

The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules

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I have been asked to talk about the Hague, Hague-Visby and Hamburg Rules. So what I will do is talk about all three sets of Rules briefly and then offer some views on possible adoption of the Hamburg Rules.

Let us start with the Hague Rules which are operative in this country together with — I shall guess, I have not brought the figures with me — 50 or 60 other countries.

The Hague Rules are so called because the work on them commenced at a meeting of the International Law Association at The Hague in the Netherlands in 1921. They were eventually adopted by a diplomatic convention at Brussels in 1924 so they are also referred to as the Brussels Convention, although they are normally called the Hague Rules. They are therefore very much connected with the Netherlands and Belgium. They represent the first effective internationally agreed control of bill of lading terms.

One has to view them against the background operative at the time of their introduction. This was that in many trades, many shipowners were at that time undertaking no liability whatsoever. There is a famous quotation from the Annual Report of West of England P & I Club in 1889 which says (in effect) that “the Committee congratulates the members on the absence in recent years of cargo claims which has been brought about by the now general adoption of the negligence clause; the premium reduction for use of this clause is therefore discontinued”.

So one has to remember that in certain areas, especially the North Atlantic, at least some shipowners were apparently excluding virtually all, or at any rate a great deal of, their liability. Now, what they call

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the negligence clause which, in effect, excluded all shipowners' liability for all events including their own negligence, was valid in England before English courts, subject to presumptions that the basic liability of the shipowner in regard to seaworthiness and care of cargo was not excluded unless clearly stated. But this clause in most forms was clear and therefore was valid.

In the United States, such a clause was not always valid. It might be held invalid as contrary to public policy. So if there was litigation in the United States, or governed by the law of one of the States, this clause might be ineffective. But of course a lot of litigation took place in England; and there was a case which may well have caused some annoyance in the United States called *Re Missouri Steamship Company*.¹ Here an English court — where it was disputed what law governed a bill of lading — said “This clause may be invalid under American law and valid under English law. The shipowner must have intended it to be valid; therefore the contract is governed by English law”. As I say, this view may well have caused some annoyance outside England. And as many, or probably all of you will know, a result of such developments was the Harter Act of 1893 in the United States which established a compromise which has survived in a sense in Hague and Hague-Visby (Hamburg is different) which was that the shipowner is not allowed to contract out of a liability for due diligence — not the strict liability, but due diligence — as regards seaworthiness and care of cargo; and in return for that, he is not liable for negligence in navigation and management of the ship. The latter notion is sometimes referred to as “nautical fault” (a translation of the French *faute nautique*, a phrase which is a little easier and quicker to refer to). This, of course, was a scheme of split risk. Some risks are carriers' risks and some risks are cargo risks. Carriers' risks are seaworthiness (not as I said, the strict duty which the common law required, but rather a duty of reasonable care as to seaworthiness) and care of cargo; shippers' risks are negligence in navigation and management. A justification for that was perhaps (a rather old fashioned one) that sea transit was a dangerous adventure. A person participating in it assumes that the carrier will do the best he can and therefore it is fair to excuse him of the particularly maritime, as opposed to the bailee, aspects of the responsibilities undertaken.

The Harter Act compromise was taken through to the Hague Rules and therefore to the Brussels Convention, which represented a compromise between shipowners, I think, to quite a considerable extent British, who operated under considerable immunities which they were not keen to surrender, and cargo-owning countries, especially the

¹ (1889) 42 Ch D 321.

United States and what are now called Commonwealth countries — Canada, Australia and New Zealand and so forth. These countries regarded themselves to some extent as being in the hands of foreign shipowners. This was true even in the United States, because during the American Civil War, a lot of tonnage was transferred from the American flag; and the movement from wooden vessels to metal vessels and screw vessels also gave European carriers a strong position in the North Atlantic which they had not had in the days of wooden vessels (in respect of which I believe that there was some American predominance).

This compromise was sold to shipowners on the basis of uniformity in bills of lading. A major argument put forward at that time was that different forms of bills of lading made them very difficult to handle; people had to read them carefully to see what liability was involved; the position of financing banks had become difficult; uniformity would bring great advantages.

So the Hague Rules, adopted at Brussels in 1924, are a scheme for uniformity of bills of lading adopting the Harter Act compromise of the split risk between carriers' risks and cargo owners' risks.

It should be noted, as I am sure you know, that on the whole the balance might well appear to be in favour of cargo, because the shipowner was not allowed to exclude his liability beyond what the rules provided. That is to say, the shipowner could not exclude his liability for due diligence as to seaworthiness and care of cargo, though of course in return for that he had the negligence in navigation and management exception. This was to some extent regarded, therefore, as a compromise leaning in favour of cargo. One has also, however, to remember that the shipowner obtained the benefit of the one year time bar and the package or unit limitation; and although the latter at that time represented a more considerable sum per package or unit, especially for the smaller packages then used, I imagine, than now, nevertheless those two represented considerable benefits to the shipowner. One hundred pounds sterling gold value in 1924 is however, the equivalent of quite a considerable sum now, as cases like *The Rosa S*² and in Australia, *Brown Boveri v Baltic Shipping Co*³ show.

Those then are the Hague Rules, which is what you have here, and the general scheme of them I think is well known to most maritime lawyers the world over.

Now what are Visby? The Visby Rules or Hague-Visby Rules are what we have in the United Kingdom, and now I believe, in something

² [1988] 2 Lloyd's Rep 574.

³ [1989] 1 Lloyd's Rep 518.

of the order of 25 other states. These arose really from problems in the Hague Rules which were mostly regarded as adverse to carriers; so the Visby amendments were to some extent put forward by carrying interests. They consist of provisions intended to remedy defects noted in the Hague Rules over some 40 years of operation, to which carriers had drawn attention.

The defects were basically five, and three of them resulted from English cases.

The first is the so-called *Vita Food* gap. This is a gap in the international operation of the rules to which attention was drawn, or which was a gap created, by the *Vita Food* case,⁴ a Privy Council case from Nova Scotia. The facts involved Newfoundland but the case was actually from Nova Scotia.

Briefly, the scheme of the Rules, so as to try to give them international operation, was that countries who were parties to them should enact the Rules for outward shipments from their ports. Now if you get an outward shipment from country X and there is litigation in country X, you would assume that the wording of the relevant statute incorporating the Rules (if such was necessary) would make the courts in country X apply the Rule whatever the choice of law in the bill of lading. But what happens if litigation arises on shipments from country X in country Y? Country Y is not going to apply the law of country X unless that is the law applicable to the contract — what is called the proper law of the contract. It was hoped to make sure that the courts of country Y applied the Rules by use of the clause paramount device, with which you are familiar, which requires bills of lading to contain what is called a "clause paramount" saying that the Hague Rules are to apply. So if there is litigation in country X on a shipment out of country X, by its own law, the law of country X should be applied. If, however, litigation occurs in country Y, the Rules being incorporated by contract under the clause paramount, it may be hoped country Y will apply them too.

The difficulty is this. What happens if the clause paramount is omitted? The *Vita Food* litigation occurred in Nova Scotia on a shipment out of Newfoundland, which was a Convention country, at that time independent. The ship belonged to a Nova Scotian corporation — that was also (part of) a Convention country. The clause paramount was however, omitted from the bill of lading because an old form of bill was being used. The full complexity of this case takes some time to explain and I do not imagine you want me to go over it fully. But the general thrust of the case was to expose a difficulty. The bill of lading — in this case out of Newfoundland to New York on a

⁴ [1939] AC 277.

ship owned by a Nova Scotian corporation — provided that it was governed by English law. Now English law only applied the Rules to a shipment out of the United Kingdom — not surprisingly as that was part of the overall scheme. This was not a shipment out of the United Kingdom, so if English law applied the Rules were irrelevant. The importance of the decision was that the English choice of law clause was valid despite the absence of connection of the facts with England.

This led to two difficulties. The first was that if the clause paramount was omitted and a bill of lading for shipment out of a Convention country contained a choice of law clause for a jurisdiction which either did not apply the Rules at all or did not apply them to that voyage, the Rules could be evaded; and therefore the international application of the Rules, at least in many Convention countries, was to some extent torpedoed.

There was a second part of the problem which was largely an English problem and could be avoided by different drafting. It was that it was not even really clear that the Rules were compulsorily applicable to a shipment out of the United Kingdom if the bill of lading contained a choice of law clause for another jurisdiction. So if there was a choice of law clause on a shipment out of England for the law of Norway — supposing Norway to be a Convention country which only applied the Rules to shipments out of Norway — it was arguable that the wording was not strong enough to make the English court apply the rules where English law was not the proper law of the bill of lading.

To summarise, the so-called *Vita Food* gap enabled the Rules, at any rate in theory, to be evaded by a choice of law clause for a jurisdiction which either had not adopted the Rules at all or did not apply them to that voyage.

The second matter it was decided to change was the result of an English case called *Scruttons v Midland Silicones*.⁵ That case held that the protection of the Hague Rules did not affect stevedores, since they were not parties to the contract of carriage. So that although you could not sue the carrier, you might well be able to sue the stevedoring firm; and that firm could not rely on the time bar or the package or unit limitation, which of course they would wish to do.

As you know, attention was then given to drafting a clause which got round this. This is called the “Himalaya” clause because it was drafted to deal with the problem first manifested in an earlier Court of Appeal case called *Adler v Dickson*.⁶ This concerns Mrs Adler, who was a passenger on the P & O liner “Himalaya”. She was not able to sue the

⁵ [1962] AC 446.

⁶ [1955] 1 QB 158.

shipowner so she successfully sued the captain and the bosun in respect of an accident in the operation of the gangway. That set the alarm bells ringing, and the same matter was then (unsuccessfully) litigated to the House of Lords in connection with cargo. Meanwhile a clause intended to deal with this was drafted and brought into use. It is called the “Himalaya” clause since it originated from the passenger case about the P & O liner “Himalaya”.

As you know, this clause was first held effective to protect stevedores in the New Zealand Privy Council case called *The Eurymedon*.⁷ Subsequently, the issue was raised again in an Australian Privy Council case, *The New York Star*,⁸ with the same result. (The case also raised a further point as to application of the Rules after discharge of the goods from the vessel).

The third defect which it was sought to deal with was a case called *The Muncaster Castle*⁹ which was unpopular with carriers. This case held that the shipowner's duty as to due diligence in furnishing a seaworthy vessel was non-delegable. That is to say, the shipowner could not say that he had exercised due diligence by appointing competent marine surveyors or repairing companies and so forth. If those organisations were themselves negligent, the shipowner had to answer. Shipowners did not like this case, though some of the effects of which were taken away shortly after by a case called *The Amstelslot*¹⁰ where the actual duty of care was set a bit lower — or rather, what was negligence was set a bit higher. Nevertheless, carriers thought that they should be able to discharge their duty of care by delegating it to competent independent contractors.

Fourthly, there were problems regarding the probative effect of bills of lading, which did not actually, I think, derive from common law countries. There were questions of exactly of what statements in the bill of lading were proof, and to what extent they could be disproved — statements as to the amount of goods loaded and apparent order and condition on shipment.

Fifthly, there were problems regarding the package or unit limitation. There were problems of inflation. The limit was 100 pounds sterling, “taken to be” gold value. But no one knew what that meant: there were different values of gold, two tier systems and so forth, and the matter had not been tested. Recently, of course, it has been — but not then.

⁷ [1975] AC 154.

⁸ [1981] 1 WLR 138.

⁹ [1961] AC 807.

¹⁰ [1963] 2 Lloyd's Rep 223.

It was also regarded as unsatisfactory that there was no package or unit limitation applicable to bulk cargoes — at least not in the English version of the Rules, though the American Act referred to “customary freight unit”. In default of such wording there might be no package or unit limitation applicable to such cargo, so it was suggested that there should be a limit by reference to weight.

Also, there was the problem of containers. Is a container a package or unit? If it is, a container of high value items such as computers is obviously going to have an enormous value far above the package or unit limitation. So what was to be done about them?

These problems — the *Vita Food* gap, *Scruttons v Midland Silicones* and *The Muncaster Castle*, the probative effect of bills of lading and the package or unit problem — were sought to be dealt with by the CMI. The third one, that of *The Muncaster Castle*, got lost at some point. It proved unpopular and carriers in the end had to drop it. It was thought that shipowners ought to be liable and sue their own independent contractors, which seems to be quite reasonable.

The remaining points were worked on and a draft was produced at the CMI Conference at Stockholm in 1963 and signed at the city of Visby on the island of Gotland in the Baltic at the end of the conference. Further work was done on them and, extensively amended, they were the subject of an international Protocol to the 1924 Convention adopted at Brussels in 1968. They are therefore the Brussels Protocol to the 1924 Convention, and the rules as amended are called the Hague-Visby Rules: they received sufficient ratifications to come into effect in 1977.

What then are the Hague-Visby Rules? They are simply the Hague Rules with a fairly small number of alterations, some of them quite important but not all very conspicuous. The main bulk of the Hague-Visby Rules is exactly the same as the Hague Rules. They are Hague with certain alterations made in the interests of correcting particular difficulties perceived then as having emerged from the operation of the Hague Rules over 44 years.

What is there in the Hague-Visby Rules which is different from the Hague Rules? Let us go over the main problems which I listed earlier.

The first is the *Vita Food* gap. The *Vita Food* gap was closed by means of a different technique which, at least in common law countries, depends on domestic legislation. Article X of the Visby Rules prescribes itself to what voyages the Rules apply. There was actually such an article in the Hague Rules, with more limited application, but for some reason it was not enacted in the English Act and I guess, therefore, not in your New Zealand Act. However, Article X of the Visby Rules actually prescribes when the Rules apply. They apply (in

brief) to outward shipments from a contracting state, to bills of lading issued in a contracting state, and cases where the contract provides that the law of a contracting state governs. This is then put into effect in the United Kingdom by a new form of statutory wording. The old form said that the Rules “have effect in relation to and in connection with” outward shipments from UK ports. The new form, which is also used in connection with other international conventions, says that the rules “have the force of law”. That means that an English court has to apply them on a shipment out of *any* Convention country; which would of course, have solved the *Vita Food* case, where a Nova Scotian court in a Convention country would have had to apply them on a shipment out of Newfoundland, another Convention country.

Suppose, for example, there is litigation in England on a bill of lading out of Singapore providing that “This bill of lading is stated as being governed by the law of Indonesia” which is a non-contracting state, though it will, I believe, give effect to clauses paramount. If litigation arises in London, the English court has to apply the Rules to that bill of lading because it covers a shipment out of a contracting state. So the procedure for “internationalisation” is more efficient, at any rate (in common law countries) if the domestic legislation bringing the Rules into effect is properly drafted. Curiously enough in Singapore itself, the legislation, it seems to me, was not properly drafted. The draftsman, perhaps not completely briefed as to the *Vita Food* gap, actually used the old-fashioned wording “have effect in relation to and in connection with” but retained also the outward shipment rule, despite the presence in the Rules of Article X. This causes difficulty for them in Singapore but that need not affect us here. It does, however, draw attention to the fact that if you adopted Visby here, you would need to make sure the implementing legislation uses a correct form of words to force the New Zealand courts to apply the rules on shipment out of any Convention country — an important part of the “internationalisation” system.

As many of you know, we have in England a very strong case indeed on this, called *The Hollandia*.¹¹ In that case there was a shipment out of Scotland in a Dutch vessel, and the bill of lading was governed by Dutch law. In the Netherlands they have the Hague rules, under which the package or unit limit is lower. The bill was stated as governed by Dutch law, with jurisdiction in the Netherlands. The English court held the clause for jurisdiction in the Netherlands was a clause reducing the carriers’ liability under Article III.8 and was therefore invalid. The Dutch jurisdiction clause was therefore struck out and the issue became simply one of *forum conveniens* which led to a decision in favour of English jurisdiction. That is quite a dramatic (and not

¹¹ [1983] 1 AC 565.

uncriticised) case holding that this formula "force of law" has a coercive effect on the courts.

Secondly, the *Scruttons v Midland Silicones* point. This relates to actions against stevedores or indeed, if such are worth bringing, against captains or other individual persons operating the ship or indeed, working cranes and so forth. Are they protected by the rules? The answer prior to the Visby Protocol would be "no". The problem is now, however, dealt with in Article IV.Bis.2, a whole new section put in after Article IV. Article IV.Bis.2 provides as follows —

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

That presumably, was meant to deal with *The Eurymedon* and *The New York Star* situations. But the wording is that if such an action is brought against the servant or agent of the carrier, such servant or agent not being an independent contractor, such servant or agent shall be entitled to avail himself of the defences and limits of liability. Stevedores are normally independent contractors. So curiously enough, it does not actually seem to protect stevedores — although it would protect employees such as captains, crane operators and such like. The proper way of assessing this is still not clear. On one view, it must be meant to cover stevedores and some special interpretation function must be deployed to try and make sure they come under the words "servant or agent" despite the following words. On another view, international agreement in Brussels in 1968 was not secured to the exemption of independent stevedores. Some of you may know a statement of Mr Justice Murphy, a sort of *cri de coeur* in the High Court of Australia in *The New York Star*¹³ that "Australian importers have no real freedom in their arrangements: to regard these as being in the area of contract is a distortion". He held that stevedores could not take advantage of the Rules.

There is also another enigmatic section in Article IV.Bis, the meaning of which is simply not clear. What is provided is this —

Article IV.Bis.1

The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss of or damage to the goods covered by a contract of carriage whether the action be founded in contract or in tort.

This obviously covers actions in tort against the carrier. What is intended to be its effect? There are two views, and the matter is almost, but not quite, untested.

¹³ (1978) 139 CLR 231, 285.

One view is that all this provision does is to provide that if the carrier could be sued in contract and you elect instead to sue in tort, you will not get a different result — the same protections will apply. In that case, it has virtually no effect in common law countries, or at least, most of them. Such is the view of Professor Treitel expressed in [1984] LMCLQ at p.304.

You will know of course, that there are situations where there is no claim against the carrier in contract because delivery orders or waybills are used and the consignee seeks to sue; or because you want to sue the actual carrier and your contract is with the contracting carrier, for instance, on a charterer's bill of lading, and so forth. There is a situation then where you cannot sue the carrier in contract and you seek to do so in tort. As I say, the obvious example is a charterer's bill of lading where the plaintiff seeks to sue the actual carrier. Does Article IV.Bis.1 cover that or not? The view that it did in certain circumstances was taken by Mr Anthony Diamond, QC, a well known barrister and writer in this area, in a seminal article on the Hague-Visby Rules in [1978] LMCLQ 225.¹⁴

There is recent authority on this in the English Court of Appeal in a case called *The Captain Gregos*.¹⁴ The court took the narrow view that the provision only protects carriers who are sued in tort when they could have been sued in contract. It does not appear, however, that the matter was fully argued and it seems that an appeal to the House of Lords is unlikely. So it may be that the matter cannot be regarded as finally settled.

The third problem — that of *The Muncaster Castle* — was as I said, dropped at some stage in the negotiations.

The fourth relates to the probative effect of bills of lading. This is dealt with by the addition of one sentence in Article III. This Article requires the carrier on demand to issue a bill of lading containing certain particulars. Article III.4 then says "Such a bill of lading shall be prima facie evidence of receipt by the carrier of the goods therein described in accordance with paragraphs (a) (b) and (c)". That may not be very significant. But the Visby Rules contain one more sentence. "Proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith". That was, I believe, put in to remedy some defect in a civil law country or countries, but it has some effect for us in common law countries because it potentially remedies the problem stemming from the case of *Grant v Norway*,¹⁵ which is still around, although it could be

¹⁴ At pages 248-253.

¹⁴ [1990] 1 Lloyd's Rep 310.

¹⁵ (1851) 10 CB 665.

overruled by any supreme appellate tribunal whether in New Zealand, Australia or the United Kingdom. It is taken as laying down that a master has no authority to sign a bill of lading for goods not on board, so that if the goods are not actually on board when the bill of lading is signed, the bill of lading does not bind the shipowner. The new provision potentially enables one to get round that defence.

There are, however, some slight technical difficulties in it. The wording is that "proof to the contrary shall not be admissible". I shall just touch on two technical points. First, proof to the contrary of what? The opening words make the bill of lading prima facie evidence of receipt by the carrier; so he cannot prove that the goods were not received. So if the carrier is willing to admit that he received the goods, and all he wants to say is that they are not on this ship (but will come on the next ship in six months time) — an unusual situation, obviously — then this provision may not work.

There is also a second difficulty which is that if no goods were ever shipped at all under the contract, it may often be arguable that there was no contract of carriage at all, so that the Hague-Visby Rules are not triggered off at all, because they only apply to contracts of carriage. If you take the view that a contract of carriage is usually not made until the goods are put on board — which receives some support of course from the *Scancarriers v Aotearoa*¹⁶ decision in New Zealand and see *Heskell v Continental Express*¹⁷ — then this provision may not be as useful as it looks.

Lastly, package or unit. As you will know, it was intended to provide for the inflation problem by linking the package or unit limitation to the Ponce franc, which is a unit of currency defined by gold content. This subsequently proved not very satisfactory and the limit is now in some countries (including the United Kingdom) defined by reference to Special Drawing Rights on the International Monetary Fund. This raises the limit considerably from 100 pounds sterling (even as raised by the former Gold Clause agreement) though not as high as the sum provided by the *Rosa S / Brown Boveri*¹⁸ reasoning.

What about bulk cargo? That is dealt with by the addition of a provision as to weight. Some countries, I believe, wanted weight to be the only criterion for the package or unit limitation. The Visby Protocol adds an alternative under Rule IV.5(c) (in the UK form).

... neither the carrier nor the ship shall in any event become liable for any loss or damage to or in connection with goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher.

¹⁶ [1985] 2 Lloyd's Rep 419

¹⁷ [1950] 1 All ER 1033.

¹⁸ [1989] 1 Lloyd's Rep 518.

So an alternative is limit per kilogram gross weight, whichever is the higher. Then finally, there is the container provision, which is Article IV.5(d) which basically says, to put it in a crude form, that whether the container is the package or unit, or the contents, depends on how the bill of lading is made out.

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

Thus, if a bill of lading refers to "one container said to contain machinery", then that is the package or unit. If it refers to "one container containing 600 TV sets", the sets would be the packages or units. This is probably true also where the bill refers to a container "said to contain 600 TV sets". It seems likely that that is sufficient enumeration for this purpose even though of course, in a dispute, the claimant might have to prove that the contents had been there on filling the container.

One other point to which I draw your attention is Article IV.5(e)-

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

So the package or unit limitation is broken if the carrier acts with intent to cause damage or recklessly. The meaning of this new notion is not yet tested, although there is a relevant recent case called *The Chanda*¹⁹ dealing, however, with a dispute under the Hague Rules.

These then are the Hague-Visby Rules, which are simply the Hague Rules with certain amendments which carriers and shipowners describe as clarifying and rectifying certain difficulties which had emerged over 40 years of the Rules. Cargo interests may, however, see them as being largely in the interests of carriers.

Now to the Hamburg Rules. These, as you will know, originated from a report written by the Secretariat of UNCTAD around 1970, which drew attention to certain defects in the Hague Rules. These were said to be disadvantageous to cargo-owning countries and to developing countries in particular, in that they operated to place more business in developed countries, protecting shipowners, and also creating double insurance situations where the cargo owner was carrying insurance for liability which was really that of the shipowners but could not easily be made to stick.

The difficulties perceived in the Hague and Hague-Visby regimes were these. Firstly, the excepted perils of Hague and Hague-Visby do

¹⁹ [1989] 2 Lloyd's Rep 494.

not apply to deck cargo, for which a shipowner can stipulate special terms; nor to carriage of live animals, which is obviously a more specialised form of carriage. Both of these involve special risks. It was nevertheless asked why they should be outside the Rules altogether, so that the carrier can set his own terms.

Secondly, some of the excepted perils. Why is the shipowner excepted from liability for nautical fault? Why is he not liable for negligence in management and navigation? The view would be that this is an old-fashioned exception dating back to sailing vessels and days when maritime ventures were hazardous. One can now establish what shipowners ought to have done in particular circumstances; why can they not be liable for negligence in navigation and management? Why also is there a special exception for fire, unless caused by actual fault or privity of the carrier?

Thirdly, there is a so-called "before and after" problem. When does the application of the Rules start and when does it stop? Views on this differ from country to country. The view can be held that the Rules come into operation on the ship's rail — when crossing the ship's rail. On another view, the Rules themselves actually say in Article II —

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

That suggests the carrier has to load and unload as part of his functions. Then there is the English view, established in *Pyrene v Scindia*²⁰, that it turns on the particular contract as to how much loading and unloading the carrier does; and on that turns to what the Rules apply.

Fourthly, there are certain matters hardly touched on at all, for instance, delay.

Fifthly, the time bar. Why should there be such a short time bar for actions against the shipowner, especially if he is subject to no such special bar for an action against you?

Sixthly, the package or unit limitation. One can ask more generally why it exists at all; and also, whether it is not too low. It is said to need raising and inflation-proofing. Of course, to some extent, that is dealt with by Hague-Visby.

Seventhly, there is nothing in the Rules about jurisdiction and arbitration clauses and this gives a free rein to carriers to require arbitration and/or litigation in countries convenient to themselves. Of course, a shipper can negotiate with the carrier for arbitration or

litigation somewhere else; but the carrier may not always be very receptive to such an amendment of his standard terms.

Next, the burden of proof is different in different countries; and the interpretation of particular clauses varies from country to country.

But last, and most importantly, the general idea behind Hague and Hague-Visby is the split risk regime which comes from Harter — carrier liable for seaworthiness and care of cargo; cargo owner takes the risk and insures in respect of negligence in navigation and management. This split risk of course, leads to difficulties. First, there are difficulties of proof. How does cargo prove exactly what happened, especially when you have got to get your proceedings going within a year? It may be difficult to know whether what happened is a carrier's responsibility or a cargo owner's risk. There are questions of burden of proof which may differ from country to country, and may not be very clear. Lastly, even if you do know and can prove exactly what happened, it may be highly arguable whether what went wrong was to be classified as negligence in care of cargo or negligence in management of the ship. So it is possible to litigate to the highest tribunal as to whether what happened — even assuming it to be absolutely clear — should be classified under one risk or the other.

A commonly held view was that this led to disadvantages to developing countries and to cargo-owning countries, because it was said to favour carriers. In particular, in the cargo-owning country, one might have to carry insurance in respect of something for which the carrier was really liable, because of the difficulty in establishing this. There were also risks of loss or damage over and above the package or unit limitation, of missing the time bar and so forth.

Now of course, if the cargo owner's insurance carries less risks, these should be on the carrier, so that even if the carrier's P & I premiums then go up, leading to a rise in freight rates, the cost of cargo insurance should, at least in theory, be diminished. Whether this is really true or not, it has been said that the existing regime leads to double insurance which is simply inefficient.

Considerations of this sort led to the promulgation of the Hamburg Rules. Now the Hamburg Rules were meant to deal with the difficulties to which I have referred; they require adoption by 20 countries and I think they have got about 17 at present, though not all are obviously leading maritime countries.

The main differences between Hamburg and Hague and Hague-Visby are, rapidly summarised, as follows.

The principal feature of the Hamburg Rules is the new basic rule of liability in Article 5 —

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

²⁰ [1954] 2 QB 402.

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.

So the basic rule then is that he is liable in certain circumstances defined unless he proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

Then the defence of negligence in navigation and management does not appear. There are some provisions about the "before and after" problems which extend the shipowners' responsibility before unloading and after unloading, but they are still not very clear. The time bar is extended to two years and applies to actions by the carrier as well as those against him; and the time for giving notice of non-apparent damage has been extended from 3 days to 15.

The package or unit limitation is defined in the special drawing rights and is raised — which is done by Visby anyway.

There is a new joint and several liability of carriers and actual carriers, which deals with the problem of suing the actual carrier when a charterer's bill of lading is issued. This is quite complicated and can cause difficulties; but certainly potentially it makes it easier to sue the actual carrier, and also for the actual carrier to rely on the excepted perils (which may not be possible, at least in common law countries, under the existing regimes).

There are provisions about liability for delay, with special limits on damages for it. The Rules apply to deck cargo and it is specified when cargo can be carried on deck; and to live animals. They are applied to specified voyages, and actually provide where litigation or arbitration may take place.

This last point requires special notice. Article 21.1 provides —

In judicial proceedings relating to the carriage of goods under this Convention, the plaintiff, at his option, may institute an action in a court which, according to the law of the state where the court is situated, is competent, and within the jurisdiction of which is situated one of the following places

- (a) the principal place of business or, in the absence thereof, the official residence of the defendant; or
- (b) the place where the contract was made ...; or
- (c) the port of loading or the port of discharge; or
- (d) any additional place designated for that purpose in the contract of carriage by sea.

So the Hamburg Rules actually contain provisions regarding place of suing which will diminish the effect of some carriers' jurisdiction clauses. There are similar provisions for arbitration contained in Article 22.

There are (in Article 17) some rather mysterious provisions regarding letters of guarantee — that is to say, letters of guarantee against

the issue of clean bills of lading, which one might not think were a very suitable matter for regulation by the international rules governing the contract of carriage. And among other things, there is in Article 23.4 an attempt to make the carrier pay for loss caused by the use of invalid clauses. I imagine everyone is familiar with the problem of contracting parties who seek to throw up a smoke screen by purporting to rely on a clause that actually is invalid; and that may cause loss to a claimant in time spent negotiating, etc. Attempts are therefore made to make carriers pay for damage caused by attempts to rely on invalid clauses, though whether they will work is a different matter.

The basic regime then, is one under which the shipowner is liable unless he proves in certain circumstances that he used all reasonable efforts to avoid the occurrence. Carriers do not favour the Hamburg Rules, as I understand it, although there may well be some who do. Why not? The first argument is that the new basic regime is unsatisfactory because it is not really clear how it will work. It provides²¹ "The carrier is liable for loss of or damage to the goods ... if the occurrence which *caused the loss ... took place while the goods were in his charge*, unless he proves that he, his servants or agents took *all measures that could be reasonably required* to avoid the occurrence and its consequences". All the matters stressed can give rise to difficulties of interpretation and proof. But their overall effect is doubtful too. At the very end a provision was added — called "The common understanding" — saying the common understanding of the parties is that the carrier's liability is based on presumed fault. The argument, however, is that the regime is really getting very near to strict liability.

And, as I have said, there is a great deal of interpretation required to see how the Rules are going to work. "The carrier is liable for loss resulting from loss of or damage to the goods ..." — "resulting from" — what does that mean?; "... as well as from delay in delivery if the occurrence which *caused*" the loss, damage or delay ..." — what does that mean and who proves it?; "... took place while the goods were in his charge as defined in Article 4 ..." — there may be quite a lot of difficulty in proving that — "... unless the carrier proves that he, his servants or agents took all measures that could reasonably be required." This is similar to the wording in the Warsaw Convention on Carriage by Air and to that of CMR Convention on International Carriage by Road — but not quite the same: what is the significance of the different phrases? Perhaps indeed, this is the point on which focus is put. What does this mean? What are "all measures that could reasonably be required"?

²¹ Emphasis added.

²² Emphasis added.

But it can also be said that the fire exception is much more clearly based on fault. Article 5.4 reads —

The carrier is liable ... for loss of or damage to the goods or delay in delivery caused by fire if the claimant proves the fire arose from fault or neglect on the part of the carrier, his servants or agents.

This is different from the general regime. There is something to work out here.

Many carriers, of course, are reluctant to see the abolition of the negligence in management and navigation exception — nautical fault. They might be willing to see “management” go, but are reluctant to see “navigation” go. And a general view is put forward that carriers will, under these Rules, have to take out much increased P & I insurance cover, especially because they do not know exactly what the claim experience is going to be; and that is bound to raise freight rates. It may also be said that this will spread the risk of negligent packers among all packers, including careful packers. Under the present situation, it is said that careful packers may get favourable insurance premiums if their claim records are satisfactory; but the carrier does not know who are good packers and bad packers, he (or she) will simply raise the freight rates to cover the P & I premiums. And so it is said that business will be taken away from local insurance — a point stressed in Australia, I believe — because the carriers will be carrying most of the risks.

There is a slight element of contradiction in all this. One scenario is that the shipowner will be carrying more risks; he will require higher freight rates because he is carrying more insurance; local insurance will lose out because people are not going to take insurance locally when the shipowner is more or less strictly liable. The converse argument is that actually there is still going to be a need for cargo insurers because of, say, the package or unit limitation, difficulties in applying the Rules, cases where shipowners can prove they have used all reasonable measures, difficulties of proving what happened and whether it happened before or after, collisions caused by negligence of other vessels and so forth. So there is a slight show of mutually inconsistent argument. One is that local insurers will lose business, the other is that there will still be a need for double insurance and that will be inefficient.

The most general argument is simply — and it is the strongest one — that all the points on liability of carriers will need redeciding. We now have 60 years of experience with Hague Rules. There is still quite a lot to do — they could be improved. But if one starts again with Hamburg, everything is going to need redeciding. Finally, I would just like to make a quotation from a CMI document. Lord Diplock said at a CMI seminar in 1976:

So while there has been no real criticism of the Hague Rules, there has been I think a consensus of criticism of the changes suggested in the UNCITRAL

UNCITRAL draft. Criticisms because basically these changes will increase the number of recourse actions and also because of the vagueness of the phrases used leading to great uncertainty and doubt as to what the subjective position of the judge will be in the various jurisdictions. They will render useless all that expensive jurisprudence accumulated over 50 years upon the meanings of the phrases in the Hague Rules and for many years after a new and vague criterion has been set down there will be all the expense incurred again while the uncertainty continues to exist.

Other main objections put forward at that time were these. The retention of the defence of error in navigation is not only based on tradition, but was founded on the lack of control over master, crew and pilots that continue to exist with the result that any carrier's liability is really vicarious. Uniformity will, in fact, be jeopardized by use of the new Rules; liability under the well defined exceptions of the Hague Rules is much easier to handle in daily routine claims settlement procedure which is based upon well established case law all over the world. Furthermore, it is as a matter of principle right to spread risks.

What is happening at present on this front? Many of you may know much more about this than I. The Hamburg Rules are strongly pressed by UNCITRAL and those responsible for their formulation. As far as I can see, there was an initial phase of interest; there was then a phase of withdrawn interest; the issue then came into prominence again. Whether interest in the Hamburg Rules is now on the increase or decline, I do not know. It is certainly true that another three ratifications (I think) will trigger them off and their jurisdiction provisions may make themselves felt in unexpected parts of the world.

The CMI meeting in Paris in June has this topic as one of the ones to be discussed. My understanding is that two different types of proposals have attracted interest. One is to prepare a sort of improved Hague-Visby under which the carrier surrenders some of his immunities, in particular perhaps, that for management of the ship, although not navigation. Such a version could be available for a voluntary incorporation in the contracts. Obviously, some may be sceptical as to whether such voluntary incorporation would often take place. So another possibility is obviously to reconsider Hague and Hague-Visby, pinpoint their difficulties and perhaps eventually suggest a new protocol improving Hague-Visby.

Among the points which could be considered in this connection are the following.

First, identity of carrier. The question of what is a shipowner's bill of lading and what is a charterer's is probably a matter for local law; but something could be done about the liability of the actual carrier in the case of a charterer's bill of lading.

Secondly, documents. Should the rules be extended to other documents, in particular, mate's receipts, sea waybills and ship's delivery

orders? This is a rather specialised point. It is not actually clear that the Rules do not apply to at least some of these documents; for the English wording for the application of the Rules, which refers to a "document of title" is not the same as the French text, which I believe, is the authentic one for international purposes (if not for statutory interpretation in some common law countries). Equally, in the United States, what is elsewhere called a "waybill" would be regarded, it seems, as a "straight consigned" bill of lading.

There are also difficulties as to what happens if the carrier refuses to issue a bill of lading either at all, or refuses to issue one containing the requisite particulars. If you then do not object, have you waived your rights to a bill of lading triggering off the Rules or do the Rules apply notwithstanding? Again, there are quite a lot of problems about deck cargo — whether deck cargo shipped as such really should disapply the Hague Rules; when is deck stowage authorised, particularly in regard to containers; and the extent to which unauthorised deck cargo is a deviation. There is the "before and after" problem — period of application — which does not always quite link up with the period during which the carrier has the goods.

As regards the exceptions, some interests (by no means all) as far as I can see, seem reasonably willing to contemplate abolition of the defence of negligence in management of the ship, though most might well be reluctant to contemplate abolition of that relating to navigation of the ship. The fire exception has different wording in Hague and Hamburg and may need reconsideration.

The "package or unit" issue may need further consideration, and there are views that the only limitation should be one based on weight. A contrary argument to consider is to what extent cargoes can be weighed? It is also said there can be very light cargoes of high value — for instance, textiles.

There is also a general point as to whether the package or unit limitation really serves any purpose, though this of course, raises again the well-known "spreading the risk" argument. Some attention might be given to the effect of deviation. This varies from one legal system to another and it has been queried whether the Hague and Visby Rules were right to extend the right to a deviation to save property as well as life. It is also arguable that provision should be made (or, at last, the existing provisions clarified) in respect of delay.

As I understand the present picture, there are some people urging adoption of Hamburg and there are some who are against Hamburg for the reasons I have given but are suggesting further attention to Hague and Hague-Visby with a view to seeing whether the defects at present perceived in them can be altered. No doubt there are numerous variants, and a third group which sees no need for change.