

A COMPARATIVE ANALYSIS OF THE HAGUE-VISBY RULES, THE HAMBURG RULES AND THE ROTTERDAM RULES

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This comparative analysis will be divided in the following three parts:

- I. Matters regulated by the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules***
- II. Matters regulated by the Hamburg Rules and the Rotterdam Rules***
- III. Matters regulated only by the Rotterdam Rules***

I. Matters regulated by the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules

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1. Definition of contract of carriage

Normally a contract is defined on the basis of the obligations of the parties. The Hague-Visby Rules do not contain any such definition, but merely connect the notion of contract of carriage to the document issued thereunder, the bill of lading. For that reason it has been said that they have adopted a documentary approach.

In the Hamburg Rules and in the Rotterdam Rules there is instead a definition of the contract of carriage but it differs in respect of the description of the obligation of the carrier which is merely the carriage of goods by sea from one port to another in the Hamburg Rules and the carriage of goods from one place to another in the Rotterdam Rules. The Hamburg Rules expressly exclude their application to the carriage by modes other than sea in case the contract involves the carriage by other modes, while the Rotterdam Rules extend their application to the carriage by other modes if the parties have so agreed.

HAGUE-VISBY RULES	HAMBURG RULES	ROTTERDAM RULES
<p style="text-align: center;"><i>Article 1</i></p> <p>In these Rules the following words are employed, with the meanings set out below:</p> <p>.....</p> <p>(b) ‘Contract of carriage’ applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which</p>	<p style="text-align: center;"><i>Article 1. Definitions</i></p> <p>In this Convention:</p> <p>.....</p> <p>6. “Contract of carriage by sea” means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea.</p>	<p style="text-align: center;"><i>Article 1. Definitions</i></p> <p>For the purposes of this Convention:</p> <p>1. “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.</p>

such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.		
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2. Geographical scope of application

Under all Conventions the carriage must be international and must be linked to a contracting State. But while in the Hague-Visby Rules it is required for their application that either the bill of lading or the port of loading be located in a contracting State, in the Hamburg Rules the place of issuance of the bill of lading is rightly ignored because it may not be connected at all with the voyage, but reference is made to both the port of loading and to the port of discharge. Therefore the Hague-Visby Rules do not apply to a contract from a port located in a non-contracting State to a port of discharge located in a contracting State, while the Hamburg Rules do apply. In addition they both apply when they or a national law giving effect to them are incorporated in the bill of lading.

Under the Rotterdam Rules the geographical connecting factors are instead the places of receipt and of delivery and the ports of loading and of discharge, the first two connecting factors having been added because the Rules apply also to door-to-door contracts under which receipt and delivery may be inland. No reference is instead made, as in the Hamburg Rules, to the place of issuance of the bill of lading (or other transport document) for the reasons previously indicated. Nor has a reference been made to the incorporation of the Rules in the transport document because the effect of such incorporation may be different in the various jurisdictions. Furthermore, the reference in both the Hague-Visby Rules and the Hamburg Rules to a national law giving effect to them may be the cause of significant uncertainty and of lack of uniformity, because national laws may give effect to them with variations.

HAGUE-VISBY RULES	HAMBURG RULES	ROTTERDAM RULES
<p><i>Article 10</i> The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:</p> <ul style="list-style-type: none"> (a) the bill of lading is issued in a contracting State, or (b) the carriage is from a port in a contracting State, or (c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract; whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person. <p>Each Contracting State shall apply the provisions of this Convention to the Bills of</p>	<p><i>Article 2. Scope of application</i> 1. The provisions of this Convention are applicable to all contracts of carriage by sea between two different States, if:</p> <ul style="list-style-type: none"> (a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or (b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or (c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or (d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or 	<p><i>Article 5. General scope of application</i> 1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:</p> <ul style="list-style-type: none"> (a) The place of receipt; (b) The port of loading; (c) The place of delivery; <p>or</p> <ul style="list-style-type: none"> (d) The port of discharge. <p>.....</p>

<p>Lading mentioned above. This Article shall not prevent a Contracting State from applying the rules of this Convention to Bills of Lading not included in the preceding paragraphs.</p>	<p>(e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.</p>	
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3. Exclusions

The Hague-Visby Rules, pursuant to article 1(b), apply only to contracts of carriage “covered” by a bill of lading or similar document of title and therefore they impliedly exclude charter parties. This provision gives rise to some uncertainty, for article 3(3) provides that the carrier must issue a bill of lading on demand of the shipper and article 6 grants the carrier freedom of contract when no bill of lading is issued. Therefore the Rules apply also before a bill of lading is issued.

The Hamburg Rules provide for their application to contracts of carriage by sea, thereby adopting a contractual approach, but then state that they do not apply to charter parties, thereby using a documentary approach in order to exclude from their scope of application contracts for which the basic document is the charter party.

Also in the Rotterdam Rules the basic approach is contractual. But that approach is supplemented by a combination of a type of trade and a documentary approach: art. 6 sets out cases where in liner transportation the Rules do not apply, such cases being identified by reference to documents (charterparties and other contractual arrangements) and then cases where in non-liner transportation the Rules instead do apply: it appears, therefore, that such provisions imply that as a general rule the Rules apply to liner transport, in respect of which the contract is contained in or evidenced by a transport document, and do not apply to non-liner transport in respect of which normally the contract is evidenced by a charterparty.

The most significant feature of the provisions on the scope of application is the protection granted to third parties: under the Hague-Visby and the Hamburg Rules such protection is granted only if a bill of lading is issued and is endorsed to a third party; under the Rotterdam Rules instead in all situations excluded from their scope of application the Rules nevertheless apply in respect of parties other than the original contracting party, irrespective of a negotiable transport document (such as a bill of lading) or a negotiable electronic transport record being issued or not, as well as irrespective of any document being issued or not.

HAGUE-VISBY RULES	HAMBURG RULES	ROTTERDAM RULES
<p><i>Article 1</i> In these Rules the following words are employed, with the meanings set out below: (b) ‘Contract of carriage’ applies only to contracts of carriage covered by a bill of</p>	<p><i>Article 2. Scope of application</i> 3. The provisions of this Convention are not applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if</p>	<p><i>Article 6. Specific exclusions</i> 1. This Convention does not apply to the following contracts in liner transportation: (a) Charter parties; and (b) Other contracts for the use of a ship or of any space thereon.</p>

<p>lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.</p> <p>(c) 'Goods' includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.</p> <p>... ..</p>	<p>it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.</p>	<p>2. This Convention does not apply to contracts of carriage in non-liner transportation except when:</p> <p>(a) There is no charter party or other contract between the parties for the use of a ship or of any space thereon; and</p> <p>(b) A transport document or an electronic transport record is issued.</p> <p><i>Article 7. Application to certain parties</i></p> <p>Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charter party or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.</p>
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4. Period of application and period of responsibility of the carrier

On the basis of the (indeed not very clear) definition of carriage of goods in article 1(e) of the Hague-Visby Rules, it is now settled that the period of their application is, for dry cargo, from the beginning of loading of the goods on the ship to the completion of their discharge from the ship. Therefore, since very frequently – this is always the case in the liner trade – the carrier takes the goods in charge before their loading on board and delivers them to the consignee in a warehouse of the port of discharge, there are periods when the goods are in the custody of the carrier to which the Hague-Visby Rules do not apply. That creates uncertainty, because the rules applicable may vary from port to port.

Such uncertainty is cured by the Hamburg Rules, for they provide that their period of application (as well as the period of responsibility of the carrier under the Convention) is that during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge. Therefore, in a port-to-port contract the Rules normally apply to the whole period during which the carrier is in charge of the goods. But this is not the case in a door-to-door contract or when the terminals of the carrier are outside the port area, because the rules applicable would be different, nor are there in the Hamburg Rules provisions on the allocation of the burden of proof as to the conditions of the goods when they arrive to the port of loading and when they leave the port of discharge.

Under the Rotterdam Rules the period of application and the period of responsibility of the carrier coincide with that during which the carrier is in charge of the goods, wherever he receives and delivers them, except where the goods must be handed over to

an authority in the place of receipt or in the place of delivery (an exception that would apply, it is thought, only in port-to-port contracts).

HAGUE-VISBY RULES	HAMBURG RULES	ROTTERDAM RULES
<p><i>Article 1</i> (e) “Carriage of goods” covers the period from the time when the goods are loaded on to the time they are discharged from the ship.</p>	<p><i>Article 4. Period of responsibility</i> 1. The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.</p>	<p><i>Article 12</i> <i>Period of responsibility of the carrier</i> 1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.</p>

5. Obligations of the carrier

The original nature of the Hague Rules as standard bills of lading clauses may explain why the basic obligation of the carrier, viz. to deliver the goods to the consignee, is not mentioned. Nor is it mentioned – and this is surprising – in the Hamburg Rules, even though it is implied in its article 5(1). Such obligation is instead set out in article 11 of the Rotterdam Rules.

Provisions are made in the Hague-Visby Rules regarding the obligations of the carrier to make the ship seaworthy and to care for the cargo, while no reference to them is made in the Hamburg Rules, since it has been deemed sufficient to provide in article 5(1) that the carrier is liable unless he proves that he and his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

The traditional obligations of the carrier to exercise due diligence to make the ship seaworthy and to care for the goods have been preserved in the Rotterdam Rules but the first of such obligations has been made continuous (the second was already so). There is in fact no reason why, once the ship has sailed from a port, the owner should be relieved from any duty to ensure its seaworthiness¹. He may not, of course, take the same kind of actions as when the ship is in a port, but nevertheless the actions that are possible must be taken. This is at present already required by the provisions of the ISM Code.

As regards transport documents, in both the Hague-Visby Rules and the Hamburg Rules it is provided that the carrier must issue a bill of lading but then in the Hamburg Rules provision is also made for the case where the carrier issues a document “other than a bill of lading” without any indication, however, as to when the carrier may do so and as to the nature of such document.

¹ The Harter Act by stating in section 2 that it was unlawful to insert in any bill of lading or shipping document any covenant whereby the obligation of the owner to exercise due diligence inter alia to make the vessel seaworthy and capable of performing her intended voyage impliedly restricted that obligation to the time preceding the commencement of the voyage. However both the Australian Sea-Carriage of Goods Act, 1904 and the Canadian Water-Carriage of Goods Act, 1910 provided, respectively in sections 5 (b) and 4 (b), that any covenant whereby the obligation inter alia to make and keep the vessel seaworthy is lessened or avoided would be illegal.

In the Rotterdam Rules various alternatives are set out in article 35: the carrier is bound to issue, at the shipper's option, a negotiable or a non-negotiable transport document unless it is the custom, usage or practice of the trade not to use one. The only question that may arise is whether the carrier, required to issue a negotiable transport document, may issue a negotiable document that expressly states that the goods may be delivered without the surrender of the transport document: a type of document reference to which is made in article 47(2). It is thought that this is not the case, for such particular type of negotiable transport document constitutes an exception to the ordinary character of such document as a surrender document and, therefore, the carrier may not issue the document mentioned in article 47(2) unless required by, or with the consent of, the shipper.

HAGUE-VISBY RULES	HAMBURG RULES	ROTTERDAM RULES
<p data-bbox="368 701 464 730"><i>Article 2</i></p> <p data-bbox="236 734 596 1066">Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.</p> <p data-bbox="368 1099 464 1128"><i>Article 3</i></p> <p data-bbox="236 1133 596 1249">1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:</p> <p data-bbox="236 1254 596 1312">(a) Make the ship seaworthy;</p> <p data-bbox="236 1317 596 1375">(b) Properly man, equip and supply the ship;</p> <p data-bbox="236 1379 596 1554">(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.</p> <p data-bbox="236 1559 596 1733">2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.</p> <p data-bbox="236 1738 596 1767">.....</p>		<p data-bbox="1118 701 1214 730"><i>Article 11</i></p> <p data-bbox="1023 734 1310 792"><i>Carriage and delivery of the goods</i></p> <p data-bbox="999 797 1342 972">The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.</p> <p data-bbox="999 976 1342 1005"><i>Article 13. Specific obligations</i></p> <p data-bbox="999 1010 1342 1218">1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.</p> <p data-bbox="999 1223 1342 1585">2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.</p> <p data-bbox="999 1619 1342 1677"><i>Article 14. Specific obligations applicable to the voyage by sea</i></p> <p data-bbox="999 1682 1342 1798">The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:</p> <p data-bbox="999 1803 1342 1861">(a) Make and keep the ship seaworthy;</p> <p data-bbox="999 1865 1342 1982">(b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage;</p>

		<p>and (c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.</p>
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6. Liability of the carrier and allocation of the burden of proof

The first difference between the three Conventions consists in the fact that the Hague-Visby Rules do not cover liability for delay while both the Hamburg Rules and the Rotterdam Rules do.

As regards the basis of the liability of the carrier, although the basis is fault under all Rules, there are significant differences between them in respect of the exceptions to the general rule that fault entails liability and of the allocation of the burden of proof.

Under the Hague-Visby Rules the carrier is exonerated from liability a) in respect of loss of or damage to the goods arising or resulting from unseaworthiness unless caused by the breach by the carrier of his due diligence obligation and, b) as well as for loss of or damage to the goods arising from fault of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship and for loss of or damage to the goods due to fire caused by fault of the crew.

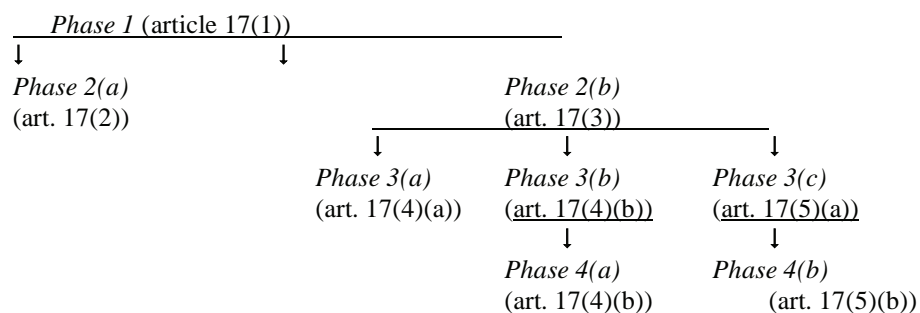
Under the Hamburg Rules and the Rotterdam Rules instead the carrier is always liable for loss, damage or delay caused by fault of the carrier, his servants or agents.

There is a difference between the Hamburg Rules and the Rotterdam Rules in respect of the liability regime for live animals. Pursuant to article 5(5) of the Hamburg Rules the carrier is not liable for loss, damage or delay resulting from any special risks inherent in their carriage. Under the Rotterdam Rules instead no particular rules are provided but freedom of contract is granted by article 81(a) except where loss, damage or delay results from an act or omission 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.

In so far as the allocation of the burden of proof is concerned neither the Hague-Visby Rules nor the Hamburg Rules make any reference to the initial burden a proof laying on the claimant. The Rotterdam Rules instead do and provide in article 17(1) that the carrier is liable if the claimant proves that the loss, damage or delay took place during the period of the carrier's responsibility. The burden of proof then shifts on the carrier and the Hague-Visby Rules and the Rotterdam Rules differ from the Hamburg Rules: the Hague-Visby Rules and the Rotterdam Rules provide two alternatives, the first being the proof that the loss, damage or delay is not attributable to the fault of the carrier or the fault of any person for whom he is liable and the second being only a presumption of absence of fault if the carrier proves that the loss, damage or delay is

caused by an excepted peril. The Hamburg Rules instead ignore the reversal of the burden of proof alternative except for the loss, damage or delay caused by fire.

The subsequent burden of proof laying on the claimant is then regulated in a more detailed manner in the Rotterdam Rules, pursuant to which the claimant may prove either that the excepted peril was caused by the fault of the carrier or of a person for whom he is liable or that an event other than an excepted peril contributed to the loss, damage or delay. The Rotterdam Rules then provide for a further alternative in favour of the claimant, consisting of the proof that the loss, damage or delay was probably caused or contributed to by unseaworthiness of the vessel, in which event the carrier may prove that he had exercised due diligence in making and keeping the vessel seaworthy. The following diagram shows the various phases of the shifting of the burden of proof:



The Rotterdam Rules have thereby codified principles adopted by the jurisprudence that has correctly qualified the excepted perils enumerated in article 4(2) from (c) to (p) as reversals of the burden of proof (only the excepted perils enumerated under (a) and (b) being actual exonerations) and has consequently allowed the claimant to defeat the presumption of absence of fault precisely by proving that the event invoked by the carrier was caused or contributed to by the fault of the carrier or that an event other than that invoked by the carrier (not being an excepted peril) contributed to the loss or damage.

The fact that in such case the claimant must identify the event that contributed to the loss or damage does not worsen his position, but is a logical consequence of the fact that the carrier, instead of merely proving the absence of fault, has identified the event that caused the loss or damage. In order to overcome the presumption the claimant must either prove the fault of the carrier or that another event caused or contributed to the loss or damage. This is, by the way, also the regime adopted by the Hamburg Rules in case of loss, damage or delay caused by fire. Nor does the allocation of the burden of proof in case of loss, damage or delay caused by unseaworthiness worsen the position of the claimant as respects that presently in existence under the Hague-Visby Rules. In fact while under the Hague-Visby Rules article 4(1) it is the claimant that, in case he alleges that the loss of or damage to the goods was caused by unseaworthiness has the burden of proving his allegation (and then the carrier has the burden of proving the exercise of due diligence), pursuant to article 17(5)(a) of the Rotterdam Rules the burden of proof of the claimant is lighter, since he must only prove that the loss, damage or delay was **probably** caused by unseaworthiness: probability, therefore, not certainty.

A special provision on the allocation of the burden of proof exists in the Hamburg Rules in respect of live animals. Pursuant to article 5(5) if the carrier proves that in the circumstances of the case the loss, damage or delay could be attributed to the special risks inherent in their carriage it is presumed that it was so caused unless the claimant proves that it was wholly or partly caused by fault of the carrier or of his servants or agents.

HAGUE-VISBY RULES	HAMBURG RULES	ROTTERDAM RULES
<p style="text-align: center;"><i>Article 1</i></p> <p>In these Rules the following words are employed, with the meanings set out below:</p> <p>(c) 'Goods' includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.</p> <p style="text-align: center;"><i>Article 4</i></p> <p>1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.</p> <p>2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:</p> <p>(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.</p> <p>(b) Fire, unless caused by the actual fault or privity of the carrier.</p> <p>(c) Perils, dangers and</p>	<p style="text-align: center;"><i>Article 5. Basis of liability</i></p> <p>1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.</p> <p>2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.</p> <p>3. The person entitled to make a claim for the loss of goods may treat the goods as lost if they have not been delivered as required by article 4 within 60 consecutive days following the expiry of the time for delivery according to paragraph 2 of this article.</p> <p>4. (a) The carrier is liable (i) 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;</p> <p>(ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or</p>	<p style="text-align: center;"><i>Article 17. Basis of liability</i></p> <p>1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.</p> <p>2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.</p> <p>3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:</p> <p>(a) Act of God;</p> <p>(b) Perils, dangers, and accidents of the sea or other navigable waters;</p> <p>(c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;</p> <p>(d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;</p> <p>(e) Strikes, lockouts, stoppages, or restraints of labour;</p>

<p>accidents of the sea or other navigable waters.</p> <p>(d) Act of God.</p> <p>(e) Act of war.</p> <p>(f) Act of public enemies.</p> <p>(g) Arrest or restraint of princes, rulers or people, or seizure under legal process.</p> <p>(h) Quarantine restrictions.</p> <p>(i) Act or omission of the shipper or owner of the goods, his agent or representative.</p> <p>(j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.</p> <p>(k) Riots and civil commotions.</p> <p>(l) Saving or attempting to save life or property at sea.</p> <p>(m) Wastage in bulk of weight or any other loss or damage arising from inherent defect, quality or vice of the goods.</p> <p>(n) Insufficiency of packing.</p> <p>(o) Insufficiency or inadequacy of marks.</p> <p>(p) Latent defects not discoverable by due diligence.</p> <p>(q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.</p>	<p>neglect of the carrier, his servants or agents in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.</p> <p>(b) In case of fire on board the ship affecting the goods, if the claimant or the carrier so desires, a survey in accordance with shipping practices must be held into the cause and circumstances of the fire, and a copy of the surveyors report shall be made available on demand to the carrier and the claimant.</p> <p>5. With 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. If the carrier proves that he has complied with any special instructions 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 servants or agents.</p> <p>6. The 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.</p> <p>7. 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.</p>	<p>(f) Fire on the ship;</p> <p>(g) Latent defects not discoverable by due diligence;</p> <p>(h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34;</p> <p>(i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;</p> <p>(j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;</p> <p>(k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;</p> <p>(l) Saving or attempting to save life at sea;</p> <p>(m) Reasonable measures to save or attempt to save property at sea;</p> <p>(n) Reasonable measures to avoid or attempt to avoid damage to the environment; or</p> <p>(o) Acts of the carrier in pursuance of the powers conferred by articles 15 and 16.</p> <p>4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:</p> <p>(a) If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies; or</p> <p>(b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in</p>
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		<p>article 18.</p> <p>5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:</p> <p>(a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods; and</p> <p>(b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) it complied with its obligation to exercise due diligence pursuant to article 14.</p> <p>6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.</p> <p><i>Article 24. Deviation</i></p> <p>When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 61.</p> <p><i>Article 81. Special rules for live animals and certain other goods</i></p> <p>Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime</p>
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		performing party if: (a) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier or of a person referred to in article 18, done with the intent to cause such loss of or damage to the goods or such loss due to delay or done recklessly and with knowledge that such loss or damage or such loss due to delay would probably result; or
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7. Liability of the carrier for other persons

The categories of persons for whom the carrier is liable gradually increase from the Hague-Visby Rules to the Hamburg Rules and the Rotterdam Rules.

Under the Hague-Visby Rules, except for the exonerations mentioned in article 4(1)(a) and (b), the carrier is liable for the faults of his servants or agents; a liability that results by implication from article 4(2)(q). The category of the agents appears to be rather limited, because article 4bis(2) provides that they do not include independent contractors and because the scope of application of the Hague-Visby Rules is limited to the period between commencement of loading on and completion of discharge from the ship; therefore, actions performed ashore in the ports of loading and discharge are not subject to the Hague-Visby Rules. But agents probably include the master and crew of the ship if they are not under the employment of the carrier, as is the case where the carrier is the time charterer of the ship.

Also in article 5(1) of the Hamburg Rules reference is made to the servants or agents of the carrier but, since the exclusion of independent contractors does not result from other provisions, agents may include also independent contractors performing services within the port areas. Furthermore, pursuant to article 10 (1) the carrier is responsible for loss, damage or delay for which a sub-carrier is liable.

The categories of persons for whom the carrier is responsible increase under the Rotterdam Rules. They in fact include, pursuant to article 18, performing parties, both maritime (i.e. sub-carriers performing in whole or in part the carriage in respect of the sea leg and all independent contractors performing services within the port area) and non-maritime (e.g. sub-carriers performing carriage in-land), as well as the master and crew of the ship and the employees of the carrier and of any performing party.

HAGUE-VISBY RULES	HAMBURG RULES	ROTTERDAM RULES
<i>Article 4</i> 2. Neither the carrier nor the ship shall be responsible for loss	<i>Article 5. Basis of liability</i> 1. The carrier is liable for loss resulting from loss of or damage	<i>Article 18. Liability of the carrier for other persons</i> The carrier is liable for the

<p>or damage arising or resulting from:</p> <p>(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.</p> <p>(b) Fire, unless caused by the actual fault or privity of the carrier.</p> <p>... ..</p> <p>(q) Any other cause arising without the actual fault or privity of the carrier, or without the actual fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.</p>	<p>to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.</p> <p><i>Article 10. Liability of the carrier and actual carrier</i></p> <p>1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.</p>	<p>breach of its obligations under this Convention caused by the acts or omissions of:</p> <p>(a) Any performing party;</p> <p>(b) The master or crew of the ship;</p> <p>(c) Employees of the carrier or a performing party; or</p> <p>(d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.</p>
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8. Liability of servants, agents and independent contractors

The Hague-Visby Rules and the Hamburg Rules do not regulate the liability of the servants or agents but merely provide, respectively in article 4bis (1) and in article 7(2), that if an action is brought against them, they are entitled to the defences and limits of liability of the carrier. The question may therefore arise whether the formulation adopted in both such Rules entails that the servants or agents are also subject to the liabilities of the carrier. But although that should be the logical consequence, and, therefore, the claimant should be entitled to sue the agent in contract, in the Hamburg Rules the heading of article 7 is “Application to non-contractual claims”. The position is different for the actual carrier, for article 10 of the Hamburg Rules provides that the liability regime applicable to the carrier applies also to the actual carrier, thereby implying that the claimant has a direct right of action against him.

The Rotterdam Rules have provisions similar to those of the Hague-Visby Rules and the Hamburg Rules in respect of the servants and agents of the carrier but with the adoption of the notion of maritime performing party they have widened the category of persons to whom they apply and clearly provide that all such persons are subject also to the obligations and liabilities of the carrier. The action against them is, therefore, clearly in contract.

HAGUE-VISBY RULES	HAMBURG RULES	ROTTERDAM RULES
<p data-bbox="347 297 485 327"><i>Article 4 bis</i></p> <p data-bbox="237 331 596 629">2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.</p> <p data-bbox="237 633 596 813">3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in these Rules.</p>	<p data-bbox="635 297 956 360"><i>Article 7. Application to non-contractual claims</i></p> <p data-bbox="616 365 975 663">1. The defences and limits of liability provided for in this Convention apply in any action against the carrier in respect of loss of or damage to the goods covered by the contract of carriage by sea, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise.</p> <p data-bbox="616 667 975 936">2. 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 defences and limits of liability which the carrier is entitled to invoke under this Convention.</p> <p data-bbox="616 940 975 1151">3. Except as provided in article 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.</p> <p data-bbox="655 1182 935 1245"><i>Article 10. Liability of the carrier and actual carrier</i></p> <p data-bbox="616 1249 855 1272">... ..</p> <p data-bbox="616 1276 975 1608">2. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of paragraph 2 of article 8 apply if an action is brought against a servant or agent of the actual carrier.</p> <p data-bbox="616 1612 975 1998">3. Any special agreement under which the carrier assumes obligations not imposed by this Convention or waives rights conferred by this Convention affects the actual carrier only if agreed to by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement.</p>	<p data-bbox="1002 297 1345 360"><i>Article 19. Liability of maritime performing parties</i></p> <p data-bbox="995 365 1355 602">1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:</p> <p data-bbox="995 607 1355 844">(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and</p> <p data-bbox="995 848 1355 1305">(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.</p> <p data-bbox="995 1310 1355 1673">2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.</p> <p data-bbox="995 1677 1355 1998">3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.</p>

	<p>4. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.</p> <p>5. The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability provided for in this Convention.</p> <p>6. Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier.</p>	<p>4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.</p>
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9. Notice of loss, damage or delay

Under the Hague-Visby Rules the notice must be given before or at the time of delivery and, if the loss or damage is not apparent, within three days of delivery. Under the Hamburg Rules the notice must be given not later than the working day after delivery or, when the loss or damage is not apparent, within 15 days after delivery. Both Rules provide that failing such notice delivery is *prima facie* evidence of delivery of the goods as described in the bill of lading or transport document.

The Rotterdam Rules provide that the notice must be given before or at the time of delivery and, if the loss or damage is not apparent, within seven days of delivery. They then regulate the consequence of the failure to give such notice by providing that the failure does not affect the right to claim compensation and the allocation of the burden of proof set out in article 17. This wording is not satisfactory, because the actual intention was to make clear that the notice – and not the failure to give it – does not affect the allocation of the burden of proof. In other words the notice does not relieve the claimant of the burden of proving that the loss or damage occurred when the goods were in the custody of the carrier.

HAGUE-VISBY RULES	HAMBURG RULES	ROTTERDAM RULES
<p><i>Article III</i></p> <p>6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be <i>prima facie</i> evidence of the delivery by the carrier of the goods as described in the bill of lading. The notice in writing need not</p>	<p><i>Article 19. Notice of loss, damage or delay</i></p> <p>1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the carrier not later than the working day after the day when the goods were handed over to the consignee, such handing over is <i>prima facie</i> evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition.</p> <p>2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply</p>	<p><i>Article 23. Notice in case of loss, damage or delay</i></p> <p>1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of loss of or damage to the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days at the place of delivery after the delivery of the goods.</p> <p>2. Failure to provide the notice</p>

<p>be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection.</p> <p>.....</p>	<p>correspondingly if notice in writing is not given within 15 consecutive days after the day when the goods were handed over to the consignee.</p> <p>3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.</p> <p>4. In the case of any actual or apprehended loss or damage, the carrier and the consignee must give all reasonable facilities to each other for inspecting and tallying the goods.</p> <p>5. No compensation shall be payable for loss resulting from delay in delivery unless a notice has been given in writing to the carrier within 60 consecutive days after the day when the goods were handed over to the consignee.</p> <p>6. If the goods have been delivered by an actual carrier, any notice given under this article to him shall have the same effect as if it had been given to the carrier; and any notice given to the carrier shall have effect as if given to such actual carrier.</p> <p>7. Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the carrier or actual carrier to the shipper not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2 of article 4, whichever is later, the failure to give such notice is <i>prima facie</i> evidence that the carrier or the actual carrier has sustained no loss or damage due to the fault or neglect of the shipper, his servants or agents.</p> <p>8. For the purpose of this article, notice given to a person acting on the carriers or the actual carriers behalf, including</p>	<p>referred to in this article to the carrier or the performing party shall not affect the right to claim compensation for loss of or damage to the goods under this Convention, nor shall it affect the allocation of the burden of proof set out in article 17.</p> <p>3. The notice referred to in this article is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the person to which they have been delivered and the carrier or the maritime performing party against which liability is being asserted.</p> <p>4. No compensation in respect of delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.</p> <p>5. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.</p> <p>6. In the case of any actual or apprehended loss or damage, the parties to the dispute shall give all reasonable facilities to each other for inspecting and tallying the goods and shall provide access to records and documents relevant to the carriage of the goods.</p>
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	the master or the officer in charge of the ship, or to a person acting on the shippers behalf is deemed to have been given to the carrier, to the actual carrier or to the shipper, respectively.	
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10. Obligations and liability of the shipper

The Hague-Visby Rules have three provisions on the obligations and liability of the shipper scattered in different parts of the text. First, in article 3(5) they provide that the shipper is deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight furnished by him. Secondly in article 4(3) they provide that the shipper is not responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without its act, fault or neglect, thereby implying, with a language similar to that used in article 4(2) for the carrier, that the shipper is liable for loss or damage sustained by the carrier caused by the act, fault or neglect of the shipper. Thirdly, article 4(6) provides that the shipper is liable for all damages and expenses directly and indirectly arising out of or resulting from the shipment of dangerous goods the shipment whereof the carrier has not consented with knowledge of their character. Strict liability in the first and third case; fault liability in the second case.

The Hamburg Rules mainly regulate the liability of the shipper in Part III, consisting of two articles, 12 and 13. Article 12 corresponds to article 4(3) of the Hague-Visby Rules and article 13 corresponds to article 4(6) but expressly states that the shipper must inform the carrier of the dangerous nature of the goods.

One aspect of the liability of the shipper – liability for incorrect description of the goods – is, however, dealt with in the subsequent Part IV that deals with transport documents: article 17 in fact contains a provision similar to that in article 3(5) of the Hague-Visby Rules.

The Rotterdam Rules regulate in chapter 7 the obligations and the liability of the shipper in much greater details. They provide in article 27 that the shipper must deliver the goods in such conditions that they will withstand the intended carriage, including handling, loading, lashing and unloading. They then provide in article 29 that the shipper must provide information, instructions and documents relating to the goods, not otherwise available to the carrier, necessary for the proper handling and carriage of the goods and for the carrier to comply with laws and regulations applicable to the intended carriage and in article 31 that the shipper must provide information for the compilation of the contract document. Finally, in article 32 they set out rules for the carriage of dangerous goods and in this respect they slightly restrict the liability of the shipper as compared to the Hamburg Rules, since they state that the shipper is liable for loss or damage caused by the goods resulting from his failure to inform the carrier of the dangerous nature of the goods if the carrier does not otherwise have knowledge of such dangerous nature.

The liability for the breach of the obligations set out in articles 31 and 32 is strict, that for the breach of the obligations set out in articles 27 and 29 is based on fault.

It is thought that these provisions clarify the nature of the obligations of the shipper that already exist and, therefore, their breach would entail the liability of the shipper under article 4(3) of the Hague-Visby Rules and under article 12 of the Hamburg Rules. In order to verify whether this conclusion is correct it is convenient to carry out a separate analysis of the obligations of the shipper under the Rotterdam Rules and their comparison with the corresponding provisions of the Hague-Visby and the Hamburg Rules.

Delivery of the goods for carriage (article 27 of the Rotterdam Rules, article 4(3) of the Hague-Visby Rules and article 12 of the Hamburg Rules)

The difference between the provision of the Rotterdam Rules and those of the Hague-Visby and Hamburg Rules consists in that the two latter Conventions do not specify which the obligations of the shippers are as regards the preparation of the goods for carriage. There cannot be any doubt, however, that such obligations do exist even if they are not specified and, as regards the Hague-Visby Rules, this is confirmed by the reference to insufficiency of packing amongst the except perils (article 4(2)(n)).

As regards the allocation of the burden of proof, no provision is made in that respect in the Hague-Visby Rules and in the Hamburg Rules, but the wording used in both indicates that the burden of proof is on the carrier. This is clearly the case in the Rotterdam Rules: article 30(1) in fact states that expressly. Nor does the reference in article 27/2 to the obligation of the shipper to properly and carefully perform the loading, stowing and unloading of the goods mentioned in article 13(2) in case the shipper has agreed to perform such activities (an agreement not conceivable in the normal liner trade and in the door-to-door carriage) affect the allocation of the burden of proof set out in article 30(1).

Information for the compilation of the contract particulars (article 31 of the Rotterdam Rules, article 3(5) of the Hague-Visby Rules and article 17(1) of the Hamburg Rules)

The wording of article 3(5) of the Hague-Visby Rules and of article 17(1) of the Hamburg Rules is practically identical. That of article 31 of the Rotterdam Rules is different, but the substance is the same, and the obligations of the shipper are not increased.

Liability is strict in all three Conventions. Although this is stated only in article 30(2) of the Rotterdam Rules pursuant to which the rule whereby the shipper is relieved of all or part of its liability if the cause of loss or damage is not attributable to its fault or the fault of any person for which it is liable does not apply to article 31(2) and 32 the fact that also the other Conventions qualify the obligation of the shipper as a warranty leads to the same conclusion.

Obligation to provide information, instructions and documents (article 29 of the Rotterdam Rules (no corresponding provision on the Hague-Visby and Hamburg Rules)

Although there are no corresponding provisions in the other Conventions, it is thought that the obligations set out on article 29 of the Rotterdam Rules are in line with the normal practice and that, therefore, the Rotterdam Rules have merely codified an implied obligation in the contracts of carriage of goods by sea, the allocation of the burden of proof being that set out in article 30(1) of the Rotterdam Rules.

Dangerous goods (article 32 of the Rotterdam Rules, article 4(6) of the Hague-Visby Rules and article 13 of the Hamburg Rules)

In none of the Conventions there is a definition of dangerous goods. But while in the Hague-Visby Rules reference is made to the inflammable, explosive or dangerous nature of the goods (as if inflammable or explosive goods could not be qualified as dangerous), and merely reference to goods of a dangerous character is made in the Hamburg Rules, in the Rotterdam Rules the danger is related to persons, property and the environment. This, it is thought, better identifies the situations in which the goods may be treated as belonging to the category of dangerous goods.

Under the Hague-Visby Rules the shipper is liable for damages caused by dangerous goods shipped without the knowledge by the carrier of their dangerous nature. From the words “shipped without knowledge” follows that if the carrier was aware of the dangerous nature of the goods the shipper is not liable. Under the Hamburg Rules the shipper is bound to inform the carrier of the dangerous nature of the goods and if necessary of the precautions to be taken and is liable to the carrier for the loss resulting from their shipment if the carrier does not otherwise have knowledge of their dangerous character. Under the Rotterdam Rules the shipper has two distinct obligations: to inform the carrier of the dangerous nature of the goods and to mark and label them in accordance with applicable law, regulations or other requirements of the public authorities. The breach of the first obligation gives rise to the liability of the shipper, as for the Hague-Visby and the Hamburg Rules, only if the carrier does not otherwise have knowledge of the dangerous character of the goods. In this respect the regime is the same in all Conventions.

The additional obligation mentioned in article 32(2) of the Rotterdam Rules, to mark or label the goods, does not arise from that article but from the applicable law regulations or other requirements of the public authorities and, therefore, does not give rise to an obligation that the shipper does not have when the Hague-Visby or the Hamburg Rules apply. Nor does the ensuing liability of the shipper in respect of any loss caused to the carrier in case of its breach constitute a novelty, because it would exist also when the Hague-Visby or the Hamburg Rules apply.

Liability is strict under all Conventions and, although this is not expressly stated, the shipper has the burden of proving that the loss resulted from the dangerous nature of the goods, while the carrier has the burden of proving that the carrier had not otherwise knowledge of their dangerous character.

It appears, therefore, that also in respect of dangerous goods the liability of the shipper does not increase under the Rotterdam Rules.

HAGUE-VISBY RULES	HAMBURG RULES	ROTTERDAM RULES
<p style="text-align: center;"><i>Article 3</i></p> <p>5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.</p> <p style="text-align: center;"><i>Article 4</i></p> <p>.....</p> <p>3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.</p> <p>.....</p> <p>6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier</p>	<p style="text-align: center;"><i>Article 12. General rule</i></p> <p>The shipper is not liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor is any servant or agent of the shipper liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part.</p> <p style="text-align: center;"><i>Article 13. Special rules on dangerous goods</i></p> <p>1. The shipper must mark or label in a suitable manner dangerous goods as dangerous.</p> <p>2. Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper must inform him of the dangerous character of the goods and, if necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character:</p> <p>(a) the shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and</p> <p>(b) the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.</p> <p>3. The provisions of paragraph 2 of this article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character.</p> <p>4. If, in cases where the provisions of paragraph 2, subparagraph (b), of this article do not apply or may not be</p>	<p style="text-align: center;"><i>Article 27. Delivery for carriage</i></p> <p>1. Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.</p> <p>2. The shipper shall properly and carefully perform any obligation assumed under an agreement made pursuant to article 13, paragraph 2.</p> <p>3. When a container is packed or a vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container or vehicle, and in such a way that they will not cause harm to persons or property.</p> <p style="text-align: center;"><i>Article 28. Cooperation of the shipper and the carrier in providing information and instructions</i></p> <p>The carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party.</p> <p style="text-align: center;"><i>Article 29. Shipper's obligation to provide information, instructions and documents</i></p> <p>1. The shipper shall provide to the carrier in a timely manner such information, instructions</p>

<p>except to general average, if any.</p>	<p>invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 5.</p> <p><i>Article 17. Guarantees by the shipper</i></p> <p>1. The shipper is deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper must indemnify the carrier against the loss resulting from inaccuracies in such particulars. The shipper remains liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity in no way limits his liability under the contract of carriage by sea to any person other than the shipper.</p> <p>2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss resulting from the issuance of the bill of lading by the carrier, or by a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, is void and of no effect as against any third party, including a consignee, to whom the bill of lading has been transferred.</p> <p>3. 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 the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including a consignee, who acts</p>	<p>and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary:</p> <p>(a) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and</p> <p>(b) For the carrier to comply with law, regulations or other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.</p> <p>2. Nothing in this article affects any specific obligation to provide certain information, instructions and documents related to the goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.</p> <p><i>Article 30. Basis of shipper's liability to the carrier</i></p> <p>1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.</p> <p>2. Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 31, paragraph 2, and 32, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34.</p> <p>3. When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 34.</p>
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	<p>in reliance on the description of the goods in the bill of lading. In the latter case, if the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier has no right of indemnity from the shipper pursuant to paragraph 1 of this article.</p> <p>4. In the case of intended fraud referred to in paragraph 3 of this article, the carrier is liable, without the benefit of the limitation of liability provided for in this Convention, for the loss incurred by a third party, including a consignee, because he has acted in reliance on the description of the goods in the bill of lading.</p>	<p><i>Article 31. Information for compilation of contract particulars</i></p> <p>1. The shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 36, paragraph 1; the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any.</p> <p>2. The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this article. The shipper shall indemnify the carrier against loss or damage resulting from the inaccuracy of such information.</p> <p><i>Article 32. Special rules on dangerous goods</i></p> <p>When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:</p> <p>(a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and</p> <p>(b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public</p>
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		<p>authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.</p> <p><i>Article 33. Assumption of shipper's rights and obligations by the documentary shipper</i></p> <p>1. A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 55, and is entitled to the shipper's rights and defences provided by this chapter and by chapter 13.</p> <p>2. Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.</p> <p><i>Article 34. Liability of the shipper for other persons</i></p> <p>The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.</p>
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11. Contract documents

The Hague-Visby Rules provide in *article 3(3)* that after receiving the goods into his charge the carrier must on demand of the shipper issue a bill of lading and in article 3(7) that after the goods are loaded the carrier must issue a shipped bill of lading. They then set out, still in article 3(3), the particulars of the goods that must be indicated in the bill of lading and provide that the carrier is not bound to state particulars that he has reasonable ground for suspecting not accurately to represent the goods. A provision that was, even at the time of adoption of the Rules, at odds with the practice of qualifying the description of the goods with clauses such as "said to weigh", etc. Finally, pursuant to an amendment adopted in 1968, article 3(4) provides a protection for the *bona fide* holder of the bill of lading by stating that proof to the contrary of the description of the goods is not admissible when the bill of lading has been transferred to a third party acting in good faith.

The Hamburg Rules, after providing in article 14 that the carrier upon receiving the goods into his charge must issue to the shipper a bill of lading, enumerate with much greater details the contract particulars and then, similarly to article 3(7) of the Hague-Visby Rules, provide that the carrier after loading the goods must issue a shipped bill of lading. Article 16 regulates the evidentiary effect of the bill of lading similarly to the Hague-Visby Rules and, contrary to the Hague-Visby Rules, grants the carrier the right to qualify the description of the goods, rather than to refuse to insert the particulars when he has reasonable grounds to suspect that they are incorrect.

The Rotterdam Rules regulate transport documents in chapter 8. The issuance of a transport document is the normal situation, but it is not a condition for the application of the Rotterdam Rules, for the issuance of a transport document is not required if carrier and shipper agree otherwise or if it is a custom, usage or practice not to use one. With such exception, pursuant to article 35 the shipper is entitled to obtain a negotiable or a non-negotiable transport document, this second alternative being a novelty as respects the Hague-Visby Rules and the Hamburg Rules.

The list of particulars to be included in the transport document does not significantly differ from that of the Hamburg Rules, but such particulars are divided in three sections: the first lists the particulars to be supplied by the shipper, the second the particulars to be provided by the carrier and the third other particulars that may or may not be added according to the circumstances of the case and are supplied in part by the shipper (name and address of the consignee) and in part by the carrier (name of the ship, places of receipt and delivery, ports of loading and of discharge).

The provisions on the qualification of the information relating to the goods are different from those of the Hague-Visby Rules and the Hamburg Rules both because they include an obligation of the carrier to qualify the information when he has actual knowledge or when he has reasonable grounds to believe that it is false or misleading, and because different rules are set out in respect of goods that are not delivered to the carrier in a closed container and goods that instead are delivered in a closed container, in such latter case the conditions differing according to whether the information relates to the description, the marks or the number or quantity of the goods or relates to their weight.

Another provision that is entirely new is that relating to the identity of the carrier; a provision that will be of considerable assistance to claimants. Pursuant to article 47 if the carrier is identified by name in the contract particulars any other information in the contract document (viz. the "identity of carrier clause") shall have no effect while if no person is identified as carrier and the transport document indicates the name of the ship the registered owner shall be deemed to be the carrier, unless he proves that the ship was under a bareboat charter at the time of the carriage and identifies the bareboat charterer indicating his address. Alternatively the registered owner may identify the carrier indicating his address and the bareboat charterer may do the same.

The provisions of the Rotterdam Rules therefore significantly differ from those of the Hague-Visby Rules and of the Hamburg Rules and appear to be definitely more clear and complete.

HAGUE-VISBY RULES	HAMBURG RULES	ROTTERDAM RULES
<p style="text-align: center;"><i>Article 3</i></p> <p>.....</p> <p>3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:</p> <p>(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.</p> <p>(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.</p> <p>(c) The apparent order and condition of the goods.</p> <p>Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.</p> <p>4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.</p> <p>...</p> <p>7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands be a</p>	<p style="text-align: center;"><i>Article 14. Issue of bill of lading</i></p> <p>1. When the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading.</p> <p>2. The bill of lading may be signed by a person having authority from the carrier. A bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.</p> <p>3. The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.</p> <p style="text-align: center;"><i>Article 15. Contents of bill of lading</i></p> <p>1. The bill of lading must include, <i>inter alia</i>, the following particulars:</p> <p>(a) the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;</p> <p>(b) the apparent condition of the goods;</p> <p>(c) the name and principal place of business of the carrier;</p> <p>(d) the name of the shipper;</p> <p>(e) the consignee if named by the shipper;</p> <p>(f) the port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading;</p> <p>(g) the port of discharge under the contract of carriage by sea;</p> <p>(h) the number of originals</p>	<p style="text-align: center;"><i>Article 35. Issuance of the transport document or the electronic transport record</i></p> <p>Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option:</p> <p>(a) A non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record; or</p> <p>(b) An appropriate negotiable transport document or, subject to article 8, subparagraph (a), a negotiable electronic transport record, unless the shipper and the carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage or practice of the trade not to use one.</p> <p style="text-align: center;"><i>Article 36. Contract particulars</i></p> <p>1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper:</p> <p>(a) A description of the goods as appropriate for the transport;</p> <p>(b) The leading marks necessary for identification of the goods;</p> <p>(c) The number of packages or pieces, or the quantity of goods; and</p> <p>(d) The weight of the goods, if furnished by the shipper.</p> <p>2. The contract particulars in the transport document or electronic transport record</p>

<p>'shipped' bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article III, shall for the purpose of this article be deemed to constitute a 'shipped' bill of lading.</p>	<p>of the bill of lading, if more than one;</p> <p>(i) the place of issuance of the bill of lading;</p> <p>(j) the signature of the carrier or a person acting on his behalf;</p> <p>(k) the freight to the extent payable by the consignee or other indication that freight is payable by him;</p> <p>(l) the statement referred to in paragraph 3 of article 23;</p> <p>(m) the statement, if applicable, that the goods shall or may be carried on deck;</p> <p>(n) the date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties; and</p> <p>(o) any increased limit or limits of liability where agreed in accordance with paragraph 4 of article 6.</p> <p>2. After the goods have been loaded on board, if the shipper so demands, the carrier must issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under paragraph 1 of this article, must state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier the shipper must surrender such document in exchange for a "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shippers 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.</p> <p>3. The absence in the bill of lading of one or more particulars referred to in this article does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the</p>	<p>referred to in article 35 shall also include:</p> <p>(a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;</p> <p>(b) The name and address of the carrier;</p> <p>(c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and</p> <p>(d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.</p> <p>3. The contract particulars in the transport document or electronic transport record referred to in article 35 shall further include:</p> <p>(a) The name and address of the consignee, if named by the shipper;</p> <p>(b) The name of a ship, if specified in the contract of carriage;</p> <p>(c) The place of receipt and, if known to the carrier, the place of delivery; and</p> <p>(d) The port of loading and the port of discharge, if specified in the contract of carriage.</p> <p>4. For the purposes of this article, the phrase "apparent order and condition of the goods" in subparagraph 2 (a) of this article refers to the order and condition of the goods based on:</p> <p>(a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and</p> <p>(b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or electronic transport record.</p>
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	<p>requirements set out in paragraph 7 of article 1.</p> <p><i>Article 16. Bills of lading: reservations and evidentiary effect</i></p> <p>1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages of pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a “shipped” bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person must insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.</p> <p>2. If the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition.</p> <p>3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:</p> <p>(a) the bill of lading is <i>prima facie</i> evidence of the taking over or, where a “shipped” bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and</p> <p>(b) proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein.</p> <p>4. A bill of lading which does not, as provided in paragraph 1, subparagraph (k), of article 15,</p>	<p><i>Article 37. Identity of the carrier</i></p> <p>1. If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification.</p> <p>2. If no person is identified in the contract particulars as the carrier as required pursuant to article 36, subparagraph 2 (b), but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner.</p> <p>3. Nothing in this article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier.</p> <p><i>Article 38. Signature</i></p> <p>1. A transport document shall be signed by the carrier or a person acting on its behalf.</p> <p>2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier’s authorization of the electronic</p>
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	<p>set forth the freight or otherwise indicate that freight is payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, is <i>prima facie</i> evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier is not admissible when the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.</p> <p><i>Article 17. Guarantees by the shipper</i></p> <p>1. The shipper is deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper must indemnify the carrier against the loss resulting from inaccuracies in such particulars. The shipper remains liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity in no way limits his liability under the contract of carriage by sea to any person other than the shipper.</p> <p>2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss resulting from the issuance of the bill of lading by the carrier, or by a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, is void and of no effect as against any third party, including a consignee, to whom the bill of lading has been transferred.</p> <p>3. Such a letter of guarantee or agreement is valid as against the shipper unless the carrier or the person acting on his behalf, by</p>	<p>transport record.</p> <p><i>Article 39. Deficiencies in the contract particulars</i></p> <p>1. The absence or inaccuracy of one or more of the contract particulars referred to in article 36, paragraphs 1, 2 or 3, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.</p> <p>2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be:</p> <p>(a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or</p> <p>(b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship.</p> <p>3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them, the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the carrier or a performing party received them.</p> <p><i>Article 40. Qualifying the information relating to the goods in the contract particulars</i></p> <p>1. The carrier shall qualify the information referred to in article 36, paragraph 1, to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper if:</p> <p>(a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is false or misleading; or</p>
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	<p>omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including a consignee, who acts in reliance on the description of the goods in the bill of lading. In the latter case, if the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier has no right of indemnity from the shipper pursuant to paragraph 1 of this article.</p> <p>4. In the case of intended fraud referred to in paragraph 3 of this article, the carrier is liable, without the benefit of the limitation of liability provided for in this Convention, for the loss incurred by a third party, including a consignee, because he has acted in reliance on the description of the goods in the bill of lading.</p> <p style="text-align: center;"><i>Article 18. Documents other than bills of lading</i></p> <p>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 <i>prima facie</i> evidence of the conclusion of the contract of carriage by sea and the taking over by the carrier of the goods as therein described.</p>	<p>(b) The carrier has reasonable grounds to believe that a material statement in the transport document or electronic transport record is false or misleading.</p> <p>2. Without prejudice to paragraph 1 of this article, the carrier may qualify the information referred to in article 36, paragraph 1, in the circumstances and in the manner set out in paragraphs 3 and 4 of this article to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper.</p> <p>3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container or vehicle, or when they are delivered in a closed container or vehicle and the carrier or a performing party actually inspects them, the carrier may qualify the information referred to in article 36, paragraph 1, if:</p> <p>(a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or</p> <p>(b) The carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information.</p> <p>4. When the goods are delivered for carriage to the carrier or a performing party in a closed container or vehicle, the carrier may qualify the information referred to in:</p> <p>(a) Article 36, subparagraphs 1 (a), (b), or (c), if:</p> <p>(i) The goods inside the container or vehicle have not actually been inspected by the carrier or a performing party; and</p>
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		<p>(ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and</p> <p>(b) Article 36, subparagraph 1 (d), if:</p> <p>(i) Neither the carrier nor a performing party weighed the container or vehicle, and the shipper and the carrier had not agreed prior to the shipment that the container or vehicle would be weighed and the weight would be included in the contract particulars; or</p> <p>(ii) There was no physically practicable or commercially reasonable means of checking the weight of the container or vehicle.</p> <p><i>Article 41. Evidentiary effect of the contract particulars</i></p> <p>Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 40:</p> <p>(a) A transport document or an electronic transport record is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars;</p> <p>(b) Proof to the contrary by the carrier in respect of any contract particulars shall not be admissible, when such contract particulars are included in:</p> <p>(i) A negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith; or</p> <p>(ii) A non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith;</p> <p>(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any of the following contract particulars included in</p>
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		<p>a non-negotiable transport document or a non-negotiable electronic transport record:</p> <p>(i) The contract particulars referred to in article 36, paragraph 1, when such contract particulars are furnished by the carrier;</p> <p>(ii) The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and</p> <p>(iii) The contract particulars referred to in article 36, paragraph 2.</p> <p><i>Article 42. "Freight prepaid"</i> If the contract particulars contain the statement "freight prepaid" or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.</p>
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12. Limitation of liability

The scope of application of the limits of liability has been widened in the Rotterdam Rules. While in fact under the Hague-Visby Rules it covers loss of or damage to or in connection with the goods and under the Hamburg Rules loss of or damage to the goods, in article 59 of the Rotterdam Rules it covers generally breaches of the carrier's obligations under the Rules. Obligations other than that relating to the (timely) delivery of the goods in the same quantity and conditions existing at the time of receipt include a) those under article 35 relating to the issuance of a transport document with the particulars required by article 36, b) those under article 40 to qualify the information relating to the goods if the carrier has actual knowledge or has reasonable grounds to believe that any material statement in the transport document is false or misleading, c) those under articles 45-47 relating to the delivery of the goods and, d) those under article 52 to execute the instructions of the controlling party. In any event the obligation that has been breached must relate to the goods, since the limits pursuant to article 59(1) are referred to the goods "that are the subject of the claim or dispute".

The limits that under the Hague-Visby Rules are **666,67 SDR** per package or unit and **2 SDR** per kilogram, have been increased in the Hamburg Rules to **835 SDR** and **2.5 SDR** respectively and have been further increased in the Rotterdam Rules to **875 SDR** and **3 SDR**: an increase, as respects the Hague-Visby Rules limits, of **31.25%** for the package limit and of **50%** for the per kilogram limit.

The increase of the limit per kilogram has been the subject of extensive negotiations and has been part of a “package” that included inter alia the provision on freedom of contract for volume contracts. Although it was approved by a substantial majority it has not been supported by some important delegations, including China, that considered it too high, and by some other delegations including Germany and Sweden, that considered it too low. The criteria on the basis of which the limit must be assessed may be several and include, inter alia, the average value of the goods carried by sea and the cost of insurance of the liability of the carrier and its impact on freight. Originally, when the Hague Rules limit was discussed, reference was made to the average value of the goods, but when in 1968 the gold pound was replaced by the Poincaré franc, that was not the case anymore. Reference to the average value of the goods was made in the debate that took place during the sessions of the UNCITRAL Working Group in order to oppose to an increase above 2.5 SDR per kilogram. It is thought, however, that if that had really been the basis of the calculation of the limit, other factors must necessarily have subsequently played an important role, since from 1979, when the SDR was adopted as money of account, to 2006 the Special Drawing Right Consumer Price Index rose by 176 per cent.

The limit for economic loss due to delay, that is not mentioned in the Hague-Visby Rules under which liability for delay is not regulated, is under both the Hamburg Rules and the Rotterdam Rules two and one-half times the freight payable in respect of the goods delayed.

The provisions on the loss of the right to limit are almost identical in the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules except that while under the Hague-Visby Rules reference is made to the knowledge that damage would probably occur, under both the Hamburg Rules and the Rotterdam Rules reference is made to the knowledge that such loss (i.e. the loss in respect of which limitation is pleaded) would probably result; a wording similar to that adopted in article 13 of the Athens Convention, in article 4 of the LLMC Convention and in article V(2) of the CLC 1992. The loss in question according to article 61(1) is “the loss resulting from the breach of the carrier’s obligation under this Convention” and this description must be related to the provision in article 59(1) on the limits of liability, pursuant to which “the carrier’s liability for breaches of its obligations under this Convention is limited to ... of the goods that are the subject of the claim or dispute”. While the liability of the carrier is related in article 17(1) to loss of or damage to the goods (or to delay in delivery), here, because reference is made to breaches of the carrier’s obligations rather than to loss of or damage to the goods, it was not possible to refer to the physical loss of or damage to the goods, but rather to the (financial) loss resulting from the breach. The question that arises is, therefore, whether the carrier should have knowledge that his action or omission would have caused to the claimant that challenged the carrier’s right to limit the (financial) loss actually suffered by him as a consequence of the loss of or damage to his goods, or that he should have had merely knowledge that his breach would have caused a loss. In view of the fact that the loss in respect of which the claimant must supply the proof required by article 61 is that that the claimant personally had suffered, it appears that the first alternative is the correct one, even though the knowledge ought not to refer, it is submitted, to the actual amount of such loss.

This view is confirmed by the wording of the parallel provision in article 61(2) in respect of delay in delivery, where the proof required of the claimant is that the delay in delivery (obviously of its goods) resulted from a personal act or omission done “with knowledge that such loss would probably result”: that loss may only be the financial loss suffered by that claimant for the delay in delivery of his goods.

Another difference exists between the provision of the Hague-Visby Rules and the Hamburg Rules and the provision in the Rotterdam Rules: while in the Hague-Visby Rules and in the Hamburg Rules reference is made to acts or omissions of the carrier, thereby giving rise to conflicting views as to whether the acts or omissions of the servants or agents of the carrier might be relevant, in the Rotterdam Rules reference is made to the personal act or omission of the person claiming the right to limit.

HAGUE-VISBY RULES	HAMBURG RULES	ROTTERDAM RULES
<p data-bbox="368 745 464 768"><i>Article 4</i></p> <p data-bbox="237 775 595 1223">5. (a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.</p> <p data-bbox="237 1234 595 1469">(b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.</p> <p data-bbox="237 1480 595 1805">The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.</p> <p data-bbox="237 1816 595 1986">(c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such</p>	<p data-bbox="651 745 946 768"><i>Article 6. Limits of liability</i></p> <p data-bbox="619 775 976 1133">1. (a) The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 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.</p> <p data-bbox="619 1144 976 1435">(b) The liability of the carrier for delay in delivery according to the provisions of article 5 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.</p> <p data-bbox="619 1447 976 1738">(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.</p> <p data-bbox="619 1749 976 1895">2. For the purpose of calculating which amount is the higher in accordance with paragraph 1(a) of this article, the following rules apply:</p> <p data-bbox="619 1906 976 1986">(a) Where a container, pallet or similar article of transport is used to consolidate</p>	<p data-bbox="1000 745 1311 768"><i>Article 59. Limits of liability</i></p> <p data-bbox="1000 775 1358 1402">1. Subject to articles 60 and 61, paragraph 1, the carrier’s liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.</p> <p data-bbox="1000 1413 1358 1827">2. When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.</p> <p data-bbox="1000 1839 1358 1986">3. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this</p>

<p>article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.</p> <p>(d) The unit of account mentioned in this Article is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in sub-paragraph (a) of this paragraph shall be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the Court seized of the case.</p> <p>.....</p> <p>(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.</p> <p>(f) The declaration mentioned in sub-paragraph (a) of this paragraph, if embodied in the bill of lading, shall be prima facie evidence, but shall not be binding or conclusive on the carrier.</p> <p>(g) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph.</p>	<p>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 the goods in such article of transport are deemed one shipping unit.</p> <p>(b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.</p> <p>3. Unit of account means the unit of account mentioned in article 26.</p> <p>4. By agreement between the carrier and the shipper, limits of liability exceeding those provided for in paragraph 1 may be fixed.</p> <p><i>Article 8. Loss of right to limit responsibility</i></p> <p>1. The carrier is not entitled to the benefit of the limitation of liability provided for in article 6 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.</p> <p>2. Notwithstanding the provisions of paragraph 2 of article 7, a servant or agent of the carrier is not entitled to the benefit of the limitation of liability provided for in article 6 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.</p>	<p>article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions.</p> <p>.....</p> <p><i>Article 60. Limits of liability for loss caused by delay</i></p> <p>Subject to article 61, paragraph 2, compensation for loss of or damage to the goods due to delay shall be calculated in accordance with article 22 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable pursuant to this article and article 59, paragraph 1, may not exceed the limit that would be established pursuant to article 59, paragraph 1, in respect of the total loss of the goods concerned.</p> <p><i>Article 61. Loss of the benefit of limitation of liability</i></p> <p>1. Neither the carrier nor any of the persons referred to in article 18 is entitled to the benefit of the limitation of liability as provided in article 59, or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier's obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.</p>
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13. Time for suit

The formulation of the provision on the time for suit in the Hamburg Rules and in the Rotterdam Rules is opposite to that in the Hague-Visby Rules in that it considers the time from the standpoint of the claimant rather than from that of the defendant. Its scope is wider, since it covers any action that may be brought under the Rules. Therefore under the Rotterdam Rules it applies both to any action of the shipper or consignee against the carrier or any maritime performing party as well as to any action of the carrier or any maritime performing party against the shipper, documentary shipper controlling party or consignee.

The limitation period also differs: one year for the Hague-Visby Rules and two years for the Hamburg Rules and the Rotterdam Rules.

The provisions on the commencement and the extension of the limitation period and on actions for indemnity are practically the same in all Rules but instead a difference may exist in respect of the suspension or interruption of the period because nothing is said in that respect in the Hague-Visby Rules and the Hamburg Rules, thereby allowing the possible application of the national law, while suspension and interruption of the limitation period is expressly excluded in the Rotterdam Rules.

A special provision has been added in the Rotterdam Rules in respect of the actions against the person identified as carrier pursuant to article 37(2). Pursuant to article 65 in such case the action may be instituted after the expiration of the two years limitation period within the later of the time allowed by the *lex fori* and ninety days commencing from the day when the carrier has been identified.

HAGUE-VISBY RULES	HAMBURG RULES	ROTTERDAM RULES
<p><i>Article 3</i> 6. Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been</p>	<p><i>Article 20. Limitation of actions</i> 1. Any action relating to carriage of goods under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. 2. The limitation period commences on the day on which the carrier has delivered the</p>	<p><i>Article 62. Period of time for suit</i> 1. No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under this Convention may be instituted after the expiration of a period of two years. 2. The period referred to in</p>

<p>delivered. This period, may however, be extended if the parties so agree after the cause of action has arisen.</p> <p>.....</p> <p>6 bis. An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.</p>	<p>goods or part thereof or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered.</p> <p>3. The day on which the limitation period commences is not included in the period.</p> <p>4. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.</p> <p>5. An action for indemnity by a person held liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if 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.</p>	<p>paragraph 1 of this article commences on the day on which the carrier has delivered the goods or, in cases in which no goods have been delivered or only part of the goods have been delivered, on the last day on which the goods should have been delivered. The day on which the period commences is not included in the period.</p> <p>3. Notwithstanding the expiration of the period set out in paragraph 1 of this article, one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party.</p> <p><i>Article 63. Extension of time for suit</i></p> <p>The period provided in article 62 shall not be subject to suspension or interruption, but the person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.</p> <p><i>Article 64. Action for indemnity</i></p> <p>An action for indemnity by a person held liable may be instituted after the expiration of the period provided in article 62 if the indemnity action is instituted within the later of:</p> <p>(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or</p> <p>(b) Ninety days commencing from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.</p> <p><i>Article 65. Actions against the person identified as the carrier</i></p> <p>An action against the bareboat charterer or the person identified as the carrier pursuant to article 37, paragraph 2, may be instituted after the expiration</p>
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		<p>of the period provided in article 62 if the action is instituted within the later of:</p> <p>(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or</p> <p>(b) Ninety days commencing from the day when the carrier has been identified, or the registered owner or bareboat charterer has rebutted the presumption that it is the carrier, pursuant to article 37, paragraph 2.</p>
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14. Freedom of contract

Even though this may seem strange, the Hague-Visby Rules allow generally freedom of contract in situations in which they do not apply. They in fact provide in article 3(8) that any clause relieving the carrier from liability otherwise than provided by the Rules is null and void and then provide in article 6 that the carrier may enter into any agreement in respect of its obligations and its liability if no bill of lading has been or will be issued and the goods carried are not ordinary commercial shipments; they further provide in article 7 that freedom of contract is permitted prior to loading and after discharge.

The Hamburg Rules instead provide in article 23 that any stipulation is null and void to the extent that it derogates from the provisions of the Convention but that the carrier may increase his responsibilities and obligations under the Convention. They further increase the protection of the shipper or consignee by providing that if it has incurred loss as a result of a stipulation which is null and void by virtue of that article the carrier must pay compensation.

The Rotterdam Rules generally provide in article 79 that the rules on the obligations and liability of both the carrier and the maritime performing parties as well as of the shipper, consignee, and controlling party are mandatory, but then allow, under certain conditions, freedom of contract for volume contracts, defined in article 1 as the contracts that provide for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time.

The special regime for volume contracts has been adopted following a proposal of the United States to allow freedom of contract for the category of transport contracts named “service contracts”, in respect of which such freedom is granted by subsection (c) of section 8 (a) of the Shipping Act 1984, as amended by section 106 (b) of the Ocean Shipping Reform Act, 1998. In view of the fact that the notion of service contract² was unknown in several other jurisdictions, it was suggested – and agreed – to adopt the term “volume contracts”, such contracts also being called “tonnage agreements”. The justification for excluding the mandatory character of the Rules in respect of such contracts consisted in the fact that the parties have normally, as in charter parties, equal

² As defined in subsection (c) of section 8(a) of the Shipping Act, 1984, as amended.

bargaining power, even though transportation is made in the liner trade. However the definition that had been adopted for such contracts was so wide as to include small contracts³, in respect of which equal bargaining power was unlikely to exist. Since all attempts to restrict the definition to contracts covering a significant amount of cargo had failed⁴, efforts were made in order to ensure otherwise the protection of small shippers; and to that end it was agreed to require a) that the contracts should not be contracts of adhesion and, therefore, should be subject to negotiation and, b) that shippers should be given an opportunity to conclude the contract on terms and conditions that comply with the Rotterdam Rules. Furthermore, the possibility of derogating from the fundamental obligation of seaworthiness as well as from the shipper's obligations to provide information in respect of dangerous cargo and generally information necessary for the proper handling of the cargo was excluded. In any event third parties are not bound by derogations unless they accept them in writing. The problem that may arise is whether, in case a consignee refuses to accept a derogation (e.g. in respect of the limit of liability) that the shipper has validly agreed in consideration of a reduction of the freight, the carrier, who has been forced to settle a claim of the consignee for loss of or damage to the goods on the basis of the limits set out in article 59 of the Rotterdam Rules, is entitled seek an indemnity from the shipper. It is thought that that is probably so.

HAGUE-VISBY RULES	HAMBURG RULES	ROTTERDAM RULES
<p data-bbox="368 969 464 992"><i>Article 3</i></p> <p data-bbox="240 1003 480 1025">.....</p> <p data-bbox="240 1025 595 1541">8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.</p> <p data-bbox="368 1574 464 1597"><i>Article 6</i></p> <p data-bbox="240 1608 595 1841">Notwithstanding the provisions of the preceding articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the</p>	<p data-bbox="671 969 924 1025"><i>Article 23. Contractual stipulations</i></p> <p data-bbox="619 1025 979 1507">1. Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of goods in favour of the carrier, or any similar clause, is null and void.</p> <p data-bbox="619 1518 979 1697">2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention.</p> <p data-bbox="619 1709 979 1841">3. Where a bill of lading or any other document evidencing the contract of carriage by sea is issued, it must contain a statement that the carriage is</p>	<p data-bbox="1011 969 1348 992"><i>Article 79. General provisions</i></p> <p data-bbox="1000 1003 1361 1115">1. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:</p> <p data-bbox="1000 1126 1361 1261">(a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;</p> <p data-bbox="1000 1272 1361 1451">(b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or</p> <p data-bbox="1000 1462 1361 1574">(c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 18.</p> <p data-bbox="1000 1585 1361 1697">2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:</p> <p data-bbox="1000 1709 1361 1841">(a) Directly or indirectly excludes, limits or increases the obligations under this Convention of the shipper, consignee, controlling party,</p>

³ Even a contract for the carriage of, say, four containers in two voyages would be a “specified quantity of goods to be carried in a series of shipments”.

⁴ One of the suggestion that had been made was to refer to contracts for the carriage of at least 1,000 containers or 10,000 tons.

<p>carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.</p> <p>An agreement so entered into shall have full legal effect.</p> <p>Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.</p>	<p>subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.</p> <p>4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 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.</p>	<p>holder or documentary shipper; or</p> <p>(b) Directly or indirectly excludes, limits or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.</p> <p><i>Article 80. Special rules for volume contracts</i></p> <p>1. Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.</p> <p>2. A derogation pursuant to paragraph 1 of this article is binding only when:</p> <p>(a) The volume contract contains a prominent statement that it derogates from this Convention;</p> <p>(b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;</p> <p>(c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and</p> <p>(d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.</p> <p>3. A carrier's public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.</p> <p>4. Paragraph 1 of this article</p>
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		<p>does not apply to rights and obligations provided in articles 14, subparagraphs (a) and (b), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in article 61.</p> <p>5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:</p> <p>(a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and</p> <p>(b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.</p> <p>6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.</p> <p><i>Article 81. Special rules for live animals and certain other goods</i> Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:</p> <p>(a) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier or of a person referred to in article 18, done with the intent to cause such loss of or damage to the goods or such loss due to delay or done recklessly and with knowledge that such loss or damage or such loss due to</p>
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		<p>delay would probably result; or</p> <p>(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and that no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.</p>
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II. Matters regulated by the Hamburg Rules and the Rotterdam Rules

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1. Deck cargo

The Hamburg Rules mention three situations in which carriage of goods on deck is permitted: when it is in accordance with usage of the particular trade, when it is required by statutory rules or regulations and when it is in accordance with an agreement with the shipper. The Rotterdam Rules add a fourth situation, which at present is by far more important: when the goods are carried in or on containers or vehicles; but they require that such containers or vehicles be fit for deck carriage and the decks be specially fitted to carry them. This brings the rule in line with carriage of containers on modern container ships and with the carriage of vehicles on modern roll-in and roll-off ships.

The conditions under which an agreement may be invoked against a third party are the same in both Conventions: it must be endorsed on the transport document.

Are equally the same the consequences of an unauthorized deck carriage and of deck carriage contrary to an express agreement: the liability of the carrier for loss, damage or delay exclusively caused by deck carriage in the first case and loss of the right to limit in the second case.

But the Rotterdam Rules differ from the Hamburg Rules in that they regulate the consequences of loss, damage or delay occurring where the goods are legitimately carried on deck. While the Hamburg Rules have no provision in this respect, the Rotterdam Rules provide first that the rules relating to the liability of the carrier apply and secondly that when deck carriage is required by law or is in accordance with customs, usages or practices of the trade in question the carrier is not liable for loss, damage or delay caused by the special risks involved in deck carriage.

It appears therefore that the provisions of the Rotterdam Rules are more complete and in line of to-day's requirements of the trade.

HAMBURG RULES	ROTTERDAM RULES
<i>Article 9. Deck cargo</i>	<i>Article 25. Deck cargo on ships</i>
1. 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.	1. Goods may be carried on the deck of a ship only if:
2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier must insert in the bill of lading or other document evidencing the contract of carriage by	(a) Such carriage is required by law;
	(b) They are carried in or on containers or vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or vehicles; or
	(c) The carriage on deck is in accordance with the contract of carriage, or the customs,

<p>sea a statement to that effect. In the absence of such a statement the carrier has the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier is not entitled to invoke such an agreement against a third party, including a consignee, who has acquired the bill of lading in good faith.</p> <p>3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article or where the carrier may not under paragraph 2 of this article invoke an agreement for carriage on deck, the carrier, notwithstanding the provisions of paragraph 1 of article 5, is liable for loss of or damage to the goods, as well as for delay in delivery, resulting solely from the carriage on deck, and the extent of his liability is to be determined in accordance with the provisions of article 6 or article 8 of this Convention, as the case may be.</p> <p>4. 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 article 8.</p>	<p>usages or practices of the trade in question.</p> <p>2. The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article, but the carrier is not liable for loss of or damage to such goods, or delay in their delivery, caused by the special risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs 1 (a) or (c) of this article.</p> <p>3. If the goods have been carried on deck in cases other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and is not entitled to the defences provided for in article 17.</p> <p>4. The carrier is not entitled to invoke subparagraph 1 (c) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic transport record in good faith, unless the contract particulars state that the goods may be carried on deck.</p> <p>5. If the carrier and shipper expressly agreed that the goods would be carried under deck, the carrier is not entitled to the benefit of the limitation of liability for any loss of, damage to or delay in the delivery of the goods to the extent that such loss, damage, or delay resulted from their carriage on deck.</p>
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2. Live animals

There is a significant difference between the provisions on live animals of the Hamburg Rules and those of the Rotterdam Rules: while in fact the former regulate the liability of the carrier, the latter grant the carrier freedom of contract and, therefore, even if they are included also in this section they have already been considered in section I (14).

HAMBURG RULES	ROTTERDAM RULES
<p><i>Article 5. Basis of liability</i></p> <p>5. With 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. If the carrier proves that he has complied with any special instructions 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 servants or agents.</p>	<p><i>Article 81. Special rules for live animals and certain other goods</i></p> <p>Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:</p> <p>(a) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier or of a person referred to in article 18, done with the intent to cause such loss of or damage to the goods or such loss due to delay or done recklessly and with knowledge that</p>

	such loss or damage or such loss due to delay would probably result; or
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3. Obligations and liability of the actual carrier/maritime performing parties

The performance in whole or in part of the contract of carriage by a sub-contractor has been regulated for the first time in the Hamburg Rules, article 10 (2) of which provides that all the provisions of the Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. Similar provisions have been adopted by COTIF-CIM⁵ (article 27), by CMNI⁶ (article 4) and by the Montreal Convention⁷ (article 39).

The Rotterdam Rules have replaced the reference to the actual carrier with a reference to the maritime performing party, that is defined by article 1.7 as a performing party that performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. The performing party, of which the maritime performing party is a sub-species, is in turn defined by article 1.6 as a person that performs or undertakes to perform any of the carrier's obligations with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods.

HAMBURG RULES	ROTTERDAM RULES
<p style="text-align: center;"><i>Article 10. Liability of the carrier and actual carrier</i></p> <p>1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.</p> <p>2. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of paragraph 2 of article 8 apply if an action is brought against a servant or agent of the actual carrier.</p> <p>3. Any special agreement under which the carrier assumes obligations not imposed by this Convention or waives rights conferred by this Convention affects the actual carrier only if agreed to by him expressly and in writing.</p>	<p style="text-align: center;"><i>Article 19. Liability of maritime performing parties</i></p> <p>1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:</p> <p style="margin-left: 20px;">(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and</p> <p style="margin-left: 20px;">(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities</p>

⁵ Uniform Rules concerning International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999.

⁶ Budapest Convention on the Contract for the International Carriage of Goods by Inland Waterway, 2000.

⁷ Convention for the Unification of Certain Rules for the International Carriage by Air, 1999.

<p>Whether or not the actual carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement.</p> <p>4. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.</p> <p>5. The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability provided for in this Convention.</p> <p>6. Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier.</p>	<p>contemplated by the contract of carriage.</p> <p>2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.</p> <p>3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.</p> <p>4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.</p>
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4. Jurisdiction

Within the European Union the provisions on jurisdiction contained in both the Hamburg Rules and the Rotterdam Rules come under the competence of the Commission and of the Council of Europe and, therefore, individual Member States would be prevented to become individually parties to such Rules. This difficulty has been overcome by the Rotterdam Rules by making the chapter on jurisdiction applicable only if States pursuant to article 74 declare to be bound by the provisions of chapter 14 (so-called "opt in" option).

The basic difference between the provisions of the Hamburg Rules and those of the Rotterdam Rules consists in that the Rotterdam Rules allow exclusive jurisdiction clauses in respect of volume contracts, even though such clauses are binding on third parties only if the conditions set out in article 67 (2) are met, such conditions being a) that the court chosen is in one of the places designated in article 66 (a), b) that the clause is contained in a transport document or electronic record, c) that the third party is given adequate notice of the court chosen and that its jurisdiction is exclusive and, d) that the law of the court seized recognizes that that person may be bound by such clause, this latter condition being based on the decision of the EC Court of Justice in the *Corek* case.

As compared with the conditions set out in article 80 (2) the conditions set out in paragraph 2 (c) and (d) are missing. A link with article 80 would exist only if an exclusive jurisdiction clause could be qualified as constituting a derogation pursuant to article 80(1), viz. as a clause that provides for greater or lesser rights, obligations and liabilities than those imposed by the Rotterdam Rules. However an application by analogy of article 80 does not seem possible because article 67(1) sets out the conditions

for the validity of exclusive jurisdiction clauses and mentions only some of the conditions set out in article 80(2)

HAMBURG RULES	ROTTERDAM RULES
<p style="text-align: center;"><i>Article 21. Jurisdiction</i></p> <p>1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:</p> <p>(a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or</p> <p>(b) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or</p> <p>(c) the port of loading or the port of discharge; or</p> <p>(d) any additional place designated for that purpose in the contract of carriage by sea.</p> <p>2. (a) Notwithstanding the preceding provisions of this article, an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.</p> <p>(b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest.</p> <p>3. No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.</p> <p>4. (a) Where an action has been instituted in a court competent under paragraphs 1 or 2 of this article or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgement of the court before which the first action was instituted is not enforceable in</p>	<p style="text-align: center;"><i>Article 66. Actions against the carrier</i></p> <p>Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 67 or 72, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:</p> <p>(a) In a competent court within the jurisdiction of which is situated one of the following places:</p> <p>(i) The domicile of the carrier;</p> <p>(ii) The place of receipt agreed in the contract of carriage;</p> <p>(iii) The place of delivery agreed in the contract of carriage; or</p> <p>(iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or</p> <p>(b) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.</p> <p style="text-align: center;"><i>Article 67. Choice of court agreements</i></p> <p>1. The jurisdiction of a court chosen in accordance with article 66, subparagraph <i>b</i>), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:</p> <p>(a) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated or (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and</p> <p>(b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.</p> <p>2. A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if:</p> <p>(a) The court is in one of the places designated in article 66, subparagraph <i>a</i>);</p> <p>(b) That agreement is contained in the transport document or electronic transport record;</p> <p>(c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and</p> <p>(d) The law of the court seized recognizes that that person may be bound by the exclusive</p>

<p>the country in which the new proceedings are instituted;</p> <p>(b) For the purpose of this article, the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action;</p> <p>(c) For the purpose of this article, the removal of an action to a different court within the same country, or to a court in another country, in accordance with paragraph 2 (a) of this article, is not to be considered as the starting of a new action.</p> <p>5. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an actions, is effective.</p>	<p>choice of court agreement.</p> <p><i>Article 68. Actions against the maritime performing party</i></p> <p>The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:</p> <p>(a) The domicile of the maritime performing party; or</p> <p>(b) The port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performs its activities with respect to the goods.</p> <p><i>Article 69. No additional bases of jurisdiction</i></p> <p>Subject to articles 71 and 72, no judicial proceedings under this Convention against the carrier or a maritime performing party may be instituted in a court not designated pursuant to article 66 or 68.</p> <p><i>Article 70. Arrest and provisional or protective measures</i></p> <p>Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless:</p> <p>(a) The requirements of this chapter are fulfilled; or</p> <p>(b) An international convention that applies in that State so provides.</p> <p><i>Article 71. Consolidation and removal of actions</i></p> <p>1. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, the action may be instituted only in a court designated pursuant to both article 66 and article 68. If there is no such court, such action may be instituted in a court designated pursuant to article 68, subparagraph (b), if there is such a court.</p> <p>2. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, a carrier or a maritime performing party that institutes an action seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum pursuant to article 66 or 68 shall, at the request of the defendant, withdraw that action once the defendant has chosen a court designated pursuant</p>
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	<p>to article 66 or 68, whichever is applicable, where the action may be recommenced.</p> <p><i>Article 72. Agreement after a dispute has arisen and jurisdiction when the defendant has entered an appearance</i></p> <ol style="list-style-type: none"> 1. After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court. 2. A competent court before which a defendant appears, without contesting jurisdiction in accordance with the rules of that court, has jurisdiction. <p><i>Article 73. Recognition and enforcement</i></p> <ol style="list-style-type: none"> 1. A decision made in one Contracting State by a court having jurisdiction under this Convention shall be recognized and enforced in another Contracting State in accordance with the law of such latter Contracting State when both States have made a declaration in accordance with article 74. 2. A court may refuse recognition and enforcement based on the grounds for the refusal of recognition and enforcement available pursuant to its law. 3. This chapter shall not affect the application of the rules of a regional economic integration organization that is a party to this Convention, as concerns the recognition or enforcement of judgements as between member States of the regional economic integration organization, whether adopted before or after this Convention. <p><i>Article 74. Application of chapter 14</i></p> <p>The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.</p>
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5. Arbitration

In both the Hamburg Rules and the Rotterdam Rules the general rules are parallel to those for jurisdiction: the person asserting a claim against the carrier may in fact chose as place of arbitration any of the places mentioned respectively in article 22(3) and in article 75(2)(b), such places being the same as those mentioned for jurisdiction respectively in article 21(1) and in article 66(a). However in the Rotterdam Rules the designation of the place of arbitration, if contained in a volume contract, is binding on the parties to the agreement and is binding on persons other than the party to the volume contract subject to the same conditions required for jurisdiction clauses, except that the reference to the law of the court seized is replaced by a reference to the applicable law. Such law is the national law of the place where arbitration proceedings are instituted by the person asserting a claim against the carrier and, therefore, the same comment made in respect of jurisdiction clauses applies.

HAMBURG RULES	ROTTERDAM RULES
<p style="text-align: center;"><i>Article 22. Arbitration</i></p> <p>1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.</p> <p>2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.</p> <p>3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:</p> <p style="padding-left: 2em;">(a) a place in a State within whose territory is situated:</p> <p style="padding-left: 4em;">(i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or</p> <p style="padding-left: 4em;">(ii) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or</p> <p style="padding-left: 4em;">(iii) the port of loading or the port of discharge; or</p> <p style="padding-left: 2em;">(b) any place designated for that purpose in the arbitration clause or agreement.</p> <p>4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.</p> <p>5. The provisions of paragraphs 2 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.</p> <p>6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.</p>	<p style="text-align: center;"><i>Article 75. Arbitration agreements</i></p> <p>1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.</p> <p>2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at:</p> <p style="padding-left: 2em;">(a) Any place designated for that purpose in the arbitration agreement; or</p> <p style="padding-left: 2em;">(b) Any other place situated in a State where any of the following places is located:</p> <p style="padding-left: 4em;">(i) The domicile of the carrier;</p> <p style="padding-left: 4em;">(ii) The place of receipt agreed in the contract of carriage;</p> <p style="padding-left: 4em;">(iii) The place of delivery agreed in the contract of carriage; or</p> <p style="padding-left: 4em;">(iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.</p> <p>3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if the agreement is contained in a volume contract that clearly states the names and addresses of the parties and either:</p> <p style="padding-left: 2em;">(a) Is individually negotiated; or</p> <p style="padding-left: 2em;">(b) Contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement.</p> <p>4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:</p> <p style="padding-left: 2em;">(a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article;</p> <p style="padding-left: 2em;">(b) The agreement is contained in the transport document or electronic transport record;</p> <p style="padding-left: 2em;">(c) The person to be bound is given timely and adequate notice of the place of arbitration; and</p> <p style="padding-left: 2em;">(d) Applicable law permits that person to be bound by the arbitration agreement.</p> <p>5. The provisions of paragraphs 1, 2, 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is void.</p> <p style="text-align: center;"><i>Article 76. Arbitration agreement in non-linear transportation</i></p> <p>1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-linear transportation to</p>

	<p>which this Convention or the provisions of this Convention apply by reason of:</p> <ul style="list-style-type: none"> (a) The application of article 7; or (b) The parties' voluntary incorporation of this Convention in a contract of carriage that would not otherwise be subject to this Convention. <p>2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:</p> <ul style="list-style-type: none"> (a) Identifies the parties to and the date of the charter party or other contract excluded from the application of this Convention by reason of the application of article 6; and (b) Incorporates by specific reference the clause in the charter party or other contract that contains the terms of the arbitration agreement. <p><i>Article 77. Agreement to arbitrate after a dispute has arisen</i></p> <p>Notwithstanding the provisions of this chapter and chapter 14, after a dispute has arisen the parties to the dispute may agree to resolve it by arbitration in any place.</p> <p><i>Article 78. Application of chapter 15</i></p> <p>The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.</p>
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III. Matters regulated only by the Rotterdam Rules

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1. Carriage preceding or following the sea leg

When the Hague Rules were adopted in 1921 not only in the tramp trade, but also in the liner trade, the goods were normally received and delivered alongside. That explains why the scope of application of the Hague Rules, and of the 1924 Brussels Convention in which they were incorporated, was tackle to tackle: that was in fact the period of responsibility of the carrier. Later on, however, in the liner trade it proved necessary for the carrier, in order to avoid delays, to receive and deliver the goods in its port warehouses or in those of its agents and thus the period of its responsibility became wider than the period of application of the Hague Rules as well as of the Hague-Visby Rules wherein the relevant provisions were left unaltered. Consequently the liability of the carrier in respect of loss of or damage to the goods occurring between receipt of the goods and their loading on board the ship as well as between completion of discharge and delivery was governed by the applicable national law.

A solution that normally avoids such duality of regimes was found by the Hamburg Rules, pursuant to which the period of responsibility of the carrier covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge. Normally, but not always, because the terminals at which the goods are taken in charge and are delivered may be outside the port areas.

But none of the existing instruments applies to the whole contract period when the carrier undertakes to take the goods in charge at the door of the shipper and to deliver them at the door of the consignee, as gradually has become more and more frequent with the advent of containers.

The industry has since 1971 felt the need for a unique instrument governing the whole transport performed by different modes and BIMCO issued a form of combined transport bill of lading which, after setting out general rules on the liability and limitation of liability of the carrier, provides that if it can be proved where the loss or damage occurred, the carrier and the merchant shall be entitled to require such liability to be determined by the provisions contained in any international convention or national law that cannot be departed from to the detriment of the merchant and would have applied if the merchant had made a separate contract with the carrier in respect of that particular stage of transport where loss or damage occurred. Twenty years later, in June 1991 the International Chamber of Commerce and UNCTAD adopted the UNCTAD-ICC Rules for Multimodal Transport Documents, the multimodal transport contract being defined as a single contract for the carriage of goods by at least two different modes of transport. In such Rules the general provision on the liability of the carrier is

based on article 5(1) of the Hamburg Rules, but for loss, damage or delay in respect of goods “carried by sea” the exemptions granted by article 4(2)(a) and (b) of the Hague-Visby Rules apply as well as the due diligence obligation to make the ship seaworthy at the commencement of the voyage.

The decision to extend to the land carriage connected with carriage by sea the scope of application of the new draft instrument prepared by the CMI was prompted by the awareness that such extension would respond to the needs of the trade, for already in 2002 about fifty per cent of containers carried by sea were carried door-to-door⁸. The Rotterdam Rules have not therefore been conceived with the view to regulating generally multimodal carriage, but only with a view to regulating contracts of carriage by sea in which the carrier agrees to extend its services also to the transportation by other modes that precedes and follows carriage by sea. They were not intended to be a multimodal instrument in the traditional sense since carriage by other modes must be a complement to carriage by sea.

The application of the Rotterdam Rules also to the carriage by modes of transport other than sea and the need for such carriage by other modes to be complementary to the carriage by sea results from the coordination between the definition of contract of carriage in article 1.1, pursuant to which the contract must provide for carriage by sea and may also provide for carriage by other modes of transport in addition to the sea carriage, and the provision on the general scope of application in article 5, in which the four geographical links take the two alternatives into account: if the contract is wholly by sea, only the port of loading and the port of discharge are relevant; if the contract is partly by sea, also the place of receipt and the place of delivery, that do not coincide with the port of loading and the port of discharge, are relevant and it suffices that anyone of them be in a Contracting State; provided, however, that the sea leg be international.

This widens considerably, in case of door-to-door contracts, the scope of application of the Rotterdam Rules as respects the Hague-Visby Rules and the Hamburg Rules, since in a door-to-door contract it is sufficient for the Rotterdam Rules to apply that the inland place of delivery be in a contracting State, provided the sea leg is international.

The provisions that regulate the legal regime applicable to door-to-door contracts of carriage are articles 26 and 82.

Article 26

The conditions for the operation of article 26 are three. The first of such conditions relates to the time when the event has occurred: the loss of or damage to the goods or the event or circumstance causing a delay must have occurred solely before their loading on or after their discharge from a ship. The second is that the other international instrument would have applied if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of or damage to the goods or the event or circumstance causing a delay occurred. The third condition

⁸ UNCITRAL Note by the Secretariat, document A/CN.9/WG.III/WP.29 at para. 25.

is that the provisions on the carrier's liability, limitation of liability or time for suit be mandatory or cannot be departed from to the detriment of the shipper.

In Europe this would be the case for carriage by road or rail, under the CMR and the COTIF-CIM respectively. Since both such instruments apply only to international transport, the Rotterdam Rules apply in full to carriage by road or rail within the port area and to national carriage from the port area to a final destination outside such area. They also apply to other activities performed within the port area, such as transportation and handling of the goods, watching and storage: there is in fact no international convention governing any of such activities that at present is in force. Moreover they apply without any exception in respect of matters other than liability, limitation of liability and time for suit: therefore chapters 3, 7 through 11, 14 and 15 are always applicable. In view of the fact that the provisions of the Rotterdam Rules yield only to provisions of other applicable instruments that specifically provide for the carrier's liability, also the provisions in Chapter 4 of the Rotterdam Rules that set out the obligations of the carrier generally (articles 11, 13 and 15) are always applicable.

It has been pointed out that the requirement that the loss, damage or delay must occur solely during a leg other than the sea leg does not suffice to avoid a conflict with the CMR, as well as with COTIF-CIM and with the Montreal Convention. This, however, has been taken care of by article 82, that will be considered below.

It has also been pointed out that that limited network system may give rise to a conflict of conventions, but the likelihood of such conflict appear very marginal if at all.

In respect of the CMR the relevant provisions would be those on notice of loss, damage or delay, on obligations of the sender and on transport documents. As regards the notice of loss, damage or delay the provisions of the CMR (article 30) and of the Rotterdam Rules (article 23) are practically identical and, therefore, no conflict may arise. As regards the obligations of the sender, articles 7 and 11 of the CMR will not apply because they govern situations related to the issuance of a consignment note and the carrier will not issue such a note but a transport document as provided by article 35 of the Rotterdam Rules, nor will the shipper have any interest to request one; in so far as dangerous goods are concerned article 22 of the CMR sets out provisions very similar, if not identical, to those set out in article 32 of the Rotterdam Rules and, therefore, a conflict cannot be envisaged. The only provision in relation to which a conflict is conceivable is article 10 of the CMR, pursuant to which the liability of the sender for defective packing is excluded if the defect is apparent or known to the carrier, but the difference is not conspicuous in view of the provisions on the basis of the shippers' liability in article 30 of the Rotterdam Rules.

In respect of COTIF-CIM, the relevant provisions would only be those in respect of the obligations of the sender and of the transport documents and the comments made in respect of the corresponding obligations of the sender under the CMR apply also in this case.

Article 82

Article 82 provides that nothing in the Rotterdam Rules affects the application of the conventions reference to which is made thereafter merely by indicating the various modes of transport (carriage by road, by rail, by air and by in-land waterway) even though it is easy to identify which the individual conventions are.

a) *Carriage by road*

The provision reference to which is made in article 82(b) with the words “to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship” is that in article 2(1) of the CMR⁹ and, therefore, the scope of article 82 is limited to the situation envisaged therein. The most relevant aspect of a possible conflict would be that relating to the difference of the limits of liability that under the Rotterdam Rules are 3 SDR per kilogramme and 875 SDR per package or other shipping unit while under the CMR the (sole) limit is 8.33 SDR per kilogram. However the smaller average weight of the packages carried in containers has greatly reduced the problem and indeed would afford a greater protection to the shipper if the limit per package or other shipping unit is applied. In fact the CMR limit is equal to the Rotterdam Rules limit per package if the package weighs 105.04 kilograms and is lower if the weight is less than 105,04 kilograms: the limit for a package weighing 50 kilograms is 416.50 SDRs under CMR and is 875 SDRs under the Rotterdam Rules.

b) *Carriage by rail*

Article 82(c) provides that the provisions of a convention governing carriage by rail shall prevail over those of the Rotterdam Rules “to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail”. The word “supplement”, that is used in COTIF-CIM, conveys the idea of something that is complementary to something else and could not exist independently: for example, in a contract of carriage by rail from Paris to London the carriage of the railroad cargo vehicle on a ship across the Channel is a “supplement to the carriage by rail” but in a door-to-door contract from Singapore to Zurich via Genoa the carriage by sea from Singapore to Genoa can hardly be qualified as a “supplement” to the carriage by rail from Genoa to Zurich. Distance may, therefore, be a relevant feature for the qualification of the maritime leg as a supplement of the railroad leg.

In so far as the limit of liability is concerned the comments made for the CMR apply also here, for the limit per kilogram is the same

c) *Carriage by air*

In view of the fact that article 82(a) provides generally that the provisions of the Rotterdam Rules shall not prevail over any international convention governing carriage

⁹ Specific reference to article 2 of the CMR has been made during the 18th sessions of the Working Group: A/CN.9/616 para.221; general reference to the CMR has been made during the 20th session: A/CN.9/642, para. 230.

convention governing carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage, its scope is general. The aspect, however, that is more relevant is, also in this case, the limit of liability, which under the Montreal Convention is 17 SDRs per kilogram. Therefore in this case such limit is equal to that per package according to the Rotterdam Rules if the package weighs 51.47 kilograms. Therefore the limit for a package weighing 50 kilograms is slightly higher under the Rotterdam Rules (875 SDRs) than under the Montreal Convention (850 SDRs). It is instead higher under the Montreal Convention for packages weighing over 51.7 kilograms: a weight that probably is not very frequent for goods carried by air.

d) Carriage by inland waterway

The convention that may be relevant in connection with the words “to the extent that such convention according to its provisions applies to a carriage of goods without transshipment both by inland waterway and sea” is the CMNI¹⁰, article 2(2) of which provides that the Convention applies unless a marine bill of lading is issued in accordance with the maritime law applicable or the distance travelled in waters to which maritime regulations apply is greater. Therefore the possibility of a conflict is very marginal, since the distance travelled by sea will almost always be greater and, in any event a “marine bill of lading” will be issued, the transport document that the carrier must issue under the Rotterdam Rules being certainly the equivalent of the “marine bill of lading”.

ROTTERDAM RULES
<i>Article 12. Period of responsibility of the carrier</i>
<p>1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.</p> <p>2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.</p> <p>(b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.</p> <p>3. For the purpose of determining the carrier’s period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:</p> <p>(a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or</p> <p>(b) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage.</p>
<i>Article 26. Carriage preceding or subsequent to sea carriage</i>
<p>When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier’s period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:</p> <p>(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier’s activities if the shipper had made a separate and direct contract with the carrier in respect</p>

¹⁰ Budapest Convention on the contract for the carriage of goods by inland waterway, 2000.

of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

Article 82. International conventions governing the carriage of goods by other modes of transport

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

(a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;

(b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;

(c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or

(d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

2. Electronic records

One of the novelties in the Rotterdam Rules is the regulation of the electronic alternative to the transport document. In view of the continuous development of electronic communications and the fact that so far the attempts to create a workable system allowing the replacement of paper documents by electronic records have not been successful, the provisions regulating such possible replacement have been drafted in such a way as to allow their application whatever future system may in the future be envisaged.

This has been achieved through the addition of a short chapter – chapter 3 – providing for the equal value of transport documents and their electronic equivalent, the electronic transport record, setting out the basic conditions for the use of the electronic transport records and the rules governing the replacement of transport document with transport records and vice versa and through the reference throughout the convention to the electronic transport records in all the provisions in which reference is made to transport documents (articles 35, 36, 37, 38, 39, 40, 41, 45, 47, 51, 57, 58).

ROTTERDAM RULES

Article 8. Use and effect of electronic transport records

Subject to the requirements set out in this Convention:

(a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and

(b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

Article 9. Procedures for use of negotiable electronic transport records

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:

(a) The method for the issuance and the transfer of that record to an intended holder;

(b) An assurance that the negotiable electronic transport record retains its integrity;

(c) The manner in which the holder is able to demonstrate that it is the holder; and

(d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1 (a) (ii) and (c), the electronic transport record has ceased to have any effect or validity.

2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.

Article 10. Replacement of negotiable transport document or negotiable electronic transport record

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:

(a) The holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;

(b) The carrier shall issue to the holder a negotiable electronic transport record that includes a statement that it replaces the negotiable transport document; and

(c) The negotiable transport document ceases thereafter to have any effect or validity.

2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:

(a) The carrier shall issue to the holder, in place of the electronic transport record, a negotiable transport document that includes a statement that it replaces the negotiable electronic transport record; and

(b) The electronic transport record ceases thereafter to have any effect or validity.

3. Obligations and liabilities of maritime performing parties

When it was considered whether and to which extent the sub-contractors of the carrier, called *performing parties*, should be subject to the Rotterdam Rules and liable to be sued by the shipper or consignee, it was decided that it would be convenient to do so only in respect of services rendered at sea or in the ports and therefore the notion of *maritime performing party* was created, thereby incorporating in the Rotterdam Rules the principles on which the Himalaya clause is based. Article 19(5), therefore extends the rule adopted in article 10 of the Hamburg Rules to sub-contractors performing services ashore but within the port areas and provides that a maritime performing party is subject to the obligations and liabilities imposed on the carrier and is entitled to the carrier's defences and limits of liability as provided in the Rotterdam Rules. For the Rules to apply it is necessary, however, that if the maritime performing party is a (sub)carrier it must receive the goods for carriage or deliver them in a Contracting State or, if it is performing services ashore, that such services be performed in a port situated in a Contracting State.

There is a marginal doubt as to whether this is an innovation as respects the Hamburg Rules, since besides regulating the liability of the actual carrier in article 10 the Hamburg Rules, similarly to the Hague-Visby Rules, provide in article 7(2) that servants or agents of the carrier against whom an action is brought may avail themselves of the defences and limits of liability of the carrier but, differently from the Hague-Visby Rules, do not provide that the agents may not be independent contractors. And since the Hamburg Rules apply also to the period during which the goods are in charge of the carrier in the ports of loading and discharge, it is conceivable that sub-contractors operating in the port areas may avail themselves of the defences and limits of liability as applicable to the carrier. But it would remain to be seen if this is only an option for them or they are also subject to the rules applicable to the carrier.

In any event the Rotterdam Rules make the position clear.

The incorporation in the Convention of the principles on which the Himalaya clause is based has been criticized because it would prevent certain providers of services, such as freight forwarders or terminal operators, to avail themselves of their present freedom of contract. But nowadays in many jurisdictions such freedom of contract is considerably restricted and the protection of the Convention for matters such as limitation of liability and time for suit may be greater than that they might obtain otherwise.

On the other hand the extension of the application of the provision of the Rotterdam Rules to all persons providing services ancillary to the carriage by sea in the ports of loading and discharge ensures uniformity and thus certainty in an area at present left to national laws and also to a freedom of contract, the limits of which may however vary from port to port.

ROTTERDAM RULES

Article 1. Definitions

... ..

6. (a) “Performing party” means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.

(b) “Performing party” does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.

7. “Maritime performing party” means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

Article 19. Liability of maritime performing parties

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier’s defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier’s obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

4. Delivery of the goods

No provision exists in the Hague-Visby Rules and in the Hamburg Rules in respect of the rights and obligations of the parties relating to the delivery of the goods after their arrival at destination. The problems that may arise are instead various: from the right of the carrier to withhold the goods if freight is not paid, to its powers in case nobody appears to take delivery of the goods, or to the request of delivery by a person that has failed to properly identify itself or that does not surrender the negotiable transport document. All such problems must therefore be solved on the basis of either the proper law of the contract or the *lex fori* and the ensuing uncertainty is obvious. The Rotterdam Rules contain provisions on the rights and obligations of the parties. The first issues that had to be settled were those relating to the obligations of the carrier to deliver the goods and of the consignee to accept delivery. The obligation of the carrier to deliver the goods is subject to different conditions, according to whether a negotiable transport document (or electronic record) has been issued or not. In the former case it is subject to the surrender by the consignee of the document or record; in the latter it is subject to the consignee properly identifying himself. Furthermore, in the former case pursuant to article 46 the carrier, for the protection of the holder of the negotiable document or record, has not only the right not to deliver the goods but also the obligation to refuse delivery without the surrender of the document except when the transport document expressly state that the goods may be delivered without surrender of the document.

Another area in which the lack of uniform regulations creates uncertainty, since the applicable rules are normally those in force in each port of discharge, is that relating to the rights and obligations of the carrier in case the goods remain undelivered because either the consignee does not accept delivery, the person entitled to delivery cannot be found or the carrier is entitled to refuse delivery. Article 48 sets out the manners in which the carrier may in such event dispose of the goods and the conditions he has to observe.

ROTTERDAM RULES

Article 43. Obligation to accept delivery

When the goods have arrived at their destination, the consignee that demands delivery of the goods under the contract of carriage shall accept delivery of the goods at the time or within the time period and at the location agreed in the contract of carriage or, failing such agreement, at the time and location at which, having regard to the terms of the contract, the customs, usages or practices of the trade and the circumstances of the carriage, delivery could reasonably be expected.

Article 44. Obligation to acknowledge receipt

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

Article 45. Delivery when no negotiable transport document or negotiable electronic transport record is issued

When neither a negotiable transport document nor a negotiable electronic transport record has been issued:

- (a) The carrier shall deliver the goods to the consignee at the time and location referred to in article 43. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier;
- (b) If the name and address of the consignee are not referred to in the contract particulars, the

controlling party shall prior to or upon the arrival of the goods at the place of destination advise the carrier of such name and address;

(c) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(d) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary shipper pursuant to subparagraph (c) of this article is discharged from its obligations to deliver the goods under the contract of carriage.

Article 46. Delivery when a non-negotiable transport document that requires surrender is issued

When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The carrier shall deliver the goods at the time and location referred to in article 43 to the consignee upon the consignee properly identifying itself on the request of the carrier and surrender of the non-negotiable document. The carrier may refuse delivery if the person claiming to be the consignee fails to properly identify itself on the request of the carrier, and shall refuse delivery if the non-negotiable document is not surrendered. If more than one original of the non-negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity;

(b) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

Article 47. Delivery when a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 43 to the holder:

(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), upon the holder properly identifying itself; or

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;

(b) The carrier shall refuse delivery if the requirements of subparagraph (a) (i) or (a) (ii) of this paragraph are not met;

(c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity. When a negotiable electronic transport record has been used, such electronic transport record ceases to have any effect or validity upon delivery to the holder

in accordance with the procedures required by article 9, paragraph 1.

2. Without prejudice to article 48, paragraph 1, if the negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rules apply:

(a) If the goods are not deliverable because (i) the holder, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, subparagraph 10 (a) (i), or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(b) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph 2 (a) of this article is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;

(c) The person giving instructions under subparagraph 2 (a) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph 2 (e) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;

(d) A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods pursuant to subparagraph 2 (b) of this article, but pursuant to contractual or other arrangements made before such delivery acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods;

(e) Notwithstanding subparagraphs 2 (b) and 2 (d) of this article, a holder that becomes a holder after such delivery, and that did not have and could not reasonably have had knowledge of such delivery at the time it became a holder, acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

Article 48. Goods remaining undelivered

1. For the purposes of this article, goods shall be deemed to have remained undelivered only if, after their arrival at the place of destination:

(a) The consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in article 43;

(b) The controlling party, the holder, the shipper or the documentary shipper cannot be found or does not give the carrier adequate instructions pursuant to articles 45, 46 and 47;

(c) The carrier is entitled or required to refuse delivery pursuant to articles 44, 45, 46 and 47;

(d) The carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested; or

(e) The goods are otherwise undeliverable by the carrier.

2. Without prejudice to any other rights that the carrier may have against the shipper, controlling party or consignee, if the goods have remained undelivered, the carrier may, at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require, including:

(a) To store the goods at any suitable place;

(b) To unpack the goods if they are packed in containers or vehicles, or to act otherwise in respect of the goods, including by moving them; and

(c) To cause the goods to be sold or destroyed in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.

3. The carrier may exercise the rights under paragraph 2 of this article only after it has given reasonable notice of the intended action under paragraph 2 of this article to the person stated in the contract particulars as the person, if any, to be notified of the arrival of the goods at the place of

destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper.

4. If the goods are sold pursuant to subparagraph 2 (c) of this article, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred by the carrier and any other amounts that are due to the carrier in connection with the carriage of those goods.

5. The carrier shall not be liable for loss of or damage to goods that occurs during the time that they remain undelivered pursuant to this article unless the claimant proves that such loss or damage resulted from the failure by the carrier to take steps that would have been reasonable in the circumstances to preserve the goods and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps.

Article 49. Retention of goods

Nothing in this Convention affects a right of the carrier or a performing party that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due.

5. Rights of the controlling party

Particularly if goods are sold in transit, there may be situations in which the shipper may have to give instructions to the carrier or change the instructions previously given. The Rotterdam Rules regulate in chapter 10 such situations and call the right to give instructions “right of control” and the person that may exercise such right “controlling party”. They start by setting out in article 50 which such rights are and include, in addition to the right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage, the right to obtain delivery of the goods at a scheduled port of call or, in respect of land carriage, to any place en route and the right to replace the consignee.

They then specify who the controlling party is and regulate the conditions under which the carrier is bound to execute the instructions, such conditions being the reasonable possibility to execute the instructions at the time when they are given and the right to obtain security for the relative costs.

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Article 50. Exercise and extent of right of control

1. The right of control may be exercised only by the controlling party and is limited to:
 - (a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;
 - (b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and
 - (c) The right to replace the consignee by any other person including the controlling party.
2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.

Article 51. Identity of the controlling party and transfer of the right of control

1. Except in the cases referred to in paragraphs 2, 3 and 4 of this article:
 - (a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party;
 - (b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its comes the controlling party; and
 - (c) The controlling party shall properly identify itself when it exercises the right of control.
2. When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document by transferring the document to that person without endorsement. If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control; and

(b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

3. When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and

(c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

4. When a negotiable electronic transport record is issued:

(a) The holder is the controlling party;

(b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1; and

(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

Article 52. Carrier's execution of instructions

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 50 if:

(a) The person giving such instructions is entitled to exercise the right of control;

(b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and

(c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.

2. In any event, the controlling party shall reimburse the carrier for any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.

3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.

4. The carrier's liability for loss of or damage to the goods or for delay in delivery resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 17 to 23, and the amount of the compensation payable by the carrier shall be subject to articles 59 to 61.

Article 53. Deemed delivery

Goods that are delivered pursuant to an instruction in accordance with article 52, paragraph 1, are deemed to be delivered at the place of destination, and the provisions of chapter 9 relating to such delivery apply to such goods.

Article 54. Variations to the contract of carriage

1. The controlling party is the only person that may agree with the carrier to variations to the contract of carriage other than those referred to in article 50, subparagraphs 1 (b) and (c).

2. Variations to the contract of carriage, including those referred to in article 50, subparagraphs 1 (b) and (c), shall be stated in a negotiable transport document or in a non-negotiable transport document that requires surrender, or incorporated in a negotiable electronic transport record, or, upon the request of the controlling party, shall be stated in a non-negotiable transport document or incorporated in a non-negotiable electronic transport record. If so stated or incorporated, such variations shall be signed

in accordance with article 38.

Article 55. Providing additional information, instructions or documents to carrier

1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to the goods not yet provided by the shipper and not otherwise reasonably available to the carrier that the carrier may reasonably need to perform its obligations under the contract of carriage.
2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions or documents to the carrier, the shipper shall provide them. If the carrier, after reasonable effort, is unable to locate the shipper, the documentary shipper shall provide such information, instructions or documents.

Article 56. Variation by agreement

The parties to the contract of carriage may vary the effect of articles 50, subparagraphs 1 (b) and (c), 50, paragraph 2, and 52. The parties may also restrict or exclude the transferability of the right of control referred to in article 51, subparagraph 1 (b).

6. Transfer of rights

In chapter 11, the title of which is *Transfer of rights*, article 57 actually regulates the manners in which the holder of a negotiable transport document may transfer the rights incorporated therein. In addition, and this is more important, article 58 regulates the situations in which the holder of a negotiable transport document that is not the shipper assumes liabilities under the contract of carriage and states that he does not do so merely by reason of being the holder but he does if he exercises any right under the contract of carriage. However he assumes liabilities only to the extent that such liabilities are incorporated in or ascertainable from the document. A significant precedent in this connection is the decision of the House of Lords in the *Berge Sisar* case.

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Article 57. When a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:
 - (a) Duly endorsed either to such other person or in blank, if an order document; or
 - (b) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.
2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

Article 58. Liability of holder

1. Without prejudice to article 55, a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.
2. A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.
3. For the purposes of paragraphs 1 and 2 of this article, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:
 - (a) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or
 - (b) It transfers its rights pursuant to article 57.