

> liability otherwise than as provided in this Convention, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability."

I shall deal with the three amendments made to Article III of the Hague Rules by Article 1 of the Protocol separately.

A. Paragraph 1 of Article 1 of the Protocol:

This amends Article III of the Hague Rules by adding to paragraph 4 of Article III the following:-

> "However, proof to the contrary shall not be admissable when the Bill of Lading has been transferred to a third party acting in good faith."

It should be noted that there is no obligation on the carrier to issue a bill of lading unless demanded by the shipper. It is also arguable that even if a bill of lading is demanded by the shipper, there is no obligation on the carrier to express an opinion as to the apparent order and condition of the goods, unless that too is demanded by the shipper. In practice however the words "received in good order and condition" invariably appear on bills of lading.

As against the carrier those words are prima facie evidence in favour of the shipper and can, in theory, be rebutted although only the clearest language qualifying such a statement will assist the carrier. See The Tromp 1921 P.337 and The Skarp 1935 P.134.

At common law the master (or other person signing a bill of lading) is generally estopped as against an indorsee of the bill of lading by statements in it so far as they relate to matters which are, or ought to be, in the master's knowledge and the owners are estopped in the same way by such statements if they are within the scope of the master's authority. Thus, in Compagnia Naviera Vascongada v. Churchill

& Sim 1906 1 K.B. 237 the master had signed bills of lading for timber as "shipped in good order and condition", "to be delivered in like good order and condition". The timber had before shipment become badly marked and stained by petroleum, and thereby commercially depreciated. The defendants had become indorsees of the bills of lading, for value, on the assumption that the timber was in the condition as described, and they claimed from the shipowner the depreciation in value caused by the stained condition, which must have been apparent on shipment. Channel J. held that the words "shipped in good order and condition" were not words of contract in the sense of a promise or undertaking; the words were an affirmation of fact, or an assent by the captain to an affirmation of fact which the shipper made as to his own goods, but that the purchasers were entitled to recover, since the shipowners had failed to deliver the timber in good order and condition, and were estopped by the terms of the bill of lading from denying that it was shipped in good order and condition.

It is noteworthy that indorsees in order to rely on the estoppel have to show that it was on the faith of the admission contained within the bill of lading that the goods were in apparent good order and condition that they have become indorsees for value. This it is submitted is the major alteration made by the Protocol since the third party (or indorsee) only has to show that he has acted in good faith and does not have to show that he has relied on the admission contained in the bill of lading.

A question which will have to be determined by the Courts is whether a consignee can be described as a "third party". If he cannot be described as a third party he could only rely on the common law estoppel, although his position under the various State bills of lading Acts is secure at least in respect of quantity. See Section 7 of the New South Wales Usury, Bills of Lading and Written Memoranda Act 1902 which provides:-

> "Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against a master or other persons signing the same, notwithstanding that such goods or some parts thereof may not have been shipped, unless such holder of the bill of lading has had actual notice, at the time of receiving the same, that the goods had not been in fact laden on board."

In these days of containerized transporation of cargoes the benefit to consignees or even indorsees of the provisions in Article III Rule 4 must be seen to be somewhat limited in any event since carriers who continue to use the words "received in apparent good order and condition" can always argue that in respect of F.C.L. cargoes the notation on the face of the bill of lading to the effect that the goods were received in "apparent good order and condition" must of necessity refer merely to the external condition.

B. Paragraph 2 of Article 1 of the Protocol

This amendment provides for the deletion of sub-paragraph 4 of Rule 6 of Article III of the Hague Rules which provides as follows:-

> "In any event the carrier and ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

The amendment provides for the insertion of the following new clause:-

> "Subject to paragraph 6 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."

The effect of the amendment is that the words "loss or damage" have been omitted and the words "the goods" have been inserted. The intention seems to be to apply the time limit to claims which might not strictly come within the term "loss or damage" and thus include claims for wrong delivery and delay. However, the amendment is not explicit in this regard and there may be an argument that such claims are not time barred within the one year limitation period.

In addition the word "whatsoever" has been included. It is thought that this word has been inserted because of the divergent views held by the English and American Courts as to whether in circumstances in which a deviation which brings the contract of carriage to an end has occurred, the carrier can rely on the one year limitation period. The English Courts have held that since the contract comes to an end when such an event occurs the ordinary six year limitation period is applicable whereas the American Courts have placed greater emphasis on the words "in any event" and applied the one year time limitation even in such circumstances. It is submitted that the use of the word "whatsoever" puts beyond doubt that the intention of the amendment is to permit the carrier to rely on the one year time limitation period notwithstanding that a deviation has occurred.

It is noteworthy that the word "delivery" has been retained although the case of C. Tennant Sons & Co. v. Norddeutscher Lloyd 1964 A.M.C. 754 showed that there are problems in defining when "delivery" takes place. The American Court held that "the beginning of the limitation period commences when the cargo leaves the ship's slings, whether it be by complete transfer of the possession and control of the goods to the consignee or as in the instant case, by constructive delivery to the consignee's duly authorised agent".

As to the limitation period itself and the possibility of its being extended by agreement between the parties the British Maritime Law Association agreement of 1950 contained a clause along similar lines to the last sentence in paragraph 2 of Article 1 of the Protocol. The British Maritime Law Association clause, however, is more positive in its approach in that it provides that:

> "the shipowners will, upon the request of any party representing the cargo (whether made before or after the expiry of the period of 12 months after the delivery of the goods or the date when the goods should have been delivered a laid down by the Hague Rules) extend the time for bringing suit for a further 12 months, unless:-
>
> a. notice of the claim with the best particulars available has not been given within the period of 12 months, or
>
> b. there has been undue delay on the part of consignees, receivers or underwriters in obtaining the relevant information and formulating the claim".

It will be appreciated that the effect of the amendment made by the Hague Visby Rules is not mandatory, but gives the parties a discretion. A carrier would, it is submitted, be justified in not extending the period of time in circumstances where no notice of the loss or damage has been given to the carrier or where there has been undue delay by the consignee. Equally, a carrier would, it is submitted, not be justified in refusing to extend the period of time in circumstances where full particulars of the loss or damage have been supplied in writing before or at the time of removal of the goods or within three days thereafter as is provided in Article III Rule 6, paragraph 1, or even within a reasonable time thereafter provided there has not been undue delay and every facility for surveying the cargo has been afforded to the carrier.

C. Paragraph 3 of Article 1 of the Protocol

This amendment provides for a further paragraph to be added to Article III Rule 6. The new paragraph provides:-

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

The effect of this amendment is that the carrier is not discharged from liability within the one year time limit provided by Article III Rule 6 sub-paragraph 4 in the case of claims for indemnity by, for example, another carrier who has to pay a claim for loss or damage to cargo which occurred while the cargo was in the custody of the carrier against whom the right of indemnity exists. The amendment gives the carrier who has had to pay a claim at least three months from the time when he has settled the claim or been sued by the claimant in which to pursue his right of indemnity against the other carrier.

In conclusion, therefore, the amendments made by the Hague Visby Rules in respect of the time limitation in the Hague Rules can be summed up as making it clear:

a. that the delay for suit can be extended by agreement.

b. that carriers have at least three months to take their recourse action.

FOURTH DRAFT OF THE UNCITRAL CONVENTION

Article 16 of the Draft Convention deals with "Bills of Lading: reservations and evidentiary effects" and provides as follows:

"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 persons 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 persons shall insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.

2. When 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 paragraph 1 of this article has been entered:

(a) The bill of lading shall be *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 shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the description of the goods therein.

4. A bill of lading which does not, as provided in paragraph 1, sub-paragraph (k) of article 15, set forth the freight or otherwise indicate that freight shall be payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, shall be *prima facie* evidence that no freight or such demurrage is payable by him. However proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication."

Rule 1 puts the burden on the carrier of inserting in a bill of lading a specific denial if the carrier knows or has reasonable grounds for suspecting that the information contained in the bill of lading does not accurately represent the goods which have been received. It is noteworthy that even in circumstances where the carrier has no reasonable means of checking the accuracy of the details he is obliged to state that fact.

By Rule 2 the carrier is deemed to have noted on the bill of lading that the goods were in apparent good condition if he fails to note the condition of the cargo on the bill.

In circumstances in which no insertion has been made in the bill of lading specifying any inaccuracy or any other matters as set out in Rule 1, by reason of Rule 3, the bill of lading is to be prima facie evidence of the taking over of the goods by the carrier. By the same rule the carrier is prevented from seeking to prove the contrary when the bill of lading has been transfered to a third party, which specifically includes a consignee, provided that the third party has acted in good faith in reliance on the description of the goods therein. It is submitted that in circumstances where the contract of sale has taken place prior to the contract for the carriage of goods a consignee might have difficulty in establishing that he has acted in reliance on the description of the goods in the bill of lading. This provision is therefore more restrictive insofar as third parties are concerned than the Visby Rules provision.

Article 19 of the Draft Convention deals with "notice of loss, damage or delay" and provides as follows:-

> "1. Unless notice of loss or damage, specifying the general nature of such loss or damage, be given in writing by the consignee to the carrier not later

than the day after the day when the goods were handed over to the consignee, such handing over shall be prima facie evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition.

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

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

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

5. No compensation shall be payable for delay in delivery unless a notice has been given in writing to the carrier within 21 consecutive days after the day when the goods were handed over to the consignee.

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

Rule 1 extends the time within which notice of loss or damage has to be given to the carrier by the consignee to a time which is "not later than the day after the day when the goods were handed over to the consignee" instead of the day on which the goods are "delivered to the consignee". The handing over of the goods is to be "prima facie evidence of the delivery by the carrier of the goods in good condition".

Rule 2 provides for the situation in which the loss or damage is not apparent and permits the consignee a period of fifteen days after the day when the goods were handed over to the consignee within which to give notice in writing. Article I of the Draft Convention defines "writing" as including "inter alia, telegram and telex". Article III Rule 6 of the Hague Rules has therefore been extended insofar as the loss or damage is not apparent by providing that the notice in writing must be given within fifteen instead of three days as provided by the Hague Rules. In its report on the Draft Convention, the UNCTAD Secretariat has recommended that a proviso be added to meet the situation where loss or damage which is not apparent at the time of delivery is discovered at a later date and it is considered reasonable in the particular circumstances of the case that notice was not given within the necessary fifteen days.

Rule 3 provides that notice in writing need not be given in respect of loss or damage which is ascertained during a joint survey or inspection by the parties at the time when the goods are handed over to the consignee.

Rule 4 provides that the parties should give each other all reasonable facilities for inspecting and tallying the goods where there is any actual or apprehended loss or damage to the goods.

Rule 5 provides that notice in writing should be given within twenty-one days after delivery of the goods where a claim is to be made for compensation for delay in delivery. The UNCTAD Secretariat considered that the period of twenty-one days in which claims for delay should be made is unduly harsh and that this Rule should be deleted.

Article 20 of the Draft Convention deals with "limitation of actions", and provides as follows:-

> "1. Any action relating to carriage of goods under this Convention is time-barred if legal or arbitral proceedings have not been initiated within a period of two years.
>
> 2. The limitation period commences on the day on which the carrier has delivered the goods or part of the goods or, in cases where no goods have been delivered, on the day on which the goods should have been delivered.

3. The day on which the period of limitation commences shall not be included in the period.

4. The person against whom a claim is made may at any time during the limitation period extend the period by a declaration in writing to the claimant. The declaration may be renewed.

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

Rule 1 provides that any action relating to carriage of goods under the Convention is time-barred if legal or arbitral proceedings have been initiated within a period of two years. This gives effect to the English Court of Appeal decision in The Merak 1965 P.223. The question is still left open, however, as to whether it is sufficient for suit to be commenced in one jurisdiction. Roskill J. in the English High Court in the case of Compania Colombiana de Seguros v. Pacific S.N. Co. 1965 1 Q.B. 101 held that "applying ordinary canons of construction it must mean unless suit before the Court is brought within one year". In Carver "Carriage by Sea" the view is expressed that His Honour's decision is based on a false analogy with Limitation Act Cases. Article 21 of the Draft Convention deals with jurisdiction and identifies certain places in which the Plaintiff may at its option commence proceedings (for example, the principal place of business of the Defendant, the place where the contract was made, the port of loading or the port of discharge). Provided, threfore, proceedings are commenced in one of the places specified in Article 21 within two years, it is submitted that the Plaintiff would not be time-barred.

Most importantly, it will be noted that the period of lmmitation has been extended to two years. The limitation period is applicable to "any action relating to carriage of goods" which would, therefore, include not only the shipper's claims for damages against the carrier, but also the carrier's claims against the shipper, for example, for unpaid freight. The principal argument against extending the period of limitation is that the presentation and settlement of claims is likely to be more protracted where a longer time bar period is in operation. C.M.I. in its comments on the Draft Convention submitted to UNCITRAL dated 1st January, 1977 suggested that an extension of the time limitation period would "tend to cause confusion and result in losses of right of action where by mistake the claimant believes that the new rule has replaced the previous one year limit. This risk is apparent in short sea ferry traffic which is sometimes governed by the rules relating to carriage by sea and sometimes by the rules relating to carriage by road. Further, it will create difficulties for a sea through-carrier to pursue his recourse actions against road and rail carriers and generally upset harmonisation of the law in a field where it is particularly needed".

With reference to the remarks made earlier in relation to the Visby Rules it would seem that the Draft Convention intends that the American line of cases be followed so that in circumstances where a deviation occurs, which brings the contract to an end, the carrier is entitled to rely on the limitation period as Rule 1 applies to "any action".

Rule 2 provides that the limitation period commences on the day on which the carrier has "delivered the goods". The problem referred to earlier in this paper of defining the meaning of the word "delivery" will still exist under the

Draft Convention, although surprisingly under Article 19 there will not be the same scope for confusion since as has been seen, time is calculated from the date on which goods are "handed over to the consignee".

Rule 3 provides that the day on which the period of limitation commences shall not be included in the period.

Rule 4 provides that the person against whom a claim is made may at any time during the limitation period extend the period by a declaration in writing to the claimant. It will be noted that Courts will still have to decide on any given occasion whether or not the carrier has waived any reliance on the limitation period. This will presumably be more difficult for claimants to establish under the Draft Convention since the declaration by the carrier must be in writing.

Rule 5 is in similar terms to paragraph 3 of Article 1 of the Protocol and provides that an action for indemnity by a person held liable may be brought even after the expiration of the period of limitation provided that the claim is brought within the time allowed by the law of the State where proceedings are initiated. The Rule also provides that the time allowed shall be not less than ninety days commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.

INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW RELATING TO BILLS OF LADING(*1)

(Translation)

...

Having recognized the utility of fixing by agreement certain uniform rules of law relating to bills of lading

...

Art. 1. In this Convention the following words are employed with the meanings set out below:

a. 'Carrier' includes the owner or the charter who enters into a contract of carriage with a shipper.

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

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

d. 'Ship' means any vessel used for the carriage of goods by sea.

e. 'Carriage of goods' covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

Art. 2. Subject to the provisions of Article 6, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

Art. 3.(*2) - 1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

a. Make the ship seaworthy;

b. Properly man, equip and supply the ship;

c. Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

– 2. Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

– 3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

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

b. Either the number of packages or pieces, or the quantity, or 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 § 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.

(*1) Convention as amended by the protocol done at Brussels on 23 Febr. 1968.
(*2) Text of the article as amended by the prot. d d. 23-2-1968.

– 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 indemnity the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

– 6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier of 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.

If the loss or damage is not apparent, the notice must be given within three days of the delivery of the goods.

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

Subject to paragraph *6bis* 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.

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

– 7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands, be a 'shipped' bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in § 3 of Article 3, 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 connexion with, goods arising, from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

Art. 4.(*1) – 1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of § 1 of Article 3. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article.

– 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

a. 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 of privity of the carrier;

(*1) Text of the article as amended by the prot. d.d. 23-2-1968.

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 commotions;
l. Saving or attempting to safe life or property at sea;
m. Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;
n. Insufficiency of packing;
o. Insufficiency or inadequacy of marks;
p. Latent defects not discoverable by due diligence;
q. Any other cause arising without the actual fault or privity of the carrier, or without the actual 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.

– 3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

– 4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

– 5. *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, wichever is the higher.

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

The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

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

d. A franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900'. The date of conversion of the sum awarded into national currencies shall be governed by the law of the Court seized of the case.

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

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

g. By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph *a* of this paragraph may

be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph.

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

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

Art. 4bis. (*1) – 1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.

– 2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

– 3. The aggregate of the amounts recoverable from the carrier, and such servants or agents, shall in no case exceed the limit provided for in this Convention.

– 4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this Article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Art. 5. A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under this Convention, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

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

Art. 6. Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect:

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

Art. 7. Nothing herein contained shall prevent a carrier or shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connexion with, the custody and care and handling of goods prior to the loading on, and subsequent to, the discharge from the ship on which the goods are carried by sea.

Art. 8. The provisions of this Convention shall not affect the rights and obligations

(*1) Text of the article as inserted by the prot. d.d. 23-2-1968.

of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

Art. 9.(*1) This Convention shall not affect the provisions of any international Convention or national law governing liability for nuclear damage.

Art. 10.(*1) The provisions of this Convention shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

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

b. the carriage is from a port in a Contracting State, or

c. the Contract contained in or evidenced by the bill of lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract,

whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

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

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

Art. 11. After an interval of not more than two years from the day of which the Convention is signed, the Belgian Government shall place itself in communication with the Governments of the High Contracting Parties which have declared themselves prepared to ratify the Convention, with a view to deciding whether it shall be put into force. The ratifications shall be deposited at Brussels at a date to be fixed by agreement among the said Governments. The first deposit of ratifications shall be recorded in a procès-verbal signed by the representatives of the Powers which take part therein and by the Belgian Minister for Foreign Affairs.

The subsequent deposit of ratifications shall be made by means of a written notification, addressed to the Belgian Government and accompanied by the instrument of ratification.

A duly certified copy of the procès-verbal relating to the first deposit of ratifications, of the notifications referred to in the previous paragraph, and also of the instruments of ratification accompanying them, shall be immediately sent by the Belgian Government through the diplomatic channel to the Powers who have acceded to it. In the cases contemplated in the preceding paragraph, the said Government shall inform them at the same time of the date on which it received the notification.

Art. 12. Non-signatory States may accede to the present Convention whether or not they have been represented at the International Conference at Brussels.

A State which desires to accede shall notify its intention in writing to the Belgian Government, forwarding to it the document of accession, which shall be deposited in the archives of the said Government.

The Belgian Government shall immediately forward to all the States which have signed or acceded to the Convention a duly certified copy of the notification and of the act of accession, mentioning the date on which it received the notification.

Art. 13. The High Contracting Parties may at the time of signature, ratification or accession declare that their acceptance of the present Convention does not include any or all of the self-governing dominions, or of the colonies, overseas possessions, protectorates or territories under their sovereignty or authority, and they may subsequently accede separately on behalf of any self-governing dominions, colony, overseas possession, protectorate or territory excluded in their declaration. They may also denounce the Convention separately in accordance with its provisions in respect of any self-governing dominion, or any colony, overseas possession, protectorate or territory under their sovereignty or authority.

Art. 14. The present Convention shall take effect, in the case of the States which have taken part in the first deposit of ratification, one year after the date of the protocol recording such deposit.

As respects the States which ratify subsequently of which accede, and also in cases in which the Convention is subsequently put into effect in accordance with Article 13, it shall take effect six months after the notifications specified in paragraph 2 of Article 11 and

(*1) Text of the article as amended by the prot. d.d. 23-2-1968.

paragraph 2 of Article 12 have been received by the Belgian Government.

Art. 15. In the event of one of the contracting States wishing to denounce the present Convention, the denunciation shall be notified in writing to the Belgian Government, which shall immediately communicate a duly certified copy of the notification to all the other States, informing them of the date on which it was received.

The denunciation shall only operate in respect of the State which made the notification, and on the expiry of one year after the notification has reached the Belgian Government.

Art. 16. Any one of the contracting States shall have the right to call for a fresh conference with a view to considering possible amendments.

A State which would exercise this right should notify its intention to the other States through the Belgian Government, which would make arrangements for convening the Conference.

Done at Brussels, in a single copy. August 25th, 1924.

PROTOCOLE PORTANT MODIFICATION DE LA CONVENTION INTERNATIONALE POUR L'UNIFICATION DE CERTAINES RÈGLES EN MATIÈRE DE CONNAISSEMENT, SIGNÉE À BRUXELLES LE 25 AOÛT 1924(*1)

...

Considérant qu'il est souhaitable d'amender la Convention internationale pour l'unification de certaines règles en matière de connaissement, signée à Bruxelles le 25 août 1924,

...

Art. 1. – 1. A l'article 3, paragraphe 4, il y a lieu d'ajouter le texte suivant:

'Toutefois, la preuve contraire n'est pas admise lorsque le connaissement a été transféré à un tiers porteur de bonne foi.'

– 2. A l'article 3, paragraphe 6, le quatrième alinéa sera supprimé et remplacé par la disposition suivante:

'Sous réserve des dispositions du paragraphe *6bis*, le transporteur et le navire seront en tous cas déchargés de toute responsabilité quelconque relativement aux marchandises, à moins qu'une action ne soit intentée dans l'annee de leur délivrance ou de la date à laquelle elles eussent dû être délivrées. Ce délai peut toutefois être prolongé par un accord conclu entre les parties postérieurement à l'événement qui a donné lieu à l'action.'

– 3. A l'article 3 il y a lieu d'ajouter après le paragraphe 6 un paragraphe *6bis*, libellé comme suit:

'Les actions récursoires pourront être exercées même après l'expiration du délai prévu au paragraphe précédent, si elles le sont dans le delai déterminé par la loi du Tribunal saisi de l'affaire. Toutefois, ce délai ne pourra être inférieur à trois mois à partir du jour où la personne qui exerce l'action récursoire a réglé la réclamation ou a elle-même reçu signification de l'assignation.'

Art. 2. L'article 4, paragraphe 5, sera supprimé et remplacé par le texte suivant:

'*a.* A moins que la nature et la valeur des marchandises n'aient été déclarées par le chargeur avant leur embarquement et que cette déclaration ait été insérée dans le connaissement, le transporteur, comme le navire, ne seront en aucun cas responsables des pertes ou dommages des marchandises ou concernant celles-ci pour une somme supérieure à l'équivalent de 10 000 francs par colis ou unité ou 30 francs par kilogramme de poids brut des marchandises perdues ou endommagées, la limite la plus élevée étant applicable.

b. La somme totale due sera calculée par référence à la valeur des marchandises au lieu et au jour où elles sont déchargées conformément au contrat, ou au jour et au lieu où elles auraient dû être déchargées.

La valeur de la marchandise est déterminée d'après le cours en Bourse, ou, à défaut, d'après le prix courant sur le marché ou, à défaut de l'un et de l'autre, d'après la valeur usuelle de marchandises de mêmes nature et qualité.

(*1) Brussels p. 35.