

# **The UNCITRAL Convention: Changes to existing law**



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## **Abbreviations**

BIMCO	The Baltic International Maritime Council
BOLERO	Bill Of Lading Electronic Registry Organization
CMI	Comité Maritime International
EWHC	High Court of England and Wales
FFO	Fixed or Floating Object
IMO	International Maritime Organization
ISM Code	International Management Code for the Safe Operation of Ship and for Pollution Prevention
Lloyd's Rep	Lloyd's Reports
ND	Nordiske dommer i Sjøfartanliggender
QBD	Queens Bench Division
SDR	Special Drawing Right
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development

# 1 Introduction

## 1.1 Presentation

Virtually all products are affected by transportation whether it is by land, air, sea or all of the above and the international trade and the legal framework that aims to regulate it are essential to the global commercial market. This thesis will address the international rules on the carriage of goods [wholly or partly] by sea.

Currently, there is a shattered legal situation within international transport law due to the existence of several instruments that all may apply depending on state ratification and mode of transport. Because of the international characteristic of shipping, there is a pressing need for harmonization of legislation among states in order to provide predictability for the contracting parties. It is an ambition of the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (hereinafter referred to as the UNCITRAL Convention) to replace the current regulations<sup>1</sup> on the carriage of goods by sea and harmonize multimodal transportation. In this ambition, changes to existing law may raise complications.

The new Convention is a product of UNCITRAL<sup>2</sup> and is not yet in force.

## 1.2 Statement of purpose

The UNCITRAL Convention has an ambition of being a multimodal regime, covering different modes of transport. The new Convention strives to replace the current maritime

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<sup>1</sup> The Hague-Visby rules and The Hamburg rules

<sup>2</sup> United Nations Commission on International Trade Law

conventions but due to its multimodal nature, it will likely come in conflict also with conventions that regulate other modes of transport.

The focus of this thesis will be a comparative study between current regulations, stipulated in the Hague-Visby and Hamburg conventions, and the new UNCITRAL Convention. The study will address the significant potential changes to existing law. Questions asked are:

- If the new Convention is accepted, will there be changes to existing law?
- Will the new Convention provide for a shift in the balance between the carrier and the cargo owner?

### 1.3 Methodology and materials

As a starting point, I have used the traditional legal dogmatic method to describe existing law where legislation, case law and doctrine have been considered. Current rules are then compared to the provisions of the UNCITRAL Convention.

The thesis has a main objective of comparing different maritime conventions and the rights and obligations that those conventions impose. Naturally, the most important material as a primary source is the provisions of the conventions. In order to clarify existing rules I have used case law, doctrine and articles concerning the subject topic. Since the thesis focuses on international conventions, the court rulings are from different jurisdictions and legal systems.

As mentioned above, the UNCITRAL Convention is not yet in force. Therefore, there is an absence of case law interpreting the provisions of the new Convention. In the process of comparing the rules, attention has been given to the actual wording of the provisions, the preparatory work (*travaux préparatoires*) and articles written by prominent legal expertise in the maritime law area. The preparatory work consists of reports from the sessions of UNCITRAL's Working Group III, responsible for the drafting of the new Convention.

#### 1.4 Disposition and delimitations

A comparison of the entire convention texts of Hague-Visby, Hamburg and the UNCITRAL Convention is a far too extensive task for the scope of this thesis. However, it is my intention to highlight those areas where the differences are most evident and scrutinize the provisions that are the core of the carrier's liability.

National maritime legislation is to a great extent based on international conventions. A state adopts a convention, as described below in section 2.1.1, and drafts its national legislation consistent with the obligations that the state has committed to under the convention. My focus will be on the Hague-Visby, Hamburg and UNCITRAL conventions. I will not compare national legislation to the conventions texts.

The thesis consists of three parts. First, there is an introduction to present the topic shortly and to state the purpose and aim of the study. Secondly, there will be an introduction of the history and status of the current maritime regimes. In this second part, I will describe some of the significant potential changes in the new Convention compared to the current regimes.

In the third part, I will elaborate my analysis of certain aspects of the carrier's liability since these central provisions are the core of maritime regimes. The third part of the thesis focuses on the carrier's basis of liability and obligation of seaworthiness.

## **2 UNCITRAL - Convention on Contracts for the International Carriage of Goods [wholly or partly] by Sea**

Due to the international aspect of the shipping industry, there is a need for cooperation between states to create a harmonized legal arena that is fair, responsible and of mutual benefit to the parties involved. It is also in the interest of all involved parties that there are foreseeable rules governing transport law no matter what jurisdiction may be faced. The adoption of a convention is one way of achieving such predictability and harmonization.

This chapter is an aerial perspective on the maritime regimes that govern the carriage of goods by sea today with a focus on those significant changes to existing law that are found in the new UNCITRAL Convention.

### **2.1 Background**

#### **2.1.1 Transportation regulation**

The common options of transporting goods are road, rail, air and sea carriage. Historically, these modes of transport have been regulated, at an international level, by separate conventions specifically targeting one single mode of transport. CMR<sup>3</sup> for road, COTIF/CIM<sup>4</sup> for rail and The Montreal Convention<sup>5</sup> in regards to air transport. As the multimodal carriages increases, where the voyage is performed by more than one mode of transport, the complex and shattered legal situation within transport law becomes more evident. I will return to the issue of multimodal carriage below in section 2.2.2. The conventions dealing with international carriage provide for specific obligations pointed to the involved parties and the central function of the conventions is to allocate the risk and determine adequate liability.

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<sup>3</sup> Convention on the Contracts for International Carriage of Goods by Road

<sup>4</sup> Convention concerning International Carriage by Rail (COTIF) / Uniform Rules concerning the International Carriage of Goods by Rail (CIM) | CIM is an appendix to COTIF

<sup>5</sup> Convention for the Unification of Certain Rules for the International Carriage of Goods by Air, “The Montreal Convention”



The provisions of the conventions are applicable in the jurisdictions, which support the convention and therefore will the interpretation of the regulations be at the discretion of the national courts. Most national legislation within the maritime area around the world, including the Scandinavian countries, is based on the international maritime conventions. A state may adopt a convention in several different ways. For example, an incorporation of a convention text is done in either one of following manners; (a), a legislation based on the convention is drafted and accepted, (b), a translation of the convention text is accepted as national legislation or (c) a legislation referring to the convention is accepted granting the original convention direct effect.<sup>6</sup>

In the event of a dispute between the parties, one must turn to the relevant conditions, which are regulated both by contract as well as by legislation. Part of the legislation is non-mandatory and part of it is mandatory. Characteristic for transport law, unlike traditional commercial law, is that it consists, to a large part of mandatory regulations. Traditionally, the drafting of mandatory transport regulations has its origin in the legislators desire to protect cargo interests who are considered to have a weaker position in the contractual relationship to the carrier.<sup>7</sup> The allocation of risk, rights and obligations and burden of proof is the essence of all transport law and similar to other areas of commercial law it attempts to, in a foreseeable manner, place the liability where it rightfully belongs.

### 2.1.2 Historical background of maritime conventions

Historically, the shipping industry has been much relying on the principle of freedom of contract. A contract of carriage of goods is referred to as a bill of lading and was, in its initial form, a simple document stating the conditions for the carriage and allocation of risk.<sup>8</sup> As the shipping industry grew so did the content of the bills of lading. Many of the exclusion clauses, found in the bill of lading, which exempted the carriers from liability, were considered unfair by cargo interest. Eventually this resulted in that the American

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<sup>6</sup> *Transporträtt – en översikt*, Gorton, Lars, uppl.2:1, Norstedts Juridik, 2003, p. 29

<sup>7</sup> *Ibid.* p.29,30

<sup>8</sup> *Scandinavian Maritime Law [The Norwegian Perspective]*, 2<sup>nd</sup> Ed., Falkanger, T, 2004 p.268

courts went so far as to disregard some of these exclusions clauses when interpreting the contract of carriage. English courts did not have the same point of view. The transatlantic trade was important and a struggle between, ship- and cargo owners, for the applicability of American or English jurisdiction was a fact.

In 1893 the Harter Act was signed to represent and enhance the influence of the cargo owners who had a significant impact on foremost the American view of the liability of a carriage by sea. The ship owners' organisation realized that the problems with liability and jurisdiction issues became more severe as the European cargo interests also wanted the same conditions as the Americans received through the Harter Act and by the American Courts. As an attempt to harmonize the international maritime legislation, it became the task of CMI<sup>9</sup> to construct a new instrument that would address these kinds of topics. CMI presented their work at a maritime law conference in Brussels in 1924. The product of their work was a draft convention that was presented for approval. The ratified convention, referred to as the Hague rules, is much the basis for current maritime legislation. Due to imperfections and changing conditions in the shipping industry, the rules were amended in 1968 after a conference in Stockholm. The new Hague-Visby rules are widely accepted by the international maritime society and is considered as the central code that governs the rights and obligations of the contractual parties involved in the carriage of goods by sea.<sup>10</sup>

However, much has happened since the Hague-Visby rules were drafted and as the international trade develop so must the relevant legislation. In the 1970s the United Nations overtook the task of harmonizing maritime law. This resulted in a new convention from UNCITRAL aiming to create a more fair set of regulations. The convention, the Hamburg rules, entered into force on 1 November 1992 and was said to shift the allocation of risk between the carrier and cargo owner. The most obvious change in comparison to the Hague-Visby rules was the removal of the exemptions of liability, "the catalogue", that

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<sup>9</sup> Comité Maritime International

<sup>10</sup> *The Next Sea Carriage Convention?*, Diamond, A, LMCLQ part2, May 2008 p.135,

were previously available to the carrier<sup>11</sup>. The Hamburg rules provided a better position for the cargo interests by, for example, removing claimant's burden of proving unseaworthiness.<sup>12</sup> However, the new rules met resistance among the member states. The Hamburg convention has been ratified by 33 states compared to the approximately 90 states that have ratified the Hague-Visby rules. It is important to note that none of the great shipping nations such as the U.S, the Scandinavian countries or Japan has ratified the Hamburg rules. Because of this lack of wide acceptance, the Hague-Visby is still the governing regime in international maritime law.<sup>13</sup>

### 2.1.3 The need and ambition of a new convention

Due to the "failure" of the Hamburg rules one could imagine there be some unwillingness to start over with the work of drafting a new convention. However, there was a significant need for an up-dated set of regulations that could correspond with the current realities of the industry and harmonize the shattered legal situation. As mentioned above, there are today several conventions drafted to regulate different stages of the same voyage and some of the conventions are addressing the same stage. The regulations of the conventions are applied depending on the ratification from the state of the specific convention.<sup>14</sup> Obviously, this may cause ambiguities concerning the applicability of the rules.

UNCITRAL also feared that member states would abandon current conventions and this led to the start of drafting a new instrument.<sup>15</sup> The new Convention should aim to, establish a legislation that would be of mutual benefit, removing unnecessary legal obstacles and bearing in mind the technical developments such as electronic transport documents. One of its initial working assumptions is to regulate all stages of the carriage, thereby shifting from the previous principle of tackle-to-tackle to a door-to-door responsibility for the carrier. By

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<sup>11</sup> See section 3.1.2

<sup>12</sup> The Hamburg rules art. 5

<sup>13</sup> *The Next Sea Carriage Convention?*, Diamond, A, LMCLQ part2, May 2008 p.136,137,

<sup>14</sup> For example: Hague, Hague-Visby and Hamburg are all dealing with the sea leg of the carriage and the applicability of each convention depends on which states that have ratified it.

<sup>15</sup> *The Next Sea Carriage Convention?*, Diamond, A, LMCLQ part2, May 2008 p.136,137

doing so, UNCITRAL has an ambition of creating a convention that deals with the multimodal aspects of the transport. This view is more consistent with the current reality of transport since cargo owners often enter a contract to send their goods from point A to point B, using more than one modes of transportation. Conclusively, the goal is to create a commercial friction free legal arena by harmonizing international maritime law. The aim is to replace the current conventions and avoid legal obstacles causing unnecessary litigation between the parties concerned.

In April 2002 UNCITRAL's Working Group III (transport law) adopted a draft instrument, with its origin from CMI, which laid the foundation for further discussions. Several sessions have been held where inputs from experts, arguments from involved parties and compromises have developed the draft to its current form. According to the preamble of the UNCITRAL Convention, it recognizes the significance of the current regulations on the carriage of goods by sea but also notes the importance of modernizing the same in order to keep up with technological and commercial development.

In the strive of harmonizing international trade law, removing legal obstacles and aiming to create fair provisions there is no doubt that there has been significant changes when drafting the new convention compared to the current regimes.

## 2.2 Scope of application

### 2.2.1 Period of responsibility

The determination of liability for loss, damage or delay is subject to the regulations on the period of responsibility. For claimant to impose liability on the carrier, the goods must be in the carrier's care during his period of responsibility when the incident causing the loss, damage or delay occurred. All conventions<sup>16</sup> contain provisions that aim to specify when

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<sup>16</sup> The Hague, The Hague-Visby rules |The Hamburg rules| UNCITRAL Convention

that period begins respectively ends. These provisions have over time extended the period of responsibility.

The starting point is found in the Hague-Visby rules article 1.(e) where it is stated that “*carriage of goods covers the period from the time when the goods are loaded on to the time they are discharged from the ship*”. This rule is referred to as the tackle-to-tackle principle and means that the period of responsibility commences when ship’s tackle is hooked on, or if shore tackle is being used, when the goods cross the ship’s side.<sup>17</sup> As the shipping industry and the loading equipment have developed, the principle has been subject for debate. In *Pyrene Co. v. Scindia Navigation Co.* the cargo was damaged during loading operations as it fell down before passing the ship’s rail. The court said that the ship owner had undertaken responsibility for the entire loading and discharging process and therefore concluded that the damage occurred during the carrier’s period of responsibility even though the cargo had not passed the ship’s rail. If it is the carrier’s function to load, he is responsible under the Hague-Visby rules but if the cargo interests undertake the loading operation, the Hague-Visby rules says nothing concerning the carrier’s liability.<sup>18</sup> In *ND 1961.255 NCA RAGNHILD* the carrier discharged the frost sensitive goods on the dock in cold weather, even though the cargo owner was not there to take custody of the goods. The carrier was held liable even though liability after discharge had been disclaimed. These are examples of how the courts modify and extend the stipulated principles by their interpretation of the provisions.

In the Hamburg rules art 4 the legislator has extended the time period for which the carrier is responsible for the goods. This is a result from rulings in previous cases, as seen above, as well as the convention’s ambition to provide a better position for the cargo interests. The purpose of the extended period of responsibility was to replace the tackle-to-tackle principle with a rule more appropriate to modern conditions.<sup>19</sup> As stated in art 4.1,2 of the Hamburg rules, the carrier is responsible for the goods from the time he has taken over the

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<sup>17</sup> *Marine Cargo Claims*, Tetley, William, The Carswell Company Ltd, 1965, p.8

<sup>18</sup> *Scandinavian Maritime Law [The Norwegian Perspective]*, 2<sup>nd</sup> Ed., Falkanger, T, 2004 p.306

<sup>19</sup> *The Law of International Trade and Carriage of Goods*, Spurin, C.H, NADR Ltd, 2004, Ch.6 p.2

goods from the shipper or a person with a similar function *at the port of loading* until delivery *at the port of discharge* as described in art 4.2(b). This is known as a port-to-port principle and prevents the carrier from exempting himself from pre and post loading stages that weakens the position of the cargo interests. Once the carrier's period of responsibility has commenced according to art 4, all the ancillary operations, such as loading and discharge, will be an integral part of the contract and the responsibility of the carrier.<sup>20</sup> The carrier's period of responsibility under the Hamburg rules is longer than the equivalent principle in Hague-Visby. The development has been from tackle-to-tackle to port-to-port and UNCITRAL is now taking the period of responsibility one step further by introducing a door-to-door responsibility for the carrier.

Art 12 of the UNCITRAL Convention stipulates that the period of responsibility begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered. In order to determine when the period of responsibility commences according to the new Convention it is important to clarify whom the carrier and a performing party are. The definitions of these subjects are found in art 1.5,6 in the Convention and state that a carrier is a person that enters a contract of carriage with a shipper. The contractual carrier may then use subcontractors to fulfil his obligations under the contract of carriage. These persons, the subcontractors, are called a performing party and are defined as someone other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods so far that person acts directly or indirectly at the carrier's request, supervision or control.<sup>21</sup> Furthermore, a maritime performing party means a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge.<sup>22</sup>

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<sup>20</sup> *The Hamburg Rules*, 2nd ed., Johnson, Andrew, L.L.P. Ltd, 1995 p.10

<sup>21</sup> UNCITRAL Convention 1.6 (a)

<sup>22</sup> UNCITRAL Convention 1.7

In the context of period of responsibility, the definitions above are vital since the contractual carrier is responsible for the entire carriage from receiving the goods until delivery regardless of what stage of the carriage the damage occur, i.e. a door-to-door responsibility.<sup>23</sup> This means that the theoretical starting point of liability is that it does not matter if the cargo was damaged whilst on truck, train or ship for inflicting carrier liability. As shown below under section 2.2.2, this is modified by the Convention's limited applicability and subsidiary nature.

The period of responsibility and an extension of such a period is closely related to the methods of transportation. The container "revolution" allows the cargo to be shipped containerized via different modes of transport without unpacking. This form of shipping opens wider opportunities for the occurrence of door-to-door contracts of carriage where the shipper only has to enter one contract even though the carriage is performed by several modes of transport. A door-to-door principle is therefore more suitable considering the current realities of the transportation industry and grants the UNCITRAL Convention applicability during the entire voyage<sup>24</sup>, subject to the limitations mentioned below in section 2.2.2.

This extended period of responsibility that aims to unify the legislation throughout the entire chain of transport provides a more favourable position for the claimant as he only has one contractual partner to hold liable. In addition to the right according to the contractual relationship, the claimant has the possibility to sue each performing carrier in tort<sup>25</sup>. The introduction of legislated door-to-door responsibility is one of the most significant changes to existing law in the new UNCIRAL Convention.

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<sup>23</sup> *Change to Existing Law*, Sturley, Michael, CMI Yearbook 2007-2008 p. 256,257

<sup>24</sup> *The UNCITRAL Yearbook*, Volume XXXIV 2003 p.371

<sup>25</sup> *Scandinavian Maritime Law [The Norwegian Perspective]*, 2<sup>nd</sup> Ed., Falkanger, T, 2004 p. 265

## 2.2.2 Multimodal carriage

Multimodal carriage means that the voyage is performed by different modes of transport. Traditionally, the shipper enters a separate contract of carriage for each part/mode of the carriage. However, it is becoming more common to enter one contract of carriage with one carrier who undertakes the task of the entire transport of the goods to its place of delivery. As mentioned above under section 2.2.1, the carrier may use subcontractors, performing parties, in order to fulfil his obligation under the contract of the carriage but he will remain as the only contractual carrier. Currently, the specific modes of transport and the related contract of carriage are subject to a regime governing that specific area, such as road, rail and air<sup>26</sup>. It is the ambition of the UNCITRAL to provide for a multimodal convention that can apply during the entire carriage from first point of receipt to final delivery. There have been previous attempts to harmonize the different modes of transport but experience show that it is difficult.

### 2.2.2.1 Existing regimes

Multimodal transport is not a new phenomena, neither is the idea of a convention that aims to impose a liability system applicable through the entire carriage. An UN initiative lead to the drafting of the 1980 Multimodal Transport Convention, which is not in force since it lacks ratifications from the required amount of 30 member states. The UNCTAD/ICC rules for Multimodal Transport Documents have had greater success within the commercial transport industry. However, the rules are only applicable if incorporated in the contract of carriage by the contracting parties.<sup>27</sup> Even though a modest success, the existing multimodal instruments have inspired the drafting of the UNCITRAL convention as the need for uniformity in multimodal transport is still considered a priority.

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<sup>26</sup> See section 2.1.1

<sup>27</sup> The Hague-Visby rules also requires an incorporation but the different is that Hague-Visby has a significantly wider acceptance.



In the context of multimodal transport, a convention's scope of application is pending on what modes are included in the definition of the contract of carriage. In the Hague-Visby rules the contract of carriage is defined in art 1.(b). It states that a 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. A similar definition is found in the Hamburg rules art 1.6 where it is stipulated that if a contract of carriage overlaps different modes of transport the rights and liabilities prescribed by the convention only apply to the sea part of the carriage.<sup>28</sup> Therefore, the Hague-Visby and the Hamburg rules are strictly maritime conventions and not applicable through the part of the voyage where it contains other modes of transport.

#### 2.2.2.2 The UNCITRAL Convention

Unlike the Hague-Visby and Hamburg rules, the new Convention includes other modes of transport in its definition of a contract of carriage. The definition is found in art 1.1 of the UNCITRAL Convention. It states that the contract of carriage means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. Furthermore, the contract shall provide for carriage by sea and may provide for carriage by other modes of transport. Thereby is the UNCITRAL Convention introducing a multimodal coverage that significantly separates it from current maritime conventions as mentioned above in the previous section. If the Convention applies this means that, the carrier, defined in art 1.5, has a responsibility during the entire carriage, according to the provisions of the Convention, regardless of what mode of transport. However, there are significant limitations of the UNCITRAL Convention's applicability that prevents it from being a true multimodal regime.

In art 1.1 of the UNCITRAL Convention, it is stated that the contract of carriage *shall* provide for carriage by sea. This means that part of the carriage must be by sea. For

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<sup>28</sup> *The Hamburg Rules*, 2nd ed., Johnson, Andrew, L.L.P. Ltd, 1995 p. 4

example, a combination of carriage by road and rail without a sea segment would therefore fall outside the scope of the convention and that limits it as a multimodal regime. In the context of multimodal application, Mr Anthony Diamond QC raises a few notable question marks. If the contract of carriage does not explicitly states a mode of transport but only a place of delivery, is the Convention applicable even though art 1.1 states that the contract *shall* provide for carriage by sea? In addition, if the contract of carriage contains a sea segment of the carriage but, due to unexpected circumstances, the actual carriage is not performed at sea, is the Convention then applicable?<sup>29</sup> The question boils down to whether the content of the contract of carriage is decisive for the scope of application or if it is the actual circumstances of the carriage? This will have to be determined by the courts, which may cause some difficulties due to a vague formulation of what is to be included in the scope of the Convention.

According to art 26, the UNCITRAL Convention shall be subsidiary to other international instruments if loss, damage or delay solely occurs due to a circumstance before or after the loading or discharge from ship. The rule is subject to that the provision of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the incident of loss, damage or delay occurred.<sup>30</sup> The scenario explained above would prevent the applicability of the UNCITRAL Convention. This is unfortunate since, even though there may be other regimes better suited to govern the liability of specific modes of transport, such as road or rail carriage, the downside of having a network-convention framework is that it may create ambiguities as to what set of rules actually applies for the carriage.<sup>31</sup> In addition, one can imagine some difficulties in establishing the exact point in time for cause of loss, damage or delay in order to prove that cause took place either solely before or solely after sea carriage. This will surely render in some litigation hurdles.

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<sup>29</sup>*The Next Sea Carriage Convention?*, Diamond, A, LMCLQ part2, May 2008 p. 140

<sup>30</sup> UNCITRAL Convention art 26 (a)

<sup>31</sup> *Sea Carriage Goes Ashore: The Relationship Between Multimodal Conventions and Domestic Unimodal Rules*, Sturley, Michael, 2007

The issue of conflict with other international conventions is also brought to attention in art 82 of the UNCITRAL Convention. It states that the Convention will not affect the application of other international conventions governing the liability of the carrier for loss or damage to goods in regards to air, road, rail or inland waterways to the extent that such convention according to its provisions also applies to the sea leg of the voyage. It is clear that there is an unwillingness to entirely replace those regional conventions that govern one specific mode of transport.<sup>32</sup>

Even though the Convention has limitations in regards to its applicability that prevents it from being a true multimodal regime, the inclusion of other modes of transport is new and is a significant change to the current strictly maritime conventions. If the contracting parties could be able to rely on only one set of regulations throughout the entire carriage, that would mean a big step towards the harmonization of transport law. The idea of a multimodal regime reflects the development and current realities of the industry and will certainly have an effect on the contractual carrier's liabilities in the future.

### 2.2.3 The freedom of contract and volume contracts

A mandatory regime is supposed to protect the basic rights and obligations of the contracting parties and this purpose can be undermined if the parties are given too extensive possibilities to negotiate their way out of the scope of the provisions. The Hague-Visby, Hamburg and UNCITRAL conventions all contain regulations addressing the validity of clauses derogating from the provisions of the convention and the UNCITRAL Convention introduces the concept of volume contracts, which is not found in the current regulations.

Both the Hague-Visby and Hamburg has similar stipulations regarding the freedom of contract. In short, they state that any stipulation in a document evidencing the contract of

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<sup>32</sup> *Change to Existing Law*, Sturley, Michael, CMI Yearbook 2007-2008 p. 257

carriage of sea is void to the extent that it derogates, directly or indirectly from the provisions of the conventions unless it is to increase the liabilities of the carrier.<sup>33</sup> The mandatory provisions of the conventions provide for a framework of rules that constitute a minimum level of liability.

The UNCITRAL Convention maintains the same fundamental idea of a mandatory regime and attitude towards the validity of derogating clauses. Art 79 of the UNCITRAL Convention contains a general rule, which states that deviations from the provisions of the convention are void if they exclude or limit the obligations of the parties mentioned in the article.

In addition, it is important to note that charter parties fall outside the scope of mentioned conventions<sup>34</sup> although current regulations are often voluntarily incorporated in the agreement between ship owner and charterer.

### 2.2.3.1 Volume contracts

It was foremost the U.S delegation that pushed for an approach of freedom of contract and for the inclusion of a *volume contracts* provision creating further possibilities to negotiate a way out of the Convention.<sup>35</sup>

The definition of volume contracts is found in art 1.2 and it states:

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

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<sup>33</sup> The Hague-Visby rules art 3.8 | The Hamburg rules art 23

<sup>34</sup> The Hague-Visby rules art 5 | The Hamburg rules art 2.3 | UNCITRAL art 6

<sup>35</sup> *UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly] by Sea*, Downing, Susan, Kelso, Neil, 2006, [http://esvc000873.wic005u.server-web.com/docs/Downing\\_paper.pdf](http://esvc000873.wic005u.server-web.com/docs/Downing_paper.pdf)

This is relatively wide definition and concerns have been raised that volume contracts could be comprised of as little as two shipments over a long period, potentially applying to 95% of existing shipments.<sup>36</sup> It does appear that most contracts of carriage could be drafted in such a way that it would meet the requirements stipulated in art 1.2, if desirable by the contracting parties. This would open for the risk that the UNCITRAL Convention, in practice, becomes optional rather than mandatory. The New Zealand delegation has expressed such concern, they say that the possibility of avoiding the scope of the Convention, provided by the rules on volume contracts, contradicts the purpose of harmonization, and there is an obvious risk of exposing the weaker party in a negotiation of an abuse of power.<sup>37</sup> However, the freedom of contract between the carrier and the shipper in regards to volume contracts is subject to the conditions in art 80.1-4. It must be an individually negotiated volume contract that contains an explicit and prominent statement that it derogates from the Convention. Furthermore, even though the formal conditions are met, the special rules for volume contracts do not affect the mandatory rights and obligations of seaworthiness or cargoworthiness.<sup>38</sup> This means that certain obligations stated in the convention cannot be avoided by contract. In the relationship between the carrier and any person other than the shipper, that person must give his expressed consent to derogation from the convention in order for it to be valid according to art 80.5.

The inclusion of volume contracts in the new Convention certainly extends the possibilities of avoiding the applicability of the provisions and therefore causes a change to existing law but the possibilities are modified by significant limitations. The required conditions in art 80 are for the protection of a potentially weaker party in negotiations and for the general interests of a safe industry. However, there is a risk that the long provision contributes to the complexity of the convention and making it difficult to understand what rules apply when and under what circumstances.

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<sup>36</sup> <http://www.europeanshippers.com/docs/press/070924doc.jsp>

<sup>37</sup> *Comments on the Draft Uncitral convention at its 21th session, 2008*

<sup>38</sup> Nor do they affect shipper's obligation to provide information (art 29) nor the special rules on dangerous goods (art 32)

## 2.3 Limitation amounts

If found liable for loss or damage, the carrier has a right, according to current regulations, to limit that liability pursuant to the provisions described below. The right to limitation can be of significant importance both to cargo interests and to the carrier. The upside of limitation amounts is obvious for the carrier but it may also benefit the cargo interests if it enables the carrier to calculate his risks in advance and offer cheaper freights.<sup>39</sup>

Traditionally, there have been various defences and potential limitation for the carrier and it is a part of ensuring a functioning commercial market.

The limitation amount is normally based on the number of packages or gross weight, whatever limitation results in the highest amount shall be used.<sup>40</sup> The two options are meant to complement each other, depending if the goods are carried as many small packages or if the goods cannot be divided in small packages but has a significant gross weight.<sup>41</sup> If the goods are carried in a container it is the number of packages in the container that shall be used in regards to limitation where the amount of packages is stated by the bill of lading.<sup>42</sup> In the Hague-Visby rules the limitation amount is 666,67 SDR<sup>43</sup> per package or 2 SDR per kilo of gross weight. Exceeding amount will be excluded from the carrier's liability. The Hamburg rules art 6 increases same limitation amounts to 835 SDR per package and 2.5 SDR per kilo of gross weight. This trend has continued in the UNCITRAL Convention that increases the limitation amounts in art 59 to 875 SDR per package and 3 SDR per kilo of gross weight.

The UNCITRAL Convention art 17 impose an explicit liability on the carrier for delay. The liability for delay is also subject to limitation in art 60 where it is stated that the liability for economic loss due to delay is limited to two and one-half times the freight payable on the

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<sup>39</sup> *The Liability and Limitation of Liability Regime*, Kofi, Mbiah, CMI Yearbook 2007-2008, p. 297

<sup>40</sup> Hague-Visby rules art 4.5 | Hamburg rules art 6, note: the Hague rules only contain a package limitation.

<sup>41</sup> *Limitation of Liability for Maritime Claims*, Griggs Patrick, LLP, 2005, p. 134

<sup>42</sup> The Hague-Visby rules art 4.5.c | The Hamburg rules art 6.2

<sup>43</sup> Special Drawing Right (HVR art 4.5.d) : an amount set by the International Monetary Fund.

goods delayed. However, this amount may not exceed the limit in art 59 in respect of total loss.

The provisions on limitation of liability are available to all maritime performing parties, defined in art 1.7, if the conditions are met in art 19. This means that all persons that perform any of the carrier's obligations during arrival at the port of loading until departure from the port of discharge may invoke the same defences and limitations of liability as those available to the carrier.<sup>44</sup>

It is most notable but hardly drastic that the new UNCITRAL Convention increases the limitation amounts for the carrier. The increase of the amounts over time is a natural consequence of inflation and the higher value of the goods carried in today's shipping. Even though a different wording, the content of the corresponding regulations in Hague-Visby and Hamburg rules is similar. The application of the limitation rules will most likely cause little new uncertainties for the courts that have not already been addressed in the Hague-Visby rules. It is an updated version of the current provisions unlike other areas of the UNCITRAL Convention that deals with entirely new shipping realities.

## 2.4 Electronic transport documents

Electronic bills of lading are a relatively new feature within the shipping industry. It is difficult to define exactly what a bill of lading is since there is no universally applicable definition but one can point out some distinctions. Three common characteristics of a bill of lading are that (i) it constitutes a receipt for the goods shipped or received by the carrier, (ii) it constitutes a document of title for such goods and (iii) it contains or evidences the contract of carriage by sea relating to the goods.<sup>45</sup> The bill of lading has a vital role in shipping. Between the shipper and the carrier it is *prima facie* evidence of quantity, it states the apparent order and condition of the goods etc., it may also function as collateral for various creditors as it is a document of title. Traditionally, the bill of lading is a physical

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<sup>44</sup> The UNCITRAL Convention art 1.7, 19, 59

<sup>45</sup> *Bills of Lading*, Aikens, Richard, Informa London, 2006, p.13

document that can be signed and possessed but we are now in a time where the industry recognizes the benefits of paperless transport documents.

It is important to know, in regards to the problematic issue of electronic documents, that bills of lading can be either negotiable or non-negotiable. It is the document's capacity of transferability that mainly separates the two. Negotiable bills of lading are can be transferred to a new holder and it is the possession of the physical bill of lading that usually entitles the right to the goods unlike a non-negotiable document where a consignee is usually named and that identification grants him the right to delivery.<sup>46</sup>

The Hague-Visby rules does not define the term bill of lading and the Hamburg rules speak of a bill of lading as a document and defines it similar to the three characteristics as mentioned above<sup>47</sup>. None of the named conventions explicitly recognizes electronic transport documents. However, the courts may interpret the term bill of lading in the current regulations widely enough to include an electronic equivalent<sup>48</sup> and thereby providing it with a similar status as a paper copy but there may still be some uncertainties. One of the most essential functions of a bill of lading is that it provides for the rights and obligations allocated between the contractual parties. If an electronic document is not granted the same status of a bill of lading, which is a position yet to be established, the claimant risks losing the grounds to invoke liability. Another problematic issue could be a creditor's willingness or rather unwillingness to accept an electronic document as security considering its uncertain status as a transport document.<sup>49</sup>

There have been several attempts of introducing electronic documents.<sup>50</sup> Unfortunately, none of the efforts have achieved full success in establishing the electronic bill of lading

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<sup>46</sup> Ibid. p.19

<sup>47</sup> The Hamburg rules art 1.7

<sup>48</sup> *Marlton v. Tectronix UK Holdings* [2003] EWHC 383

<sup>49</sup> *CMI Rules for Electronic Bills of Lading*, Goldby, Miriam, LMCLQ [2008] part 1, p. 65

<sup>50</sup> E.g. CMI 1990 Rules for Electronic Bills of Lading | UNCITRAL 2005 Convention on the Use of Electronic Communications in International Contracts



and that emphasizes the importance of the new UNCITRAL Convention's recognition of electronic transport records. UNCITRAL Convention art 8 states:

*Use and effect of electronic transport records*

*Subject to the requirements set out in this Convention:*

- (a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and*
- (b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.*

The de-materialization of non-negotiable can be accomplished without significant obstacles. The information is issued in an electronic manner instead of paper and as the document is non-negotiable there will not be a problem with transferability or exclusive control.<sup>51</sup> To replace the system of negotiable transport documents may cause more complications. The UNCITRAL Convention art 9 and 10 contain procedures and conditions for the usage of negotiable electronic transport records. With a paper document, one has the advantage of a physical object that entitles the right of the goods and even though alterations may be done to the content of the document, the holder of the "paper" will be able to invoke his rights. Within electronic communications there is neither an original nor a physical object for the contractual parties to possess.<sup>52</sup> The UNCITRAL Convention provide the electronic transport records the same evidentiary effects as the traditional paper bills of lading<sup>53</sup>, which confirms the Convention's ambition of creating a better platform for electronic documents. The technical difficulties of ensuring safe transferability of exclusive control of the cargo is to a large extent a practical problem that will have to be solved and it is critical that the solution is functioning, safe and most

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<sup>51</sup> *Dematerialization of Shipping Documents*, Todd, Paul, <http://ourworld.compuserve.com/homepages/pntodd/intr/publms/demat.htm>

<sup>52</sup> *The Next Sea Carriage Convention?*, Diamond, A, LMCLQ part2, May 2008 p. 165

<sup>53</sup> UNCITRAL Convention art 41

importantly widely accepted by all parties such as courts, carriers, shippers, creditors etc. Systems for the issuance of electronic bills of lading are in place today<sup>54</sup> but undoubtedly there is room for improvement.

More efficient and faster communications, less paper work and overall reduced administrative costs are some of the benefits with replacing traditional paper bills lading with an electronic equivalent. The new UNCITRAL Convention provides a legal framework for the electronic handling of transport documents and this will be of significant importance in the future operation of carriers. As electronic transport records are still a relatively new phenomenon and paper bills of lading have a strong tradition there will most likely be some problems for the courts to face. However, initially it seems to be a need for credible technical systems for the issuance of electronic documents. BIMCO<sup>55</sup>, which is the recognized leader in the drafting and preparation of standard documents, including bills of lading, for the maritime industry, should be in a good position to provide for a standardized system for electronic transport records.<sup>56</sup>

A bill of lading, in paper or electronic form, is an evidence of a contract of carriage and that contract is central in the allocation of rights and obligations of the contractual parties and it also determines the basis of liability, subject to the provisions that are designed to regulate the liability and the burden of proof.

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<sup>54</sup> E.g. BOLERO, APL's system

<sup>55</sup> The Baltic International Maritime Council | the largest international association of cargo carriers.

<sup>56</sup> *CMI Rules for Electronic Bills of Lading*, Goldby, Miriam, LMCLQ [2008] part 1, p. 69

### 3 Basis of liability

This chapter will focus on the provisions that address the carrier's basis of liability in the conventions that are subject to this thesis. All of them contain similar liability systems but with some distinguished differences that I will attempt to point out. Focus will be on the burden and order of proof and those exemptions of liability that are available to the carrier.

#### 3.1 Liability system

The Hague-Visby and the Hamburg rules fundamentally differ in their wording of the basis of liability but follow the same fault-based liability system. This means that if the claimant manages to prove loss or damage to his goods, the carrier is presumed to be liable until he can exempt himself from liability by using the means available to him in the provision.

#### 3.2 Burden of proof

##### 3.2.1 The Hague-Visby rules

In the Hague-Visby rules, the wording for the basis of the carrier's liability is found in *art 4.1*:

*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 paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.*

The order of who shall prove what and when is not expressed but established by the courts when interpreting the provision. In the *Farrandoc case*<sup>57</sup> the order of proof was discussed and stated as follows; first, the claimant must prove the extent of loss or damage to the goods. The loss or damage must have occurred during the custody of the carrier and during his period of responsibility. Claimant can show damage by presenting a clean bill of lading<sup>58</sup> and if there is a divergence between the description of the cargo in the bill of lading and the actual condition on delivery the burden of proof shifts to the carrier. In order to avoid liability, the carrier must show that the damage to the goods was not attributable to his fault or was caused entirely due to one of the exemptions stated in Hague-Visby rules art 4.2. If the carrier is successful, the burden of proof shifts again and the claimant must prove another breach of obligation that overrides the exclusions, for example unseaworthiness. This is an overriding obligation, which means that if the vessel is deemed unseaworthy the carrier can no longer rely on to the “exclusion-catalogue” in art 4.2. If the vessel is found to have been unseaworthy it is up to the carrier to show that he has exercised due diligence and cannot be held liable for the damages on that basis. I will return to and elaborate on the discussion of the concept and burden of proofing seaworthiness in the next chapter.

To establish loss or damage to goods is a straightforward task but in a dispute concerning the exemptions, the above stated order of proof puts the claimant in a rather unfavourable position. There may easily arise complications for the claimant since he seldom has access to the information needed as evidence. Logs, maintenance reports and other information concerning the ship’s status and performance are not immediately accessible to the claimant. As mentioned above under section 2.2.1, there may also be difficulties placing the time of damage within the carrier’s period of responsibility under the current tackle-to-tackle principle.<sup>59</sup> One can imagine situations where goods are discharged at the port and not properly surveyed at once. This can bring consequences to the question of when the

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<sup>57</sup> *Robin Hood Flour Mills Ltd v. N.M Paterson & Sons*

<sup>58</sup> A bill of lading which does not contain any reservations/remarks on the condition of the cargo at loading.

<sup>59</sup> *The Next Sea Carriage Convention?*, Diamond, A, LMCLQ part2, May 2008 p. 149

damage occurred, on board during the carrier's period of responsibility or during the time between discharge and survey.

### 3.2.2 The Hamburg rules

The Hamburg rules deals with the basis of liability in a different manner. Art 5.1 states that:

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

In line with the fault-based liability system, the carrier is considered liable as soon as the loss, damage or delay occur and if the carrier wishes to escape liability for incurred damage he must show that he, his servants or agents took all measures that could reasonably be required to avoid not only the occurrence but also its consequences.<sup>60</sup> Compared to the Hague-Visby rules and the UNCITRAL Convention, as seen below, this certainly simplifies the basis of liability and order of proof. In Hamburg rules art. 5.1, the claimant has the burden of proving the actual loss, damage or delay but then the burden shifts to the carrier, including the burden of proofing seaworthiness.

One of the most obvious differences between the Hague-Visby and the Hamburg rules is the lack of an equivalent "exemption-catalogue" in the Hamburg rules. This contributes to a view of the Hamburg rules as less complex but has also been criticized to create ambiguous regulations. This will be further addressed in section 3.3. However, in art 5.4, the provision addresses the situation in case of fire. Here, the presumption of fault is reversed to the benefit of the carrier. Hence, according to this provision the claimant must prove the fault or neglect of the carrier in order for him to be held liable for damage in case

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<sup>60</sup> *The Hamburg Rules*, 2nd ed., Johnson, Andrew, L.L.P. Ltd, 1995 p.12

of fire, i.e. not presumed liability for the carrier. It is important to note the fact that the main rule in 5.1 states that if the carrier wishes to avoid liability he must show that he took reasonable measures to prevent damage. In art. 5.4 the claimant is obliged to prove fault or neglect in order to invoke liability. It does not seem satisfying to only show that the carrier has failed to take reasonable measures to avoid the fire or loss.<sup>61</sup> This may result in that it is harder to inflict liability on the carrier than it is for him to avoid it.

### 3.2.3 The UNCITRAL Convention

In the process of drafting the UNCITRAL Convention, the basis of liability provision was a central topic. Professor Francesco Berlingieri has described the burden of proof in art 17 of the UNCITRAL Convention to consist of four phases;<sup>62</sup>

*Phase 1*, the initial burden of proof, similar to current regulations, lies with the claimant to show loss or damage. This must also have incurred during the carrier's period of responsibility. Art 17.1.

*Phase 2*, the burden of proof now shifts to the carrier who has two alternatives. Either the carrier show that loss/damage/delay was not caused by the fault of him or any of the persons for whom he is vicarious liable or the carrier can show that one of the exempted perils, seen in 17.3, caused or contributed to the loss/damage/delay.

*Phase 3*, important to note is that *the excepted perils are not exonerations, but only cases of presumed absence of fault*<sup>63</sup> In this phase the burden shifts again on the claimant who has three options. (i) According to 17.4(a) he may attempt proving that the fault of the carrier or a person for whom he is responsible caused or contributed to the exception for which the carrier invoked in 17.3. (ii) According to 17.4(b) he may attempt proving that there was another cause to the incurred damage, which is not listed in the exception in 17.3. (iii) According to 17.5(a) the claimant may attempt proving that loss/damage/delay was probably caused by or contributed by unseaworthiness. If the claimant manages to prove fault pursuant to the first option the carrier has no further defence. If the claimant chooses

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<sup>61</sup> *The Hamburg Rules*, 2nd ed., Johnson, Andrew, L.L.P. Ltd, 1995 p. 13,14

<sup>62</sup> *Carrier's obligations and liabilities*, Berlingieri, Francesco, CMI Yearbook 2007-2008, p.281-283

<sup>63</sup> *Carrier's Obligations and Liabilities*, Berlingieri, Francesco, CMI Yearbook 2007-2008, p.282

the second or third option then the burden of proof once more shifts to the carrier in phase 4.

*Phase 4*, if the claimant chooses option (ii), the carrier must prove that this other cause was not attributable to its fault nor any person for whom he is responsible. This according to 17.4(b). If the claimant has made unseaworthiness probable pursuant to 17.5(a) then it is up to the carrier to prove that either the damage was not caused by unseaworthiness or that he has exercised due diligence and cannot be held liable.

### 3.2.3.1 Similarities and differences between the conventions

When comparing the systems of liability found in the different regimes, it is clear that all three regimes follow the same fault-based liability principle. The carrier is responsible for the loss, damage and delay that the claimant can prove within the carrier's period of responsibility. Notable here is that the UNCITRAL Convention, similar to the Hamburg rules, explicitly states a responsibility for delay, but this is not the case in the Hague-Visby rules.

All three conventions provide opportunities for the carrier to exempt himself from liability but the approach and means are different. Both the Hague-Visby rules and the UNCITRAL Convention contain a catalogue of exceptions that the carrier is able to invoke in order to avoid liability. These situations are, as stated by Prof. Berlingieri, not exonerations, but only cases of presumed absence of fault and will be discussed further below in section 3.3.

It is important to note that there are some significant alterations in the new Convention. For example, in the UNCITRAL Convention art 17.2 the carrier is given the possibility to avoid liability by proving that the cause or one of the causes of the loss, damage or delay is not attributable to its fault. For the carrier to be exempted for part of the damage is a new regulation compared to the Hague-Visby rules and it can be argued that it is ambiguous and vague. The provision does not indicate what kind of cause will be considered, nor does it inform on whether the cause need to be a substantial one or if it is sufficient that it is a less

dominant one.<sup>64</sup> This may lead to confusion among the parties involved as to what is considered as a valid cause. A result of that could be that carriers present all kinds of causes that are later rejected by the courts but in the meantime may contribute to unnecessary litigation. That would be in direct conflict with the purpose of the new convention.

The concept, definition and responsibilities of seaworthiness are discussed in the next chapter. Here, in context of burden of proof, focus will be on the burden of proving unseaworthiness. In the UNCITRAL Convention, according to art. 17.5(a), the claimant has to prove that loss, damage or delay was probably caused by or contributed by the unseaworthiness/uncargoworthiness of the vessel. By using the word “*probably*” the new regime lowers the burden of proof for the claimant.

In the Hamburg rules art. 5, there is no stated obligation for the carrier to provide a seaworthy ship. This does not mean that the duty of seaworthiness is not included in the provision. On the contrary, art. 5 expands the obligation of seaworthiness for the carrier compared to the Hague-Visby rules. This is done by extending the period of responsibility for seaworthiness throughout the entire carriage<sup>65</sup> and placing the burden of proof on the carrier. In the context of seaworthiness and possible damage, the carrier must prove that he or his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

Art. 4.1 of the Hague-Visby rules expressly states that the carrier is not 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 ship seaworthy. The burden of proving unseaworthiness follows, as described above, from the court’s interpretation of the provision, which means that it is the claimant who shall prove unseaworthiness.

Although many fundamental similarities to the Hague-Visby rules the new Convention contains some modifications in the context of burden of proof. As mentioned above, it does

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<sup>64</sup> *The Next Sea Carriage Convention?*, Diamond, A, LMCLQ part2, May 2008 p.152,

<sup>65</sup> The Hamburg rules art 4 | the carrier is responsible for the goods and whatever damage may happen to them during the carrier’s period of responsibility stated in art4.



not stretch as far as the Hamburg rules and burden the carrier with proving unseaworthiness but art 18.5(a) lightens the burden of the claimant compared to the Hague-Visby regulations by using the word *probably*. However, the fact that the claimant is burden with proving unseaworthiness at all has been the target of extensive criticism. Prof. William Tetley argues that the provision is unreasonable since in most cases the relevant information that is required for proving unseaworthiness is available to the carrier and not the claimant.<sup>66</sup> Given that logs, maintenance reports and other vital information regarding the vessel is immediately available to the carrier the Hamburg stance of burdening the carrier with proving that he has taken reasonable measures to avoid damage seems feasible.

### 3.3 The abolition of navigational and management error

The Hague-Visby rules art. 4.2 contains a list of excepted causes, for which the carrier will not be liable, subject to whether breaches of an overriding obligation, as discussed above in section 3.2.1, are also causative of loss or damage. This list of exemptions is commonly referred to as the “catalogue”<sup>67</sup>. In this section, focus will be on one of the exemptions; art. 4.2(a);

*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.*

This exemption is abolished both in the Hamburg rules and more importantly also in the UNCITRAL Convention. The exemption from liability for the error in navigation and management of the ship has been widely debated during the past decades. When discussing the exemptions found in art 4.2, one should keep in mind that, failure in complying with an overriding obligation, such as initial seaworthiness, prevents the carrier from being able to invoke the exemptions.

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<sup>66</sup> *Summary of Criticism of the UNCITRAL Convention*, Tetley, William, 2008

<sup>67</sup> See Supplement

Navigational errors include actions such as use of navigational equipment, steering, lanterns and other signals, berthing, anchorage, taking refuge in port etc.<sup>68</sup> Common incidents that result from navigational error can be grounding, collision with another ship and striking a FFO.<sup>69</sup> Any act or neglect regarding error in navigation from the persons covered by the provision above will not trigger liability for the carrier. It should be noted that it is the act, neglect, or default of the master, mariner, pilot, or the servants of the carrier that exempts the carrier from immediate liability, not the act of the carrier himself or senior personnel, which the carrier is not protected from.<sup>70</sup>

Nor will act or neglect from the persons identified with the carrier trigger such immediate liability in the management of the ship. It can be difficult to separate the term “management of ship” that is covered by the exemption from “error in management of cargo” or “commercial error” which in fact do result in liability for the carrier in case of damage.<sup>71</sup> The case *ND 1961.282 SSC MALEVIK* illustrates the fine line between the two wordings. In this case, two bilge valves were not properly closed which resulted in damaged cargo caused by the entering of seawater. The court reasoned that the valves are of benefit to both cargo and ship. Benefit to the cargo when opened since it allows water out of the cargo hold and thereby protect the cargo. Proper closing of the valves are important to the safety of the ship since if not the vessel would be at risk. In this case the cause of damage was a failure to proper close the valves and proper closing of the valves is, as stated above, most important to the ship’s safety. That is why the court attributed closing of the valves to “management of ship” instead of “management of cargo”, which it likely would be if there was neglect in opening the bilges, and exempted the carrier from liability.

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<sup>68</sup> *Scandinavian Maritime Law [The Norwegian Perspective]*, 2<sup>nd</sup> Ed., Falkanger, Thor, 2004 p. 272

<sup>69</sup> Fixed or Floating Object

<sup>70</sup> *Scandinavian Maritime Law [The Norwegian Perspective]*, 2<sup>nd</sup> Ed., Falkanger, Thor, 2004 p.271

<sup>71</sup> *Ibid.*p. 272

Arguably, the general obligation and duty of the carrier is to; carry the goods to its destination in a safe and prudent manner<sup>72</sup> and the exemption above may vastly limit that obligation.

The abolition of the exemption in the catalogue is an obvious change from the provisions in the Hague-Visby rules. It is also a change that was expected since the exemption is initially based on old shipping realities and with modern navigational equipment and a duty for the carrier to care for the cargo there seems to be no valid reason to keep the exemption of liability for navigational errors and management of ship.

However, there have been some reservations made in regards to the removal of the exemption. Anthony Diamond QC claims, without trying to defend the actual exemption, that the abolition will have a major impact on the balance of risk since it deprives the carrier of any defence for the great majority of cargo claims.<sup>73</sup> Prof. Michael Sturley on the other hand argues that the abolition of the nautical error exemption will not imply a change to current regulations. For those countries that have ratified the Hamburg convention, in which there is no “catalogue”, there will obviously be no change. In those countries, which have ratified the Hague or Hague-Visby rules and recognizes the exemption, Sturley claims that the courts rarely, if ever, uphold navigational fault as a defence. He means that the courts in those cases point to some circumstance that will amount to a failure in the carrier’s duty of initial seaworthiness.<sup>74</sup> Evidently, the opinions differ as to the importance of the captioned liability exemption.

Undoubtedly, due to the abolition of Hague-Visby art 4.2 (a); the exemption for act, fault or neglect in the navigation or management of ship, there has been a change in the UNCITRAL Convention compared to Hague-Visby rules. This can be regarded as a compromise between ship owners’ and cargo owners’ interests.

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<sup>72</sup> E.g. Hague-Visby art 3.2

<sup>73</sup> *The Next Sea Carriage Convention?*, Diamond, A, LMCLQ part2, May 2008 p. 150

<sup>74</sup> *Change to Existing Law*, Sturley, Michael, CMI Yearbook 2007-2008 p, 256

## 4 Seaworthiness

As the consequences can be of catastrophic proportions, it is critical to uphold a high safety standard in order to prevent incidents like oil pollution, extensive cargo and hull damage and other marine casualties. The ambition of a safe industry is aiming to assure that the active fleet of vessels are fulfilling approved standards and are maintaining a status of seaworthy.<sup>75</sup> This chapter will focus on the carrier's obligation of providing for a seaworthy vessel according to current regulations and how this obligation is conceived in the new UNCITRAL Convention.

### 4.1 Concept of seaworthiness

The concept of seaworthiness is difficult to define. Here, the focus will be on the meaning and development of the obligation according to case law and doctrine. The starting point is in art 3.1 of the Hague-Visby rules:

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.*

As mentioned above the Hague-Visby rules have been ratified by a large number of nations, which mean that its provisions and the meaning of those provisions have been tried before several different courts and jurisdictions. However, it is possible to find common ground in regards to the interpretation of the concept of seaworthiness.

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<sup>75</sup> [www.imo.org](http://www.imo.org)

#### 4.1.1 Definition and considerations

According to the Hague-Visby rules art. 3(a), the carrier has an obligation to before and at the beginning of the voyage exercise due diligence to make the ship seaworthy, i.e. an obligation of initial seaworthiness. It is difficult to exactly determine what seaworthiness means. It is not an absolute concept but is relative to the nature of the ship, state of knowledge, to the particular voyage and even to the particular stage of the voyage on which the ship is involved.<sup>76</sup> A widely accepted guidance of what seaworthiness constitutes is found in the judgement *McFadden vs. Bluestar* and is often referred to as “the prudent ship owner’s test”:

*“The ship must have that degree of fitness which an ordinary careful owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it. Would a prudent owner have required that it be made good before sending his ship to sea, had he known of it?”<sup>77</sup>*

The above stated test requires that all relevant circumstances shall be regarded in order to determine whether a ship is to be considered as seaworthy or not. Relevant circumstances can be the vessel’s physical condition, competence among the crew, proper documentation etc.<sup>78</sup> Failure in meeting these conditions would lead to the status of unseaworthiness. Furthermore, for a ship to qualify as seaworthy, it must also be “cargo worthy”<sup>79</sup>. That means that the ship has to have the ability to safely and in good condition carry its cargo to the intended destination.<sup>80</sup> Obviously, this can vary depending on what type of cargo the ship intends to carry and on any special conditions relevant for the intended voyage such as weather, time of year, route of carriage etc. For example, if the ship is carrying grain in bulk the cargo holds require a more thorough cleaning than for example carriage of

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<sup>76</sup> *The Fjord Wind*, [1999] 1 Lloyd’s Rep. 307 at p. 315

<sup>77</sup> *McFadden v. Blue Star Line* [1905] p.706

<sup>78</sup> *The Eurasian Dream* [2002] Lloyd’s Rep. 719 [§128]

<sup>79</sup> See Hague-Visby rules art 3.1.(c)

<sup>80</sup> *Bills of Lading*, Aikens, Richard, Informa London, 2006, p. 239

container cargo.<sup>81</sup> It is important to emphasize that the vessel is required to be prepared for what can be expected from an ordinary voyage. If damage occurs due to extraordinary circumstances, the carrier will most likely not be held responsible since he can refer to the exclusion clauses available to him.<sup>82</sup>

According to the Hague-Visby rules the carrier is only obliged to “*exercise due diligence*” to make ship seaworthy. Since seaworthiness is not an absolute concept one should note that it is a possibility for the carrier to avoid liability even though the vessel is unseaworthy as long as the carrier has fulfilled his obligation of due diligence. Naturally, the fact that the vessel is considered to be unseaworthy could indicate that the carrier has failed his duty of due diligence but it is once more a question of defining a wording in the regulations. Due diligence is a relative term which will very much depend on circumstances present in the case and actual knowledge of the person responsible. In order for the carrier to avoid liability he must act with reasonable care and such duty may, for example, be enhanced if cargo owner informs the carrier on how to properly deal with certain type of cargo.<sup>83</sup>

If a carrier is found to have failed in his obligation to make the ship seaworthy, he will be liable to pay any damages/losses that have arisen from that unseaworthiness. Additional consequences can be a loss of cover from underwriters, P&I Club, and to argue unseaworthiness is a powerful defence tool for the insurer in marine insurance.<sup>84</sup> This is illustrated by *The Star Sea*<sup>85</sup> where the vessel was destroyed by fire. The underwriter argued unseaworthiness since the chief mechanic had cut a pipe rendering the emergency fire pump useless and the Master did not have sufficient knowledge on how to operate the CO2 extinguish-system. The court held that this incompetence amounted to unseaworthiness and this was the cause of the additional loss, which resulted from failure

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<sup>81</sup> *Scandinavian Maritime Law [The Norwegian Perspective]*, 2<sup>nd</sup> Ed., Falkanger, T, 2004 p. 275

<sup>82</sup> See the Hague-Visby rules art 4.2 (a-q) “the catalogue” | The Hamburg rules do not have the same “catalogue” but the carrier is able to exempt himself from liability by taking reasonable measures | UNCITRAL convention art 17.3 (a-o)

<sup>83</sup> *Scandinavian Maritime Law [The Norwegian Perspective]*, 2<sup>nd</sup> Ed., 2004 p.268 f.f

<sup>84</sup> *The Importance of Seaworthiness*, C-H Spurin, 1996 p.4

<sup>85</sup> *The Star Sea*, [1995] 1 Lloyd’s Rep. 651

to use the fire fighting system. The additional loss was not recovered under the insurance policy but the loss incurred prior to the Master's failure was recovered.

It is important to note that the carrier is only liable in respect of failure to exercise due diligence to make the vessel seaworthy if the failure was causative of the loss alleged to have been suffered. This means that if the damage incurred was not caused by the state of unseaworthiness even though the carrier has not been due diligent the carrier will not be held liable.<sup>86</sup> However, there may still be other grounds to invoke liability.

#### 4.1.1.1 Examples from case law

Numerous cases in courts have addressed the issue of seaworthiness. Below are two that illustrate what circumstances may be of importance and what difficulties that may arise when determining whether a vessel is seaworthy or not.

In the *Pagensand*-case<sup>87</sup> the vessel was lying alongside a loading port and the second engineer removed the cover from a sounding pipe and then neglected to replace the cover properly. During the voyage, the cargo was damaged by water, which had poured in through the sounding pipe. The negligence in respect of closing the sounding pipe caused a defect, which resulted in that the M/V *Pagensand* was considered unseaworthy by the court from the commencement of the voyage since it was unlikely that the error would be detected and rectified before there was any danger for damage.

In *Eurasian Dream*<sup>88</sup> a fire started on deck 4 of a pure car carrier during discharge in the port of Sharjah. Due to lack of competence of the master and crew and proper fire-routines and fire-equipment on board the court found the vessel to be unseaworthy. The carrier was unable to use the fire-exemptions in the "catalogue" found in Hague-Visby rules art. 4.2 (b) because, as mentioned above in section 3.3, exercising due diligence in ensuring a

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<sup>86</sup> *Bills of Lading*, Aikens, Richard, Informa London, 2006, p. 248

<sup>87</sup> *ND 1956 175 SH (Pagensand)*

<sup>88</sup> *Eurasian Dream* [2002] Lloyd's Rep. 719: |§125|

seaworthy vessel is an “overriding obligation” in relation to the exemptions in art. 4.2. This means that the carrier’s duty of providing a seaworthy ship is mandatory and cannot be avoided by relying on the exemptions in art 4.2.

#### 4.2 Current regulations and the UNCITRAL Convention

The content of the obligation of seaworthiness provided by art 3 in the Hague-Visby rules is briefly explained above and it is foremost that obligation that is relevant to compare to the new wording in the UNCITRAL Convention.

However, it is appropriate to mention that the Hamburg rules’ provision concerning the carrier’s obligation of seaworthiness differs from the Hague-Visby. In the Hamburg rules the carrier has a continuous duty of providing for a seaworthy vessel throughout the entire period of carriage. As long as damage, loss or delay occurred in the carrier’s custody of the goods he is liable until he proves otherwise.<sup>89</sup> It is the period during which the goods are in the carrier’s custody that the ship is obliged to be in a seaworthy condition rather than the commencement of the voyage as in the Hague-Visby rules. As mentioned above in section 3.2.2, the carrier is able to exempt himself from liability, including the obligation of seaworthiness, by proving that he took all measures that could be reasonably required to avoid the occurrence and its consequences. The carrier is obliged to exercise due diligence to provide for a seaworthy vessel during the entire voyage and this way of reasoning is demonstrated in the new UNCITRAL Convention as well.

The UNCITRAL Convention stipulates a more extensive liability on the carrier than the current Hague-Visby provision as the obligation of making the vessel seaworthy is here imposed on the carrier also *during* the voyage.

*Article 14. Specific obligations applicable to the voyage by sea*

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<sup>89</sup> *The Hamburg Rules*, 2nd ed., Johnson, Andrew, L.L.P. Ltd, 1995 p.12



*The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:*

- (a) Make and keep the ship seaworthy*
- (b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and*
- (c) Make and keep the holds and all other parts of the ship in which the goods are carried, fit and safe for their reception, carriage and preservation.*

In the process of drafting the UNCITRAL Convention, the new time extension in art 14 met some resistance. One of the presented arguments against changing the existing provision was the fact that undoubtedly will the carrier not have the same logistic possibilities to keep the ship seaworthy at sea as he has in port. It was said to be unfair to the carrier if the courts had the same expectations of seaworthiness at sea as in port.<sup>90</sup> In response to this concern one shall keep in mind that, as previously stated, seaworthiness is not an absolute concept. Therefore, the carrier is not, according to above provision, obliged to definitely maintain the vessel at a status of seaworthy but rather to exercise due diligence, i.e. execute reasonable measures within reasonable time for what can be expected of a prudent owner to his knowledge.

Even though some reservations were made, there was a wide support and acceptance for the changing of the current provision in the new Convention.<sup>91</sup> That shows that the altering of the previous time limit for the obligation to keep the vessel seaworthy may not be very controversial. In a practical context, the new provision is far from revolutionary compared to current regulations. According to the Hague-Visby rules art 3.2 the carrier has an obligation to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. This would indicate a continuous responsibility throughout the whole carriage and not, as in regards to seaworthiness, limited to before and at the beginning of the voyage. Therefore, even though not failing in providing for initial seaworthiness the carrier has an obligation to care for the goods. Any shortcomings in fulfilling that

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<sup>90</sup> A/CN.9/510 p.15 [2002]

<sup>91</sup> A/CN.9/645 p.15 [2008]

obligation, subject to the exclusions in art 4, will give the claimant grounds for his claim for cargo damage. When looking closer it seems that it in fact lacks any substantial arguments for preserving the existing the rule which limits the obligation of seaworthiness to before and the beginning of the voyage. It is an evolutionary change of the seaworthiness provision and does not have to imply any surprising consequences for the future liability of the carrier.

However, it is a significant alteration of the wording that may be of importance to the contractual parties. Foremost, one must recognize the importance that the UNCITRAL Convention explicitly states a continuous obligation of seaworthiness. The question of initial seaworthiness at the commencement of the voyage will no longer be an issue. The stated obligation in art 14 imposes a liability for the carrier during the entire sea voyage and that will facilitate the task proving unseaworthiness as the question on when the unseaworthiness occurred would not be relevant. I will return to the alteration's potential impact on the burden of proof in my closing comments.

The basis of liability and burden of proof have been discussed above in chapter 3 but in the context of seaworthiness one must keep in mind that, according to the Hague-Visby rules and the UNCITRAL Convention, the burden of proofing unseaworthiness lies initially with the claimant.<sup>92</sup> This may be a difficult task for the claimant since he is usually not in possession of the relevant documentation, have access to take statements from crewmembers etc. required to prove unseaworthiness. Perhaps it is reasonable to shift the burden of proof. The carrier have undoubtedly a better oversight and access to documentation than the cargo interests and therefore the burden of proofing seaworthiness could be placed on him. That the part in a contractual relationship with better knowledge, easier access to documentation and other information has the burden of proof is not an unfamiliar concept in other legal areas and is used in the Hamburg rules.

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<sup>92</sup> Hague-Visby rules art 4.1 | UNCITRAL Convention art 17.5

The inclusion of “...during voyage...” in art 14 of the UNCITRAL Convention expands the carrier’s liability to exercise due diligence to keep the ship seaworthy. This does not mean an increase in what reasonable measures the carrier is obliged to perform. What constitutes due diligence in this context is a product of praxis and will have to be determined depending on relevant circumstances in the case. That the carrier in the future is bound to act with due diligence and acting as a prudent owner during the entire voyage is only reasonable. It is hard, if not impossible, to define “due diligence” without taking consideration to the facts in the case and it is a concept/term which should remain in the provision and at the discretion of the court to interpret. It is up to the courts to determine how strict the duty of due diligence should be, based on the circumstances in the case.

The extension of the period for which the carrier is obliged to provide for a seaworthy vessel will mean a potential change in the balance between the carrier and the cargo interests. I will return to this issue in my closing comments.

#### 4.2.1 International Safety Management Code

In the context of maritime safety and seaworthiness it is appropriate to mention the ISM Code<sup>93</sup>. The purpose of the Code is, according to its preamble, to provide an international standard for the safe operation of ships and pollution prevention. Law and regulations should be flexible by nature and develop in adjustment to the needs of the surroundings and the ISM Code is no exception. The ISM Code is a product from IMO<sup>94</sup> following from a range of serious maritime incidents in the late 1980’s. The Code aims to ensure safety, to prevent human injury or loss of life and to avoid damage to the marine environment.<sup>95</sup> After having the status of a resolution from IMO it became mandatory for a large number of member states in 1998 when the ISM Code was incorporated in the SOLAS

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<sup>93</sup> International Management Code for the Safe Operation of Ship and for Pollution Prevention was incorporated as chapter IX of the SOLAS convention 1974 [ISM Code]

<sup>94</sup> International Maritime Organization

<sup>95</sup> [www.imo.org](http://www.imo.org)

convention<sup>96</sup>. The ISM Code is mainly concerned with the formulation and implementation of a safe system of management and operation of the ship and thereby it especially aims to increase the competence of the crew by setting routines on board etc<sup>97</sup>. In short its purpose is to increase the safety within the shipping industry, much like the purpose of seaworthiness.

The ISM Code can be a guidance to determine whether a ship is seaworthy or not but fulfillment of the Code's regulation is not an absolute requirement to consider a vessel seaworthy. The Code requires that the ship owner provides documentation, logs, maintenance reports and other vital information in order to raise the standard of safety and it provides a framework for the issuance of safety certificates. However, a problem could be the lack of effective sanctions.

The term *seaworthy* is still in the new UNCITRAL provision, unlike the Hamburg rules art 5, and the difficulties of defining that concept remains. Even though a great number of leading cases have tried to point out what circumstances are important when determining seaworthiness it remains difficult for claimant to prove it. A way to improve this situation could be to use the ISM Code to a greater extent and perhaps even include it in art 14 of the UNCITRAL Convention. Today the ISM Code is incorporated in the SOLAS convention but lacks any real sanction in case of violation of its regulations. The reference to the ISM Code in the UNCITRAL Convention could help define the concept of seaworthiness. This would make it foreseeable for all parties involved as to what conditions are required, what documentation is required by vessel and what need to be proved by claimant in order to show unseaworthiness. The introduction of the ISM Code in the new convention could make evidence required to prove unseaworthiness slightly more available to the claimant.

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<sup>96</sup> International Convention for the Safety at Sea [SOLAS]

<sup>97</sup> *The ISM Code and the Law of Marine Insurance*, Dr. S. Hodges, p.5

## 5 Closing comments

### 5.1 The ambition of harmonization and simplicity

The UNCITRAL Convention is drafted with an ambitious goal of replacing current maritime regulations and harmonizing transport law in general, including other modes of transport. It aims to unify a shattered legal area that consists of several conventions and provide judicial development in areas where historically there has been little. The Convention wants to provide clarity to an area of the law that is characterized by its complexity. Obviously, its success is primarily depending on a wide acceptance and adoption from maritime nations in order for the Convention to gain the required strength. In terms of harmonization within the maritime area there is little to be said. If the prominent shipping nations adopt the Convention, it will likely replace the current ones and obtain the status of being the central convention that governs the carriage of goods by sea.

In addition to replacing the maritime rules, the new Convention wants to include the aspect of other modes of transport. However, due to its limited scope of application it is misleading to call the Convention a true multimodal regime. In order for the Convention to be applicable to other modes of transport there must be a sea leg of the voyage. Therefore, the Convention contains maritime-plus rules rather than having the effect of a multimodal regime. This is of course a failure of the ambition of creating a multimodal regime but its limited scope is perhaps necessary for the Convention's acceptance. In the light of the failure of The 1980 Multimodal Transport Convention, it might be too ambitious to harmonize the entire transport chain into one single convention. I think it is sound and necessary to take the first step as a maritime-plus convention and, if possible, extend the scope to a true multimodal regime at a later stage. By doing so, the individual state is able to have an adjustment period to the new framework and keep the possibility of amending the rules, to cover all modes of transport without limitations, open.

However, even if the Convention becomes reality, has it succeeded in its ambitions? The desirable simplicity of international transport rules is meant to benefit a commercial

market, making it easier for the involved parties to understand and apply the rules. I recognize the importance of current regulations, both for maritime and other modes of transport, but the unwillingness to change the current situation is preventing the new Convention from achieving the desired effect. As a product of the UNCITRAL, the Convention is drafted in accordance with many different wishes. Nations and the actors, who provide for an extensive lobbyism, have different interests in designing part of the potential future of transport legislation. The compromises that result from such a process may have led to ambiguities and a complexity that is the opposite of the initial objective. Article 17 (Basis of Liability) illustrates this problem. If the Convention has the intention of removing legal obstacles and providing for a simpler regulation then I would say that it has failed. Article 17 is a residue from the corresponding provision in the Hague-Visby rules. Article 17 contains a catalogue of exemptions that are stated without any logical reason for why those specific situations are mentioned. Art 17.3(a) states the act of God as an event or circumstance that is exempted if it contributed to the loss, damage or delay. Even though the stipulation is most likely kept for traditional reasons, one can question if it contributes to more understandable transport rules.

Another example of the UNCITRAL Convention's complex nature is the rules concerning the burden of proof, which has been addressed above in chapter 3. The long wording of the provision provides for a "ping-pong" scenario where the burden of proof shifts between the claimant and the carrier in different phases. There is an obvious risk that the shifting and the exemptions found in the provision contributes to the complexity and making the Convention fit only for a small group of lawyers, which was not its initial purpose. I believe that the Hamburg rules' solution is a more suitable way of dealing with the basis of liability. It is a straightforward provision of fault-based liability and an opportunity for the carrier to exempt himself from responsibility by showing that he has acted in a prudent manner and taken reasonable measures. The courts have and will establish what is to be regarded as prudent behaviour through their rulings. One option could be to complement the provision with a guidance of what constitutes "reasonable", not in the form of legislation but as a guidance only.

## 5.2 Changes to existing law

First, I want to emphasize that any potential changes to existing law are subject to the adoption of the UNCITRAL Convention in its current form. It is a challenging task to harmonize international transport law and in order to assure acceptance where other regulations have failed the new Convention is evolutionary rather than revolutionary. Potential changes to existing law will be most evident in areas where the Convention is imposing an extended scope of application or rules that target new realities.

### 5.2.1 Increased period of liability on the carrier

The UNCITRAL Convention imposes a door-to-door liability on the carrier. I believe this is positive in the sense that it contributes to a simplicity when determining the period of responsibility which is a fundamental condition for liability. The extended period of responsibility also provides a better platform for door-to-door contracts that, for buyers and sellers, must be a benefit to the commercial side and service of the trade. It can be argued that the longer time period imposes a liability on the carrier regarding situations that are out of his control. The carrier is responsible from receipt to delivery of the cargo, including stages of reloading operation etc. This is an extensive liability and the contractual carrier would often be unable to supervise and control the different parts of the voyage in order to protect his interests. However, the occurrence of contractual and actual carriers is in place today, which is apparent in the relationship between a ship owner and the charterer. The actual carrier has a responsibility for the carriage that is inflicted either directly from cargo owner or from charterer as a recourse claim. The responsibility for the actual carrier at each stage of the voyage would remain the same but period of time for the contractual carrier is construed differently.

The new period of responsibility is foremost providing a better position for the cargo owner as the uncertainties of responsibility issues decreases and it simplifies the occurrence of multimodal carriage.

### 5.2.2 Network or uniform liability

Since there has been repeated attempts of introducing a multimodal harmonization it is easy to believe that this the correct path for transportation law in the future. I think it is important to reflect and investigate if the goal of harmonization will bring the desired positive effects as intended. Different types of cargo require different rules. For example, bulk cargo is perhaps not as likely to be carried in a multimodal manner as container cargo. Would it not be more suitable to regulate that type of transport with a unimodal regime? I do not believe it is of interest to have different sets of rules for different types of cargo but it may question the need for multimodal harmonization.

A uniformed multimodal regime without application limitations is useful in the respect that the contractual parties only have one instrument to deal with instead of forcing the parties to delve in other conventions looking for applicable rules. A network of conventions and rules also allows for the apparent risk of forum shopping where the parties may look for the rules most favourable to their situation. This is an unwanted effect and may cause further litigation. In this regard, a single regime is more likely to provide predictability.

On the negative side, I believe that the considerable size of a multimodal regime can be a disadvantage. How can a multimodal regime properly provide rules for each mode transport compared with a unimodal convention that specifically target one way of transport and its characteristic features. If one instrument attempts to regulate all modes of transport the size and scope of it contribute to its complexity.

The UNCITRAL Convention will mean changes in respect of the liability for multimodal carriage but in its present form the Convention is vastly limited as a true multimodal regime. The multimodal inclusion will affect the current relationship between the carrier and the cargo interests and I believe that one single forceful regime is the appropriate way



forward in transport law. For future progress, it is important to remove those limitations of applicability that the UNCITRAL Convention contains today.

### 5.2.3 The obligation of seaworthiness

To provide for a seaworthy vessel is an overriding obligation for the carrier. According to the Hague-Visby rules, the obligation of seaworthiness is limited to before and at the beginning of the voyage and potential damage to the cargo after this point in time would not fall under the carrier's liability. However, in regards to cargo damage the limited obligation of seaworthiness is complemented of an obligation for the carrier to properly care for the goods until discharge. This would indicate a continuous duty throughout the entire voyage and damage to the cargo caused or contributed by unseaworthiness could likely be attributed to a failure of properly caring for the goods. A noted change in the UNCITRAL Convention is the extension of the carrier's obligation of seaworthiness from before and at the beginning to *during* the voyage. As explained above, this new wording will not initially bring a practical significant change in respect of the liability for cargo damage as there is a continuous obligation of care in the Hague-Visby rules as well. However, it is important that the new Convention explicitly states the continuous obligation of seaworthiness, not least for the sake of clarity.

I believe the most important difference through the new Convention becomes evident at a later stage. If damage to the goods is proven, the carrier is presumed liable but may turn to the exemptions stated in art 17.3 of the UNCITRAL Convention in order to avoid liability. If the claimant shows that the loss, damage or delay was probably caused by unseaworthiness then the carrier can no longer rely on the exemptions since seaworthiness has a special status of being an overriding obligation. The obligation of seaworthiness is, as mentioned above, now a continuous obligation throughout the entire carriage, unlike in the Hague-Visby rules, and that means that the claimant is given extended possibilities of preventing the carrier from invoking the exemptions in 17.3.

Furthermore, the new Convention lowers the burden of proving seaworthiness by stating that the claimant has to make it *probable* that unseaworthiness caused or contributed to the loss, damage or delay. This puts the claimant in a more favourable position compared to the Hague-Visby rules. I think it is motivated to take it one-step further and shift the burden of proof regarding seaworthiness to the carrier. He has better access to the ship's documentation and performance reports than the claimant has and should be in a position to show that the damage was not due to the lack of carrier's due diligence to provide for a seaworthy vessel. The claimant will still have to prove the initial damage to the cargo.

### 5.3 Final comments

If accepted, the UNCITRAL Convention will not mean a revolutionary change to existing law. It bears a strong resemblance to current maritime regimes and is vastly limited in its multimodal intentions. It is, however, an important step towards the modernization of transport law and could be a new platform to relate to in future development of transport law.

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