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The Hamburg Rules: A Comparative Analysis

D. E. Murray*

INTRODUCTION

The new "Hamburg Rules," which are designed to govern international carriage of goods by sea, are intended to take the place of the Hague Rules, exemplified in the American facsimile, the Carriage of Goods by Sea Act (COGSA). Although the Hamburg Rules grew out of the Hague Rules, it can be observed that the Hamburg Rules also derive some of their concepts from the Warsaw Convention (as amended) governing international air transportation.

This article is designed to analyze the new Hamburg Rules and to compare their provisions with those of the existing Hague Rules (COGSA), including some of its case law progeny, and with the original Warsaw Convention, the 1955 Hague amendments to the Warsaw Convention (Warsaw-Hague), and selected sections of the Uniform Commercial Code, the United States Interstate Commerce Act, and United States statutes limiting liability of ship owners.

INTERPRETATION OF THE HAMBURG RULES

Hamburg provides that "[i]n the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity." The

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6. See notes 81 and 88 infra.

7. See notes 165 and 168 infra.

8. See Hamburg, supra note 1, at art. 3.
Convention is "in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic." One wonders whether the drafters' goal for uniformity will be reached when a Convention is written in six different languages.

On the other hand, the provision that each language is equally authentic avoids the dilemma posed by the Warsaw Convention, which was written only in French and then improperly translated in many respects in England and the United States, with the result that courts have had to resort to dictionaries and to schoolboy French in order to interpret its terms. Under such an approach, non-uniformity prevails. No matter which approach is chosen, however, it appears that uniformity is a Utopian goal over the following years, unless one or two forums only are selected for dispute settlement in the vast majority of the bills of lading used in international trade.

**Scope of Application**

Under the Hamburg Convention, the Rules will govern all contracts of carriage by sea between two different countries if either the port of loading, the port of discharge, or one of the optional ports of discharge is the actual port of discharge, and such port is located in a contracting state. The Rules will also apply if the bill of lading is issued in a contracting state, or the bill of lading provides that the Hamburg Rules are to govern the contract of shipment. Let us assume that a bill of lading is issued in a contracting state, and the shipment is to be discharged in an American port which is governed by the Hague Rules (COGSA). Which rules will apply—Hamburg or COGSA? If suit were brought in a court in the United States, the Hague Rules (COGSA) would control. On the other hand, if suit were brought in the first contracting state, the Hamburg Rules would control. A delightful conflicts question thus arises.

9. Id. at art. 34, § 2. The preamble to the Convention also repeats much of this language.

10. See Warsaw, supra note 4, at art. 36. The Hague Protocol (Warsaw-Hague) is also drafted solely in French. See note 5 supra.


12. See Hamburg, supra note 1, at art. 21, § 1(d). This provision permits a limited choice to contract for a particular forum.

13. Id. at art. 2.

14. See COGSA, supra note 3, at § 1305.
The COGSA rules provide that they "shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they [meaning the bills of lading] shall comply with the terms of this Act." This wording has been changed dramatically under the Hamburg Rules which provide:

The provisions of this Convention are not applicable to charter parties. However, where a bill of lading is issued pursuant to a charter party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading not being the charterer (emphasis added).

Under Hamburg, it appears that only when third parties are holders of the bills of lading will the Rules govern. It seems permissible for the parties to incorporate the Hamburg Rules into the bill of lading by contractual reference.

Under COGSA, the carrier is liable for damage (if liable at all) only for the period from the time when the goods are loaded on board the ship to the time when they are discharged from the ship. It is common to say that the carrier is liable only from tackle to tackle.

COGSA further provides that the parties can, by contract, agree to the liability of the ship for custody and handling of goods prior to loading and subsequent to discharge from the ship on which the goods are carried. As a practical matter, many bills of lading do provide

15. Id.
16. See Hamburg, supra note 1, at art. 2, § 3.
17. Article 23 of the Hamburg Rules states:
Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part.

A quick reading of this provision would seem to indicate that the Hamburg Rules could not be applied by contract to a bill of lading issued to a charterer of the vessel because this would be in derogation of the Convention. On the other hand, since Hamburg has declined jurisdiction over bills of lading issued by a ship to the charterer, Hamburg should have no concern as to what private parties have chosen to do by contract; the contract does not truly derogate from the Hamburg Rules because Hamburg has chosen not to interfere with their private arrangements. Further, the use of the word derogate, which means to take away from or lessen the force of, would seem to indicate that if the parties have agreed to extend the reach of Hamburg by contract, they have not lessened its reach but have rather increased it.

for the responsibility of the carrier prior to loading and subsequent
to discharge, and at the same time, the limitation of liability pro-
visions of COGSA are also adopted for this “prior to and subsequent
to” period. In effect, the carrier assumes liability, but at a reduced
rate.\textsuperscript{19} The Hamburg Rules represent a dramatic change from the
COGSA provisions in this regard. Under Hamburg, the carrier is
liable from the time it takes possession of the goods until it does one
of the following: (1) delivers the goods to the consignee; (2) puts
them at the disposal of the consignee in accordance with the contract,
the law, or the usage of the particular trade applicable at the port
of discharge; or (3) hands over the goods to a third party or au-
thority which by operation of law or regulations applicable at the
port of discharge is required to receive the goods.\textsuperscript{20} Now it is not a
question of contract liability, but rather a question of Convention
liability which arises.

It is obvious that the Hamburg Rules have deliberately, or per-
haps inadvertently, copied the Harter Act,\textsuperscript{21} which provides that the
carrier is liable from the time it takes possession of the goods until it
delivers the goods to the consignee. Hamburg, in a sense, is simply
codifying American practice under the Harter Act. In a similar vein,
Warsaw-Hague states that the air carrier is liable for damage or loss
to cargo during the “carriage by air,”\textsuperscript{22} which is defined as the period
“during which . . . cargo is in charge of the carrier, whether in an
airport or on board an aircraft, or, in the case of a landing outside an
airport, in any place whatsoever.”\textsuperscript{23}

\textbf{Carrier-Shipper Liability}

This Hamburg rule has a startling omission, however. Article
4 provides that “[i]n paragraphs 1 and 2 of this Article, reference to
the carrier or to the consignee means, in addition to the carrier or the
consignee, the servants or agents respectively of the carrier or the
consignee.”\textsuperscript{24} No reference in this subsection is made to the concept
of independent contractors, such as independent warehousemen and
stevedoring concerns. Unless the word \textit{agent} can be interpreted to

\begin{itemize}
\item \textsuperscript{19} The carrier, without this contractual adoption of COGSA, would be
liable as a bailee without any ceiling of liability.
\item \textsuperscript{20} See Hamburg, supra note 1, at art. 4, § 2.
\item \textsuperscript{21} 46 U.S.C. §§ 190-196 (1970).
\item \textsuperscript{22} See Warsaw-Hague, supra note 5, at art. 18, § 1.
\item \textsuperscript{23} Id. at art. 18, § 2.
\item \textsuperscript{24} See Hamburg, supra note 1, at art. 4, § 3.
\end{itemize}
include independent contractors, this provision creates an omission from the standpoint of liability.25

It is well known that the Hague Rules (COGSA) were designed primarily to immunize the carrier from liability for a number of reasons,26 while the Hamburg Rules have taken exactly the opposite approach.27 To illustrate the difference between COGSA and Hamburg, let us assume a case involving negligence in the navigation of a ship by one of its officers. Under COGSA, the carrier would not be liable for such errors in navigation.28 Under the Hamburg Rules, however, the carrier may be liable if it is unable to show that the carrier, its servants, or agents took all measures that could reasonably be required to avoid the occurrence. If there was negligence by any officer or agent, the ship would then be unable to demonstrate that all measures that could reasonably be required were taken to avoid the navigational error, and liability would follow.29

For some reason, the old fire exception30 from liability has been preserved. For example, Hamburg says that “[t]he carrier is liable for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents.”31 This is similar to COGSA which provides that the carrier will not be liable for fire “unless caused by the actual fault or privity of the carrier.”32 The Hamburg Rules go on to provide that the carrier will be liable for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents, in taking all measures that could reasonably

25. See note 51 infra and accompanying text.
26. See COGSA, supra note 3, at § 1304.
27. The basis for the liability provision of Hamburg was obviously based upon a similar provision in the Hague amendments to the Warsaw Convention. The Warsaw Convention states that “[t]he carrier shall not be liable if he proves that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.” See Warsaw Convention, supra note 4 at art. 20. Hamburg states that “[t]he carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, . . . 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.” See Hamburg, supra note 1, at art. 5, § 1.
28. See COGSA, supra note 3, at § 1304(2)(a).
29. See Hamburg, supra note 1, at art. 5, § 1.
31. See Hamburg, supra note 1, at art. 5, § 4(a)(1).
32. See COGSA, supra note 3, at § 1304(2)(b).
be required to put out the fire and avoid or mitigate its con-
sequences.  

Reading these two sections together, it appears that if a fire arose without fault, the ship would not be liable unless it failed to take all measures that could reasonably be required to put out the fire; con-
versely, if the fire arose from the fault or neglect of the carrier, its servants, or agents, liability would follow.

Under the Hague Rules (COGSA), live animals are not to be deemed as goods, therefore, the carrier would not be liable to the shipper. The Hamburg Rules, on the other hand, provide that goods include live animals and "[w]ith respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage." The same section purports to cover the burden of proof:

If the carrier proves that he has complied with any special instruc-
tions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his serv-
ants or agents.

A remarkable bit of drafting was evidenced in the Convention's adoption of Annex II which states:

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

Under this something-for-everyone rule, it appears that the shipper has the "burden of proof" (apparently the burden of persuasion) in cases involving fire loss caused by the fault or neglect of the carrier, the failure of the carrier to take all measures to put out a fire and

33. See Hamburg, supra note 1, at art. 5, § 4(a)(11).
34. See COGSA, supra note 3, at § 1301(c).
35. See Hamburg, supra note 1, at art. 1, § 5.
36. Id. at art. 5, § 5.
37. Id.
38. Id. at Annex II.
39. Id. at art. 5, § 4(a)(1).
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avoid or mitigate its consequences, and intentional or reckless conduct by the carrier causing harm to the goods. In addition, it appears that the shipper has the burden of proof in loss or injury to live animals after the carrier has proved that "the loss, damage or delay in delivery could be attributed to such [special] risks" inherent in that kind of carriage. In this case, "it is presumed that the loss ... was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents."

Comparative Negligence

The Hamburg Rules include a rather poorly articulated notion of comparative negligence:

Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.

Although it is not entirely clear, it appears that this particular comparative negligence concept would be applicable to the negligence of the shipper as contrasted with any negligence on the part of the carrier. It could also apply, apparently, if there was an act of God, force majeure, or an act of a third party which contributed to the loss.

Under the Warsaw Convention, it is clearly stated that if the carrier proves that the damage was caused by, or contributed to by the negligence of the injured person, the court might, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from its liability. The Warsaw-Hague Rule is exactly the same. Warsaw and Warsaw-Hague thus leave the comparative allocation to the parochial law of the court trying the case, while Hamburg foists a comparative negligence theory on all courts, wherein it may frequently be a foreign concept.

40. Id. at art. 5, § 4(a)(11).
41. Id. at art. 8.
42. Id. at art. 5, § 5.
43. Id. at art. 5, § 7.
44. See Warsaw, supra note 4, at art. 21.
45. Id.
Hamburg has also preserved the historical notion that the carrier is not liable, except in general average,\(^4\) where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea. It is to be noted that under the Hamburg Rules, the carrier might well be liable for general average to the shipper in the case of a deviation to save life or property, while under COGSA, the carrier would not be liable for any general average or any other kind of liability in such an instance.\(^4\)

**Causes of Action**

On occasion, it has been asserted that where liability is limited by a convention or statute concerning contracts, one may circumvent the limitation of liability by suing in tort, or to use the old expression, "you may waive the contract and sue in tort."\(^4\) Hamburg disposes of this ploy by providing that the defenses of the Convention apply in any action, whether the action is founded in contract, tort, or otherwise.\(^4\) Subsection 2 of this Article, however, is not so neatly phrased and states:

If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defenses and limits of liability which the carrier is entitled to invoke under this Convention.\(^5\)

It seems clear that if suit were brought against a crew member or officer, such person would be protected by this clause, provided he was acting within the scope of his employment. This would also apply, apparently, to any other agent, but would it apply to an independent contractor, such as a warehouseman or a stevedoring firm? A tremendous amount of litigation has been engendered both in the United States and overseas by the application of the so-called

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46. General Average Contribution is defined as follows:
A contribution by all parties in a sea adventure to make good loss sustained by one of their number on account of sacrifices voluntarily made of ship or cargo to save residue and lives of those on board from an impending peril or for extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise.


47. See COGSA, supra note 3, at §§ 1304(2) (1) and (4).


49. See Hamburg, supra note 1, at art. 7.

50. Id. at art. 7, § 2.
Himalaya Clause, which by contract in the bill of lading attempts to equate the stevedore and/or warehouseman or other independent contractors as a carrier in order to extend the umbrella of protection to them. Query: Under the Hamburg Rules, would it be possible by contract to continue this practice of using the Himalaya Clause as a means of protecting the limit of liability of independent contractors? It is difficult to understand why the draftsmen failed to deal with this very current, worldwide problem.

Hamburg addresses a touchy problem; that is, can there be double liability if there is more than one defendant, for example, the ship and the stevedoring company. The cases are split under the Hague Rules (COGSA) in the United States, whereas the Hamburg Rules provide that: "[e]xcept as provided in art. 8, the aggregate of the amounts recoverable from the carrier and from any persons referred to in paragraph 2 of this Article shall not exceed the limits of liability provided for in this Convention." This clause should prevent any possibility of a double, triple, or quadruple recovery, depending upon the number of possible defendants, assuming that the stevedore and warehouseman come within the phrase "servant or agent."

Willful Misconduct

The Warsaw Convention provides that the air carrier shall not be entitled to limit its liability if the damage is caused by willful misconduct or by such default on its part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to willful misconduct. The official French version uses the word dol which has been translated, perhaps incorrectly, as being willful misconduct. This notion of willful misconduct implies that

51. The Himalaya Clause is a type of provision usually found in a bill of lading which attempts to include all independent contractors within the meaning of "carrier" so as to limit their liability under the governing statutory provisions. The clause takes its name from the ship involved in the action wherein the question of the legality of this type of provision was first adjudicated.


53. See Hamburg, supra note 1, at art. 7, § 3.


55. See Hamburg, supra note 1, at art. 7, § 3.

56. Id. at § 2.

57. See Warsaw, supra note 4, at art. 25.

there has to be some act, although case law has included the failure to act. 59

Fortunately, the Hamburg Rules contain a much better provision which states that the carrier will be liable without limit if it is proved that the loss, damage or delay in delivery resulted from "an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result." 60 This rule, of course, equates the sins of omission and commission. Further, Hamburg, by stating that a servant's reckless acts committed with knowledge that damage would probably result are included in this category, seems to be a codification of some of the better Warsaw Convention case law definitions of "willful misconduct" as meaning a "reckless disregard of the consequences," as opposed to a deliberate intent to do harm or damage. 61

Hamburg further provides that a servant or agent of the carrier will not be entitled to limit his liability

if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result. 62

A serious problem is engendered by the language just stated. Why the distinction between the act or omission of the carrier, as contrasted with the act or omission of a servant or an agent? If most carriers are incorporated under the laws of their respective countries, they may act only through their servants or agents. If that is so, why the artificial distinction between the act of the servants and the act of the carrier when the carrier can only act through its servants?

It is submitted that the answer is primarily historical, rather than logical, in nature. The Hague Rules (COGSA) stress that the carrier will not be liable for the negligence of the crew, provided that it used due diligence in furnishing a seaworthy ship. 63 The Hague Rules (COGSA) contain no provision imposing unlimited liability upon the carrier for its own intentional misconduct or for the intentional

59. Id.
60. See Hamburg, supra note 1, at art. 8.
61. See note 45 supra.
62. See Hamburg, supra note 1, at art. 8, § 2.
63. See COGSA, supra note 3, at § 1304.
misconduct of the crew. The polestar thrust of the Hague Rules (COGSA) is protection of the carrier, while the polestar thrust of the Hamburg Rules is the protection of the shipper.

This latter distinction between the acts of the carrier and the acts of the servants or agents is related to the preceding Article.\textsuperscript{64} Hamburg indicates that the carrier will be liable for the acts of its servants, who will also be liable if they act within the scope of their employment. If the servants, however, act in an intentional or reckless manner, there is an implication that they are not acting within the scope of their employment, and the carrier would therefore be liable, at most, for the limited amounts set forth in Hamburg,\textsuperscript{65} for the carrier could not prove that he and his servants took all measures that could reasonably be required to avoid the loss.

It is submitted that the Hamburg approach could lead to the following result in a case of the theft of cargo by a member of the crew: the crew member is liable for the full amount of the theft (an illusory remedy) while the carrier is liable only for the limited amounts prescribed in Hamburg. This means that carriers can ignore internal theft risks beyond Hamburg's modest limits even though theft is one of the most common causes of loss. Today the perils of the sea are really the perils of pilfering.

In this sense, Hamburg has ignored reality. The problem was solved very nicely in the Warsaw Convention, which states that the carrier will be liable without limitation if the damage was caused by an agent of the carrier acting within the scope of his employment by willful misconduct or by such default on his part as to constitute willful misconduct.\textsuperscript{66} The Warsaw Convention draws this artificial distinction between carrier liability and agent liability, but at the same time, it clearly makes the carrier liable for the acts of the servant.\textsuperscript{67}

Warsaw-Hague provides:

The limits of liability . . . shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is

\textsuperscript{64} See Hamburg, supra note 1, at art. 7, §§ 2 and 3.
\textsuperscript{65} Id. at art. 5.
\textsuperscript{66} See Warsaw, supra note 4, at art. 25.
\textsuperscript{67} Id.
also proved that he was acting within the scope of his employment.\textsuperscript{68}

The above language is almost accurately repeated in Hamburg, with the exception of the language referring to his "servants or agents."\textsuperscript{69} Let us try to compare the effect of the different language in two hypothetical cases. A servant of an airline while handling cargo sees that a bulldozer in the process of backing up is going to overrun and destroy the shipper's goods. The servant does nothing to warn the bulldozer operator, and the goods are destroyed. The airline would be liable for the full amount of the value of the goods because of the reckless omission of the servant. In the second case, the same facts occur while the goods are in the hands of the shipline; the shipline would be liable only for the reduced amounts set by Hamburg. Now, this different result for exactly the same act (or failure to act) does not make much sense. Distinctions made because of different risks—risks of the air as compared with risks of the seas—would be justifiable; but distinctions based solely upon the status of the employer seem indefensible. It is regrettable that Hamburg did not faithfully copy Warsaw-Hague in this respect.

The Hague Rules (COGSA) provide that the term "goods," does not include cargo "which by the contract of carriage is stated as being carried on deck and is so carried."\textsuperscript{70} Case law under this provision has held that if the bill of lading states that the goods may be carried on deck and they were, in fact, so carried on deck, then the protection of the Hague Rules (COGSA) would still govern this deck cargo.\textsuperscript{71} The Hamburg Rules have attempted to codify much of this case law by providing that the carrier is entitled to carry the goods "on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations."\textsuperscript{72} Hamburg goes on to provide that if the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier must insert a statement to that effect in the bill of lading or other document evidencing the contract of carriage by sea. In the absence of such a statement, the carrier has the burden of proving that an agreement for deck carriage has been negotiated.

\textsuperscript{68.} See Warsaw-Hague, \textit{supra} note 5, at art. 25.
\textsuperscript{69.} See Hamburg, \textit{supra} note 1, at art. 8, § 1.
\textsuperscript{70.} See COGSA, \textit{supra} note 3, at § 1301(c).
\textsuperscript{71.} \textit{Id.}; C. Gilmore and C.L. Black, Jr., \textit{The Law of Admiralty} 180-83 (2d ed. 1975).
\textsuperscript{72.} See Hamburg, \textit{supra} note 1, at art. 9, § 1.
The carrier is not entitled to invoke such an agreement against a third party, including a consignee, who has acquired a bill of lading in good faith. In the event that the carrier improperly carries the goods on deck, the carrier is liable for loss of or damage to the goods as well as for delay in delivery "resulting solely from the carriage on deck." The liability of the carrier is to be determined in accordance with the provisions of Article 6 or Article 8, as the case may be.

Article 9 provides, in what appears to be an afterthought, that "carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of art. 8." Of course, this breach of an express agreement is to be equated with an intentional disregard of the rights of the shipper, and unlimited liability would, therefore, be imposed upon the carrier. The overall effect of Article Nine's treatment of deck cargo would seem to be that unless there is an express agreement between shipper and carrier for underdeck carriage, the shipper can place the cargo on deck and not lose the limits of liability as provided. It is, therefore, wise for shippers who are concerned with this situation to draft express agreements that the cargo must be carried under deck.

The phrase "or with the usage of the particular trade" would seem to govern the container industry, and thus include container ships which are designed primarily to carry containers. It could now be alleged, in light of this practice, that in the container trade, deck carriage would be within the meaning of this provision.

LIABILITY OF THE CARRIER AND ACTUAL CARRIER

The Hamburg Rules draw a distinction between the notion of a "carrier" and an "actual carrier." A carrier is defined to mean "any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper." An actual carrier, on the other hand, is defined to mean "any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted." Analyzing these two concepts
together, the carrier might well be a freight forwarder through whom a contract of carriage was entered into with an actual carrier for carriage of goods by sea from one port to another. Hamburg further develops this scheme by providing that when the shipper has entrusted his goods to a carrier who in turn has entered into a contract with the actual carrier, the carrier (such as the freight forwarder) is responsible for the carriage of the goods by the actual carrier, and is jointly and severally liable with the actual carrier to the shipper.\textsuperscript{78} However, the section points out that where both the carrier and the actual carrier are liable, their liability is joint and several, but their total liability shall not exceed the limits of liability provided for in this Convention.\textsuperscript{79} If the carrier is found liable to the shipper for some omission or commission of the actual carrier, the carrier should be able to recover from the actual carrier since it is provided that "nothing in this Article shall prejudice any right of recovery as between the carrier and the actual carrier."\textsuperscript{80}

The carrier is given a way to avoid the imposition of liability for the wrongful acts of the actual carrier.\textsuperscript{81} If the contract of carriage expressly provides that a specified part of the carriage is to be performed "by a named person other than the carrier," the contract may also state that the carrier is not liable for loss, damage or delay in delivery caused during the time the goods are in the hands of the actual carrier. This exonerating clause will be ineffective, however, if the aggrieved shipper is unable to obtain jurisdiction over the actual carrier under the Hamburg Rules.\textsuperscript{82}

Articles 10 and 11 of Hamburg are an interesting hodge-podge of somewhat conflicting notions as to the liability of the initial carrier for acts of subsequent, actual carriers. Ordinarily, the initial carrier will remain liable for any acts of omission or commission by the actual carrier. This view is consistent with Section 7-302 of the Uniform Commercial Code (UCC) and the U.S. federal law,\textsuperscript{83} but is contradicted when the initial carrier is astute enough to name the actual carrier and to provide that it (the initial carrier) will not be liable for the acts of the actual carrier unless jurisdiction cannot be obtained over the actual carrier.

\textsuperscript{78} Id. at art. 10.
\textsuperscript{79} Id. at § 10.
\textsuperscript{80} Id. at § 6.
\textsuperscript{81} Id. at art. 11.
\textsuperscript{82} Id. at art. 21.
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Inasmuch as Article 11 uses the singular expressions carrier and actual carrier, one wonders what the courts will do if the through-carriage bill of lading provides for two or more actual carriers, and the loss or damage occurs during the transport by one of them, or if damages occur on both ships. It would seem that the courts, in this instance, ought to extend the reach of Article 11 (and Article 10) beyond the first actual carrier.

BILLS OF LADING

The Hamburg Rules attempt to define the bill of lading by saying that it is a document which:

evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of the named person, or to order or to bearer, constitutes such an undertaking (emphasis added).

The emphasized portions above indicate that all bills of lading must be in negotiable form, and that there could not be a so-called straight or non-negotiable bill of lading. On the other hand, Article 15, which articulates the essential items to be placed in the bill of lading, does not clearly indicate that the bill of lading must be “to order.” It does say that the name of the consignee must be given if stated by the shipper, but then in an afterthought approach, provides that the bill of lading must meet the requirements set out above, which again seems to require that the bill of lading must be issued in negotiable form.

The Hamburg Rules have avoided some of the mistakes of the original Warsaw Convention, which also requires that a large number of items be stated in the bill of lading. Warsaw provides that if the carrier fails to set out all of these particulars, it will not be entitled to avail itself of the limitation of liability provisions. It appears that the Hamburg draftsmen somewhat followed the approach of the draftsmen of the 1955 Hague amendments to the Warsaw Convention, which eliminated all of the required statements on the airway bill, with the exception that the bill must contain a statement that the transportation may be covered by the Warsaw

84. See Hamburg, supra note 1, at art. 1, § 7.
85. Id. at art. 15, § 3.
86. See Warsaw, supra note 4, at arts. 8 and 9.
Convention and that the Convention limits the liability of carriers with respect to loss or damage to cargo. Under the Hamburg Rules, if one or more of these so-called required items are left out of the bill of lading, the rules provide that:

[The absence in the bill of lading of one or more particulars referred to in this Article does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in para. 7 of art. 1.]

Therefore, there appears to be no real sanction for a failure to abide by Article 15, except for the apparently required negotiable form of the bill of lading.

Hamburg incorporates modern-day commercial practice by providing for the "on-board" or "shipped" bill of lading, wherein a carrier which takes possession of the goods and then subsequently loads them must, at the request of the shipper, issue a shipped or on-board bill of lading showing that the goods have actually been placed on board the vessel. This practice is required in most letters of credit wherein bankers insist that they will not honor a draft accompanied by a received bill of lading, as distinguished from a shipped or on-board bill of lading. The same subsection wisely provides that the ship may amend a previously issued bill of lading by noting (perhaps by a rubber stamp) that the goods have been loaded on board the vessel.

**Evidentiary Effect of Bills of Lading**

COGSA includes only slender coverage of the question as to what reservation or what statements are to be placed in bills of lading by carriers when they are unable to ascertain the contents of packages. The Hamburg Rules enlarge these COGSA Rules, and they seem to bear a resemblance to the American Pomerene Act provisions and Section 7-301 of the UCC. Under Hamburg, if the prepared bill of lading (i.e., prepared by a shipper) states particulars about which the carrier has doubts, or if he has no reasonable means of checking such particulars, the carrier or such other person must insert a reservation in the bill of lading specifying these inaccuracies,

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87. See Hamburg, supra note 1, at art. 15, § 3.
88. Id. at § 2.
90. See COGSA, supra note 3, at § 1303.
grounds of suspicion, or the absence of reasonable means of checking such inaccuracies or suspicions. If the carrier which issues the bill of lading fails to make this reservation on the bill of lading, it is "deemed to have noted on the bill of lading that the goods were in apparent good condition." 92

This provision seems to reflect a modern-day commercial practice which is exemplified by the case law. 93 If a clean bill of lading has been issued, prima facie evidence of the taking over of the goods by the carrier and proof to the contrary by the carrier is not admissible "if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein." 94 It is to be noted that the use of the word consignee here indicates that it is proper to issue a non-negotiable bill of lading, but again the answer is not clear in light of the prior discussion.

Hamburg puts the onus on the carrier of stating who is to pay for the freight and for demurrage, if any. 95 If there is no indication that the consignee is to pay these costs, it is prima facie evidence that no freight or demurrage is payable by the consignee. However,

proof to the contrary by the carrier is not admissible when the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication. 96

Again, this indicates that a non-negotiable bill of lading might be proper under the Convention.

The word consignee is defined to mean "the person entitled to take delivery of the goods." 97 This definition could be used in the sense of a named consignee in a straight bill of lading, or the "order party" in a negotiable bill of lading. In light of the wording of Article 15(1)(e), which states that the bill of lading must contain "the consignee if named by the shipper," the wording of Subsection 6, Article 1, 98 and the definition of consignee in Article 1(4), 99 the

92. See Hamburg, supra note 1, at art. 16.
94. See Hamburg, supra note 1, at art. 16, § 3(b).
95. Id. at § 4.
96. Id.
97. Id. at art. 1, § 4.
98. Id. at art. 1, § 6 provides: "'Contract of carriage by sea' means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another . . . ."
99. See note 97 supra and accompanying text.
word *consignee* should not be interpreted as signifying that a non-negotiable bill of lading is permissible. On the other hand, Article 18, which will be discussed shortly, casts some doubt on this argument.

The Hamburg Rules, after stressing the importance of the issuance of bills of lading, interjects a foreign note:

Where a carrier issues a document other than a bill of lading to evidence the receipt of the goods to be carried, such a document is *prima facie* evidence of the conclusion of the contract of carriage by sea and the taking over by the carrier of the goods as therein described.\(^{100}\)

This provision spawns a number of questions:

1. Does this provision authorize a carrier to issue "a document other than a bill of lading"—such as a dock receipt—\(^{101}\)in lieu of a bill of lading? Such a practice would be a dramatic change from the normal course of current practice in maritime transactions.\(^{102}\)

2. Does the phrase *prima facie* mean that a carrier would be able to legally deny its own receipt of goods as evidenced by its dock receipt? The carrier may not impeach its own bill of lading when it has been transferred to a third party, "including a consignee, who in good faith has acted in reliance on the description of the goods therein."\(^{103}\) Would the same rule prevail if the "dock receipt" (or a similar carrier-issued document) were transferred to a bona fide purchaser for value? The answer is not clear.

3. Must or should this "document" recite all of the requirements for a bill of lading as itemized in Article 15? For example, "the carrier may amend any previously issued document in order to meet the shipper's demand for a 'shipped' bill of lading if, as amended, such document includes all the information required to be contained in a 'shipped' bill of lading."\(^{104}\) This sentence contains the negative implication that the "other document" of title must state all of the requirements of Article 15 only if it is to be amended into a shipped bill of lading, rather than be exchanged for the issuance of the first bill of lading.

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100. See Hamburg, *supra* note 1, at art. 18.
103. See Hamburg, *supra* note 1, at art. 16, § 3.
104. Id. at art. 15, § 2.
(4) The words "such a document is *prima facie* evidence of the conclusion of the contract of carriage by sea" would, by the use of the word "conclusion," seem to mean the "execution" of the contract, in the sense of entering into it, rather than the performance of the contract. In this regard, should the wording of Subsection 3 of Article 23 have any bearing? This subsection states:

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

Under this latter rule, any "dock receipt" or other document issued by the ship would have to contain this reference to the Hamburg Convention, or the ship could incur the sanction provided for in the next succeeding subsection which imposes liability upon the ship when the shipper or consignee has suffered loss as the result of the omission of this statement.

(5) Must this document (dock receipt, etc.) be in negotiable form? If the document may be used in lieu of a bill of lading, it would be incongruous for a court to say that it need not be in negotiable form (assuming, as previously discussed, that bills of lading should or must be in negotiable form). On the other hand, it could be argued that bills of lading and this "other" document are distinct documents, and if a ship has chosen to issue this "other" document, it ought to stand on its own bottom and not be controlled by the requirements of a separate document. Of course, so long as most international sales contracts continue to insist upon "on-board bills of lading," the problems presented by Article 18 will most likely remain of mere academic interest.

**Guarantees by the Shipper**

Consistent with COGSA, the Hamburg Rules provide that when the shipper describes the goods and these descriptions are used in the bill of lading, the shipper guarantees the accuracy of these particulars and remains liable, even if the bill of lading has been transferred by him. Of course, the fact that the shipper is to indemnify the carrier in no way limits the liability of the carrier to any person other

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105. *Id.* at art. 18.
106. *Id.* at art. 23, § 3.
107. *Id.* at art. 17, § 1.
than the shipper. Hamburg takes cognizance of the infamous practice of some shippers and carriers whereby the shipper will induce the carrier not to clause the bill of lading (by showing something is wrong with the goods) by a promise of the shipper to indemnify or protect the ship in the event it is sued by a consignee or a holder in due course of the bill of lading. If the ship should issue a clean bill of lading and ignore particulars furnished to it by the shipper, or should ignore the apparent condition of the goods because of a letter of guarantee to indemnify by the shipper, this contract is void and of no effect as against any third party, including a consignee, to whom the bill of lading has been transferred.

This Article is rather awkward because it provides that such a letter of guarantee or agreement is valid as against the shipper unless the carrier or the person acting on his behalf, by omitting a reservation as to the condition of the goods, “intends to defraud a third party including a consignee, who acts in reliance on the description of the goods in the bill of lading.” It would seem that in any case where a carrier acts in reliance on this letter of guarantee or agreement, that there must be fraud by the ship, otherwise there is no reason to issue a clean bill of lading.

On the other hand, a court might be reluctant to label the particular conduct of the carrier as being fraudulent, and one wonders why the draftsmen did not use the term “design to mislead” rather than the somewhat odious term “defraud.” It is much easier to say that the carrier intended to mislead a consignee or a good faith holder of the bill of lading, but it is something else again to say that the carrier was guilty of deliberate fraud. This same subsection goes on to provide that if the omitted reservation relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier has no right of indemnity from the shipper. It appears that the indemnification agreement is not valid between the shipper and the carrier when the carrier intends to defraud a third party. Such a situation would lead to a result where the carrier would be liable to the third party with no right of indemnity from the shipper. Hamburg seems to say that where the carrier intends to defraud the third party, the carrier “is liable, without the benefit of the limitation of liability provided for in this Convention, for the loss incurred by a

109. See Hamburg, supra note 1, at art. 17, § 2.
110. Id. at § 3.
third party, including a consignee, because he has acted in reliance on the description of the goods in the bill of lading."

**Notice of Loss or Damage**

Under COGSA, the consignee, or the receiver of goods, must give the carrier written notice before, or at the time of delivery, of damage to the goods in the case of patent damage, and if this is not done, the removal of the goods "shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading." In other words, the uncomplaining removal is *prima facie* evidence that the goods were received in good order. COGSA further provides that if the loss or damage is not apparent, notice must be given within three days of the delivery.

These restrictive periods for giving notice have been slightly enlarged by Hamburg. In the case of patent damage, written notice must be given to the carrier no later than the working day after the day when the goods were transferred to the consignee, and if this is not done, such handing over is *prima facie* evidence of delivery by the carrier of the goods in good condition. In the case of latent damage, the notice in writing must be given within fifteen consecutive days after the day when the goods were delivered to the consignee. If at the time the goods were handed over a joint survey or inspection by the parties was made, then the written notice requirement is unnecessary. In case of delay, written notice must be given within sixty consecutive days after the day when the goods were transferred to the consignee. This consecutive day provision wisely eliminates the question of how to count days, holidays, and weekends. In the event that the ship claims that the goods caused harm to the ship, then the ship must give notice no later than ninety consecutive days after the occurrence of such loss or damage, or after the delivery of the goods, whichever is later. The failure by the ship to give notice is *prima facie* evidence that the carrier has sustained no loss as a result of the fault or neglect of the shipper.

111. *Id.* at § 4.
112. See COGSA, *supra* note 3, at § 1303(6).
113. *Id.*
115. *Id.* at § 2.
116. *Id.* at § 3.
117. *Id.* at § 5.
118. *Id.* at § 7.
It is interesting to note that Article 19 is in many respects much ado about nothing, because the only serious sanction for a failure to give the required written notice is that no compensation shall be payable for delay unless the written notice is given within sixty days.\textsuperscript{119} This "lack of teeth" provision parallels the COGSA Rule.\textsuperscript{120} There is no sanction for other failure to give the written notice in the case of latent or patent damage, or in the case that the ship maintains that the carrier's goods have caused harm to the ship. The real stumbling block is presented by Article 20, the limitation of actions section, to be discussed below.

**LIMITATION OF ACTIONS**

COGSA provides for a one-year limitation period.\textsuperscript{121} The Hamburg Rules, on the other hand, wisely enlarge this one-year period to two years, and also provide that the limitation period covers both judicial and arbitral proceedings during the two-year period.\textsuperscript{122} Case law in America and England has differed as to whether arbitration proceedings are within the COGSA one-year limit, with the American courts taking the view that it does not apply to arbitration proceedings, while the English courts follow the opposite view.\textsuperscript{123} Under the Hamburg Rules, this conflict will no longer prevail.

Hamburg's provisions are interestingly intertwined in that Article 20, Subsection 2 states that the limitation period commences on the day of delivery, while Article 20, Subsection 3 provides that the day on which the limitation period commences is not included in the period. In this rather awkward fashion, these subsections attempt to say that the first day of the period is not included, but that the last day of the period is counted. A party may extend the limitation period against himself;\textsuperscript{124} however, it is doubtful that this Subsection will see much practical use.

The Hamburg Rules provide that an action for indemnity by a person held liable may be instituted even after the expiration of the two-year period.\textsuperscript{125} For example, if a consignee should sue the ship

\textsuperscript{119} See note 17 supra.
\textsuperscript{120} See COGSA, supra note 3, at § 1903(6).
\textsuperscript{121} Id.
\textsuperscript{122} See Hamburg, supra note 1, at art. 20, § 1.
\textsuperscript{124} See Hamburg, supra note 1, at art. 20, §§ 2, 3, and 4.
\textsuperscript{125} Id. at § 5.
and the two-year period expires, the ship may sue the shipper provided that the suit is instituted within the time allowed by the law of the State where proceedings are instituted. However, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.  

**JURISDICTION**

The Carriage of Goods by Sea Act pays virtually no attention to the concept of jurisdiction for suit, and this omission has been corrected by the Hamburg Rules. Under Hamburg, the plaintiff has the option to file suit in a court competent within the meaning of the local law in any of the following places: (a) the principal place of business, or, in the absence thereof, the habitual residence of the defendant; (b) the place where the contract was made, provided that the defendant has a place of business, branch, or agency there through which the contract was made; (c) the port of loading or the port of discharge; or (d) any additional place designated for that purpose in the contract of carriage by sea. In light of the transitory nature of seagoing vessels, and in spite of the limited areas for jurisdiction, the ship may be arrested in any contracting state, and jurisdiction will be obtained. However, at the request of the ship owner, the claimant must remove the action to one of the jurisdictions referred to above, “but before such removal the defendant must furnish security sufficient to ensure payment of any judgment that may subsequently be awarded to the claimant in the action.” In spite of the restrictive provisions governing jurisdiction, the parties may agree to a different jurisdiction after a claim has arisen.

The doctrines of collateral estoppel and *res judicata* are implicitly recognized by a provision that where a suit has been instituted in a proper court, or where a judgment has been delivered by such a court, the plaintiff may not institute a new action between the same parties on the same grounds unless “the judgment of the court before which

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126. Id.
127. Id. at art. 21.
128. Id. at § 2(a).
129. Id.
130. Id. at art. 21, § 1(d) permits the parties to agree in advance as to jurisdiction, but it is to be an alternative jurisdiction and either party may ignore it by filing elsewhere as provided in Subsection 1 of Article 21.
the first action was instituted is not enforceable in the country in which the new proceedings are instituted." 131 It is noted that any attempt to enforce a judgment is not to be deemed the institution of a new action for this purpose. By the same token, the removal of an action to a different court in the same country, or to a court in another country, is not to be considered as starting a new action.132

At the same time of its enactment, COGSA paid no attention to the then developing concept of arbitration, and this omission has been rectified by the Hamburg Rules.133 Any agreement to arbitrate must be in writing, and if the agreement to arbitrate is contained in a charter party and the bill of lading is issued under the charter party without any notation of the agreement to arbitrate, the arbitration agreement will not be binding upon the holder in good faith of the bill of lading.134 The moral is clear, of course, namely, that the bill of lading should recite that any dispute between the carrier and the holder of the bill of lading must be submitted to arbitration. The arbitration proceedings can be instituted at the option of the claimant in the same geographical areas as stated for jurisdiction in court proceedings.135

**General Average**

The right of a ship to claim general average136 is subject to the general rule that there cannot be any contribution when the peril arises through the fault of the ship, but the ship and the shipper may agree in the bill of lading that even though the peril arose from some fault or negligence of the ship, the ship would still be entitled to contribution if the ship would not be liable for its fault under a treaty or statute, provided that the ship owners used due diligence to make the ship seaworthy.137 A typical contractual clause—the so-called "Jason clause"138—reads as follows:

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131. *Id.* at § 4(a).
132. *Id.* at § 4(b) and (c).
133. *Id.* at art. 22.
134. *Id.* at § 2.
135. *Id.* at § 3.
136. See note 46 supra.
138. The Jason, 225 U.S. 32 (1912). As with the Himalaya Clause, this type of contractual provision became known by the name of the ship involved in the action in which the question of the legality or illegality of this provision was decided.
In case of accident, danger, damage or disaster before or after commencement of the voyage resulting from any cause whatever, whether due to negligence or not for which, or for the consequences of which the carrier is not responsible by statute, contract or otherwise . . . the goods, their owners . . . shall contribute with the carrier in General Average to the payment of any . . . loss or expenses of a General Average nature that may be made or incurred . . . . (emphasis added).

The “Jason clause” is and was terribly important under COGSA because of the seventeen exemptions extended to the carrier for the errors and negligence of its officers and crew. What has Hamburg done to the Jason clause? Under Hamburg:

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

2. With the exception of art. 20 [the limitation section], the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.139

Inasmuch as the carrier under Hamburg is liable for loss, damage or delay of goods “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,”140 it would appear that the Jason Clause will have lost most of its effectiveness.

The general average concept may have continued viability in fire loss cases when the fire arises from a cause other than the fault or neglect of the ship, its servants, and agents.141 In addition, Hamburg has preserved the rescue exception to general average: “[t]he carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.”142

When the carrier’s fault combines with another cause to produce damage to the goods, the carrier is liable only for that loss caused by

139. See Hamburg, supra note 1, at art. 24.
140. Id. at art. 5, § 1.
141. Id. at § 4.
142. Id. at § 6.
its fault,\textsuperscript{143} and it would seem that the carrier would be entitled to
general average to the extent of its non-fault in any particular case.

**LIABILITY LIMITS**

Under COGSA, the carrier is liable in an amount not exceeding
$500 per package, or "customary freight unit," or the equivalent.\textsuperscript{144} As
noted by many courts, the term *customary freight* unit was inserted
by Congress; it does not appear in the original version of the Hague
Rules.\textsuperscript{145} The arbitrary figure of $500 was obviously based upon 100
English pounds, which, at the time of the adoption of COGSA, were
worth $5.00 per pound. The $500 limit for a very valuable container
load of cargo is totally unrealistic, and the Hamburg Rules attempt
to peg the recovery limits based upon calculations by the Interna-
tional Monetary Fund, or in the alternative, to the value of gold,
by means of a system remarkably similar to that established in the
Warsaw Convention.

For those countries which are members of the International
Monetary Fund, the liability of the carrier is limited to an amount
equivalent to 835 units of account per package or other shipping unit,
or 2.5 units of account per kilogram of gross weight of the goods lost
or damaged, whichever is the higher.\textsuperscript{146} The liability for delay is
limited to an amount equivalent to two and a half times the freight
payable for the goods delayed, but not exceeding the total freight
payable under the contract of carriage of goods by sea.\textsuperscript{147} The lia-
ibility for both loss and delay cannot exceed the prescribed limits of
835 units of account per package or 2.5 units of account per kilogram
of gross weight.\textsuperscript{148} In other words, the limitation of liability for both
damage and delay cannot exceed the total limitation for damage.
For those countries which are not members of the International
Monetary Fund, the rules state limits of liability of 12,500 monetary
units per package or other shipping unit or 37.5 monetary units per
kilogram of gross weight of the goods.\textsuperscript{149} This monetary unit is equal
to 65.5 milligrams of gold of millesimal fineness 900. The conversion

\textsuperscript{143} Id. at § 7.
\textsuperscript{144} See COGSA, supra note 3, at § 1304(5).
\textsuperscript{145} See, e.g., Falconbridge Nickel Mines Ltd. v. Chemo Shipping, Ltd.,
\textsuperscript{146} See Hamburg, supra note 1, at art. 6, § 1(a).
\textsuperscript{147} Id. at § 1(b).
\textsuperscript{148} Id. at § 1(c).
\textsuperscript{149} Id. at art. 26, § 2.
of these amounts into national currency is to be governed by the law of the particular country.\footnote{160}

It is interesting to compare Hamburg's stilted language with that of the Warsaw Convention:

The sums mentioned above shall be deemed to refer to the French franc consisting of 65% milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.\footnote{151}

It is obvious that the French gold franc has again been used as a baseline for international settlements. As of the time of the writing of this article, 835 “units of account” (the Special Drawing Rights of the International Monetary Fund) were worth $662.77. When one compares the purchasing power of the American dollar in 1936 with the purchasing power of the dollar today, it appears that the Hamburg Rules have reduced the real recovery limits established under COGSA. Hamburg seemingly overlooks the debasement of currency resulting from inflation.\footnote{152}

One of the principal “failures” of the Hague Rules has been the judicial difficulty in determining whether a container (which may be forty feet long by eight feet wide by eight feet high) is to be deemed a “package” under COGSA.\footnote{153} One view is that the courts ought to treat the entire container as one package on the grounds that it promotes uniformity and predictability.\footnote{154} Another view, the “functional economics test,”\footnote{155} proposes that the courts must determine whether the contents of the container could have feasibly been shipped in the individual cartons in which they were packaged by the shipper. If the answer is no, then the burden shifts to the shipper to show why the container should not be treated as a package. To put it another way:

[W]here the shipper's own packing units are functional, a presumption is created that a container is not a “package” which

\footnote{150. Id. at § 3.}
\footnote{151. See Warsaw, supra note 4, at art. 22, § 4.}
\footnote{152. The American dollar, as of July 1979, was worth 78697 Special Drawing Rights (SDR) of the International Monetary Fund. \textit{32 International Statistics} (IMF) No. 7, 388-89 (1979).}
\footnote{153. See COGSA, supra note 3, at § 1304(5).}
\footnote{154. Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7, 20 (2d. Cir. 1969) (Hays, J., dissenting).}
must be overcome by evidence supplied by the carrier that the parties intended to treat it as such.156

The basic problem was caused by the fact that the draftsmen of the Hague Rules did not foresee the development of the container as a method of shipment, nor did they foresee the extent of its worldwide adoption. The draftsmen of the Hamburg Rules did not suffer from this disadvantage, but have they properly dealt with the container? Hamburg states:

(a) Where a container, pallet or similar article of transport is used to consolidate goods the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid that goods in such article of transport are deemed one shipping unit.157

Under this definition, it would appear that if the bill of lading recited “one container, said to contain 500 typewriters,” this would constitute 500 shipping units, but if the bill of lading recited “one container, said to contain machinery,” this would constitute one unit. It is interesting that this “clear labeling” test of Hamburg was rejected under the Hague Rules in the Kulmerland case.158 Although this new requirement that the bill of lading identify the contents of the container fosters “uniformity and predictability,” it will also foster theft by employees of the longshoremen, warehousemen, and public docks because it will tell these persons exactly which containers are worth looting. The reticence of shippers to describe the goods under the Hague Rules has not been motivated by any desire to deceive the carrier, but to deceive potential thieves.

The addition of the notions of “pallet or similar article of transport” adds further complications. For example, if a large forty foot yacht is carried in a “cradle” on the deck of a ship, is the yacht to be treated as one unit? In a pre-Hamburg case, it was held that this yacht was to be treated as one “package.”159 If one equates the

157. See Hamburg, supra note 1, at art. 6, § 2.
158. See note 155 supra.
"cradle" to the "pallet or similar article of transport," the same result should follow under Hamburg. But note the perhaps incongruous result: a forty foot container (containing 500 typewriters) will have 500 units worth of damage claims against the ship, while the shipper of the yacht will have only one unit's claim. The bulk shipper of small, relatively valuable things can decrease his insurance costs, while the shipper of another unit of about the same size will have to procure full insurance coverage and increase his costs.

Under this new pallet definition, how would a court treat a bundle of twenty-two tin ingots bundled together with steel bands—is there one unit or twenty-two units? Under the Hague Rules (COGSA), an American court has held that the twenty-two ingots were to be deemed one package. Under Hamburg, there could be twenty-two units if the bill of lading so described them, and if a court determines that although no pallet was used, a "similar article of transport" was used. But was it? What is similar to a pallet without it being a pallet? For example, if a large generator (eleven feet seven inches by seven feet eight inches, and weighing 36,700 pounds) is temporarily fastened to wooden skids to facilitate shipment, is this a pallet with the generator being labeled as one unit? A pre-Hamburg case held that the method of attachment could not convert the generator into one package, and the case was remanded to determine the number of customary freight units under COGSA. A post-Hamburg court could hold either way as to whether this wooden skid was a "pallet or similar article of transport."

One additional puzzle has been created by the use of new terms in the Convention: how do we treat liquid goods such as oil, latex, etc.? For example, in a pre-Hamburg case, liquid latex was shipped in twenty-four lift-on, lift-off tanks. Each tank was seven feet one inch long, seven feet nine inches wide, and six feet four inches high. Each tank carried 2,000 gallons and weighed 12,000 pounds when loaded. Some of the latex was badly damaged in transit, while a large quantity disappeared entirely. It was held that these tanks were more nearly analogous to tanks built into the ship as an integral part thereof, than packages, even though the bill of lading prepared

by the shipper listed the number of packages as being twenty-four in number. Recovery was given to the shipper based upon the freight unit basis. The court pointed out that if the latex had been shipped in fifty-five gallon drums, each drum would be a package. If the latex had been shipped in tanks which were an integral part of the ship, there would not be any packages and a freight unit test would be used. The third possible method was the one used in this case.

How would one approach these facts under the Hamburg "shipping unit" rule? If the latex was shipped in fifty-five one-gallon drums, the shipper would be entitled to recover 835 units of account per drum or 2.5 units of account per kilogram of gross weight of the latex, whichever would be the higher. If the latex should be shipped in bulk tanks, there would not seem to be any "package" or other shipping unit, and the award would have to be made on a weight basis. Lastly, if the latex were shipped in these large removable tanks, would the court now say that there were twenty-four containers, meaning a very modest recovery by the shipper, or would the court hold that the gross weight test is the only proper one when dealing with large tanks of liquids? If the court found that a "container" includes "tanks" and the bill of lading described the latex as being in twenty-four containers, the court could grant a small recovery to the shipper. The emphasis of the Hamburg Rules on the revelations in the bill of lading might lead a court to this result. Conversely, if the court associates the word "container" with non-liquid contents, it could likely award recovery based on the gross weight of the liquid latex.

On a more positive note, the Convention provides that if the article of transport has been lost or damaged, and it is not owned or supplied by the carrier, it will be deemed one separate shipping unit.163

Carriers' Limitations of Liability

COGSA provides that its provisions shall not affect the rights and duties of carriers under various federal statutes, including those which relate to the limitation of the liability of the owners of sea-going vessels. This treaty-deference-to-statute approach is continued by Hamburg which states: "[t]his Convention does not modify the rights or duties of the carrier, the actual carrier and their servants

163. See Hamburg, supra note 1, at art. 6, § 2(b).
and agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships."

The United States' "national law" limiting the liability of owners of seagoing vessels provides:

The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending (emphasis added).

As is well known, this statute has been interpreted to mean that the phrase "value of the interest of such owner in such vessel" means the value of the interest of the owner in the vessel after the occurrence which has caused loss to the cargo interests. For example, if the ship is not entitled to any pending freight and the ship is a total loss, the owner of the ship is not liable in any amount to the cargo interests if the accident or occurrence happened "without the privity or knowledge of such owner or owners" even though COGSA and, now, the Hamburg Convention state that the ship is liable. In truth, both COGSA and Hamburg provide a liability ceiling, but the floor of, or exemption from liability may well be provided for in some parochial law of the affected nation.

**BAGGAGE**

COGSA is silent as to the question of baggage or luggage, while Hamburg provides:

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

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164. Id. at art. 25, § 1.
166. Gilmore and Black, supra note 71, at 906-08.
Under a federal act of 1871, the carrier is not liable for the loss of jewels, watches, trinkets, precious metals, notes and securities, prints, silks, furs, laces, glass, china, and other goods which are commonly carried as luggage, whether carried as cargo or as baggage, unless the passenger (in the case of baggage) gives the carrier a written notice of the true character and value of the above items. It would appear that Hamburg would then expressly defer to this older statute in such a situation.

**MISCELLANEOUS PROVISIONS**

Consistent with COGSA, the Hamburg Convention provides that any contractual stipulation attempting to negate the effect of this Convention shall be null and void, and that the benefit of insurance clause will also be deemed null and void. The carrier may increase his responsibilities by contract with the shipper, although it is doubtful that this particular subsection will see much use. Any bill of lading issued under Hamburg must contain a statement that the carriage is subject to the provisions of Hamburg which nullify any derogatory stipulations.

This provision must be stated in full in order to appreciate the rather obscure language:

Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present Article, or as a result of the omission of the statement referred to in para. 3 of this Article, the carrier must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The carrier must, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.

By virtue of the last sentence of this subsection, it is obvious that the question of attorneys' fees, expert witness fees, the costs of depositions

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169. See COGSA, supra note 3, at § 1303(8).
170. See Hamburg, supra note 1, at art. 23, § 1.
171. Id. at § 2.
172. Id. at § 3.
173. Id. at § 4.
and interrogatories, among other things, would or would not be taxable as costs depending upon the parochial law of the jurisdiction in which the case was brought. This seems to fly in the face of the over-riding commandment that the law ought to be uniform.\textsuperscript{174}

In a sort of "take it or leave it" attitude, the Hamburg Convention provides that "[n]o reservations may be made to this Convention,"\textsuperscript{175} and it will not come into force until the first day of the month following the expiration of one year from the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.\textsuperscript{176} States which later become contracting states will be bound on the first day of the month following the expiration of one year after they deposit the appropriate contractual instrument.\textsuperscript{177}

In order to revise the Convention, not less than one-third of the contracting states must make a request for a conference;\textsuperscript{178} however, in order to revise the monetary amounts, only one-fourth of the contracting states need call for a conference.\textsuperscript{179} Any decision by the conference must be taken by a two-thirds majority of the participating countries.\textsuperscript{180} The Convention enjoins that any alteration of the amounts shall be made merely as a result of a significant change in their real value.\textsuperscript{181} It is suggested that with the increase in the value of gold as compared to paper currencies, any convention in the future may be concerned with the reduction of the amount as opposed to its increase.

\textbf{Conclusion}

The Hamburg Convention is a rather remarkable document when one considers that it is the product of the deliberations and contentions of seventy-eight nations whose delegates altered the original working draft by amendments from the floor. The Rules are not

\textsuperscript{174} \textit{Id.} at art. 3. The first sentence of Subsection 4 defies explanation in speaking about loss as a result of a stipulation which is null and void by virtue of Article 23. How can there be a loss as a result of a stipulation rather than as a result of an act of omission or of commission? If the stipulation is null and void, it has not caused the loss; there must be some other thing which has done so. This sentence really does not make too much sense.

\textsuperscript{175} \textit{Id.} at art. 29.

\textsuperscript{176} \textit{Id.} at art. 30, § 1.

\textsuperscript{177} \textit{Id.} at § 2.

\textsuperscript{178} \textit{Id.} at art. 32, § 1.

\textsuperscript{179} \textit{Id.} at art. 33, § 1.

\textsuperscript{180} \textit{Id.} at § 3.

\textsuperscript{181} \textit{Id.} at § 1.
perfect rules but they are, perhaps, the best which could be obtained
in an imperfect world. As with most codifications, the success or
failure of the Rules will be dictated by the judicial reception given
them. Any defects in the Rules can be adjusted by sympathetic, in-
telligent judicial responses, for the defects are not in themselves
fatal.\footnote{For a delightfully written, rather harsh critique, see Tetley, The Ham-