Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules

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"The law charges this person thus intrusted to carry goods, against all events but acts of God, and of the enemies of the King . . . [T]his is a politick establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc, and yet doing it in such a clandestine manner, as would not be possible to be discovered and this is the reason the law is founded upon in that point." Coggs v. Bernard[1]

SUMMARY

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1. (1703) 92 Eng. Rep. 112 (Q.B.).

Carriers would generally agree—with some relief—that their reputation has improved since Sir John Holt C.J. pronounced those hard words back in 1703.[2] Shippers would also generally agree that better ships now provide better and faster service than the wooden vessels carrying badly-packed goods or those only bundled with ropes, sailing at the mercy of the Gulf Stream, directed by rudimentary sextants and imprecise charts. As for today's average consumers, used to driving cars assembled thousands of miles away from their homes and buying cheap computers from overseas, many could only understand what ocean shipping was once like with the help of some old Errol Flynn movie.

We rarely pause to think about the gigantic logistical effort that is needed to ensure our comfort and prosperity. Even further from our thoughts is the idea that the law may have anything to do with that. After all, goods are shipped around the globe because people need them, not because the law orders it. And yet, laws may help move goods around the world more easily and cheaply. Goods would still be shipped under bad laws, but this is likely to happen less efficiently and would certainly be at a higher cost.

The subject of this article is the latest effort by the international community to formulate good law for world shipping: the new Draft Convention, which is being negotiated by the United Nations Commission on International Trade Law (UNCITRAL)[3] and is intended to establish a sound and modern foundation for the international carriage of goods in the years to come.[4]

2. *Id.*

3. *See* G.A. Res. 2205 (XXI), U.N. Doc. A/6396 (Dec. 17, 1966) (announcing that UNCITRAL was established by the U.N. General Assembly in 1966).

4. *See id.* para. 12 (establishing UNCITRAL's function of furthering the harmonization and unification of the law of international trade).

I shall leave the technical aspects of the Draft Convention for the other authors. This collection of articles assembles some of the world's leading maritime scholars and experts. Having had the opportunity to assist them in their negotiations was a great honor for us in the UNCITRAL secretariat.

Instead, what I intend do is to explain why UNCITRAL undertook to formulate a new regime for international carriage of goods and what we aim to achieve with it. For that purpose, it is important to put our work into perspective, looking back at the political and economic circumstances under which uniform rules for international carriage of goods were made, by whom they were made, and why they were made.

I. EARLY NORTH ATLANTIC YEARS: FREEDOM OF CONTRACT, LINER CONFERENCES, THE HARTER ACT, AND THE HAGUE RULES

The Harter Act was the pioneering instrument for imposing mandatory liability rules on international carriers.[5] The impact of that legislation can still be felt more than a century after its enactment. A quick glance at the background of the Harter Act suffices to show its importance.

A. Shipping in the Late 19th Century

When the Harter Act was passed in 1893, Europe was still the undisputed master of the world and had extended its colonial dominions to nearly the entire African continent, large parts of Asia, and most of the Pacific region. However, the Japanese Empire was ascendant, and the United States was already recognized by the Old World as an equal power.

In the second half of the nineteenth century, the shipping industry entered into a period of unprecedented growth. The total net tonnage of steamers increased by well over 400 percent between 1850 and the end of 1869.[6] The opening of the Suez Canal in 1869 brought further changes, the most immediate of which was the saving of time: the Canal cut the distance covered by ships sailing between Europe and Asia in half.[7]

The creation of liner conferences a few years after the opening of the Suez Canal was another development of long-lasting impact on world shipping.[8] In order

5. *See* Stephen Zamora, *Carrier Liability for Damage or Loss to Cargo in International Transport*, 23 AM. J. COMP. L. 391, 402 (1975) (stating that the Harter Act was the "first challenge to a system in which ocean carriers could easily shift the risk of loss onto cargo owners").

6. *See* Max E. Fletcher, *The Suez Canal and World Shipping, 1869–1914*, 18 J. ECON. HIST. 556, 556 (1958) (reporting an increase from 168,474 to 948,367 net tons. In addition to the much greater tonnage, the best steamship of 1869 was a markedly superior vessel to the best of 1850: the screw propeller replaced the paddle wheel, iron plating was used instead of wood, and the compound engine replaced the single-cylinder engine.).

7. *Id.* at 559 (explaining that to reach Bombay from Liverpool, a sailing ship required an 11,560-sea-mile trip round the Cape of Good Hope. By substituting the canal route for the Cape, a steamship could save 5,777 of these nautical miles—almost exactly half.).

8. The first successful liner conference of the type that later became the industry's paradigm is generally considered to have been the Calcutta Conference, which was formed in 1875 by liner companies engaged in trade to that port from the United Kingdom. DANIEL MARX, JR., INTERNATIONAL SHIPPING

to curb uncontrolled and potentially destructive competition, the liner conference agreements provided for equal rates from the ports served and prohibited preferential rates or concessions for any shipper.[9] Those shippers who had previously enjoyed low rates, and in some cases preferential treatment as well, reacted quickly by making arrangements to patronize steamers willing to compete with the conferences.[10] The conferences eventually introduced the deferred rebate system as a means for securing shippers' "loyalty." Conference carriers would award freight rebates to shippers, but defer payment until the shipper had demonstrated his "loyalty" by giving the conference all his business not only for the contract period but for a subsequent period of time as well.[11]

B. Exculpatory Clauses

Besides commercial matters, such as schedules and freight rates, one of the principal subjects of discussion in these early conferences was the bill of lading.[12] Liner services had led to more predictable ship operations and a better possibility of suing the carrier if the goods were lost or damaged.[13] Thus, it is not surprising that bills of lading in use at the time modified shipowners' obligations by providing a long list of specific causes of loss, drawn from various bills of lading already in use, for which the carrier would not be liable.[14]

For centuries, both civil law[15] and common law jurisdictions[16] held carriers to a relatively high standard of liability. Despite some nuances, both systems made carriers liable for cargo damage or loss that occurred during the time that the goods were under the carrier's custody.[17] If the carrier could prove that its negligence had not contributed to the loss and that the loss was caused by an extraordinary event

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CARTELS: A STUDY OF INDUSTRIAL SELF-REGULATION BY SHIPPING CONFERENCES 46 (1953). There is, however, evidence of earlier conferences, although of either shorter duration or more limited scope. William Sjostrom, *Ocean Shipping Cartels: A Survey*, 3 REV. NETWORK ECON. 107, 112 (2004).

9. MARX, JR., *supra* note 8, at 46.

10. *Id.*

11. *Id.* at 47.

12. J. Russell Smith, *Ocean Freight Rates: and Their Control Through Combination*, 21 POL. SCI. Q. 237, 253 (1906) (noting that one of the earliest conferences, the "Transatlantic Shipping Conference" created in 1868, was busy with, among other matters of importance to carriers, working "for changes in the printed form of bills of lading for the benefit of the carrier," while attempting little in the direction of the formation and regulation of rates).

13. MARX, JR., *supra* note 8, at 47.

14. Benjamin W. Yancey, *The Carriage of Goods: Hague, COGSA, Visby, and Hamburg*, 57 TUL. L. REV. 1238, 1240 (1983) (stating that exculpatory clauses typically included losses and damage from "thieves; heat, leakage, and breakage; contact with other goods; perils of the seas; jettison; damage by seawater; frost; decay; collision; strikes; benefit of insurance; liberty to deviate; sweat and rain; rust; prolongation of the voyage; non-responsibility for marks or numbers; removal of the goods from the carrier's custody immediately upon discharge; limitation of value; time for notice of claims; and time for suit.").

15. *See* 2 RENÉ RODIÈRE, TRAITÉ GÉNÉRAL DE DROIT MARITIME §§ 574–76 (1968) (providing an overview of the development of French laws with respect to carriers' liability); *see also* Ana María Rodríguez González, *La Responsabilidad del Naviero: Receptum Nautarum, Periculum y Custodiam Praestare, Fundamentos de Derecho Romano Clásico, in* DERECHO DE LOS NEGOCIOS, 17–28 (2003) (discussing the Roman law origins of the civil law liability rules for common carriers).

16. *See* Michael F. Sturley, *Basic Cargo Damage Law: Historical Background*, *in* 2A BENEDICT ON ADMIRALTY 2-1, 2-1 to 2-3 (7th rev. ed. 1995) (describing the high standard of liability of British Carriers).

17. *Id.* at 2-1 to 2-2.

beyond its control (force majeure, shipper's fault, or inherent vice of the goods), then it was not liable.[18] The carrier was in fact an insurer of the safe arrival of the goods at their destination.[19] At the same time, however, in both common law and civil law jurisdictions, the principle of freedom of contract allowed shippers and carriers to agree on a different risk allocation.[20] As the industry structured itself in liner conferences, carriers started making use of that possibility by inserting disclaimers of liability in their bills of lading.[21]

There was a heated debate in France, where the courts generally admitted disclaimers of liability or limitation of liability clauses in bills of lading, despite protests by shippers and scholars.[22] This was done either as a complete exoneration of liability, or as a reversal of the burden of proof.[23] Other civil law countries followed, allowing the carrier to assume a position of nearly no liability with respect to the goods under its charge.[24]

British courts, too, were generally inclined to uphold exculpatory clauses, even if they released the carrier from the consequences of its own negligence.[25] The understanding of British courts was that the common carrier's liability under the common law was a default rule that could be displaced by an agreement to the contrary.[26] Since the common law held a carrier by sea to have given an implied warranty to shippers that it would use a seaworthy vessel to carry their goods,[27] British courts interpreted terms on bills of lading in a manner that was consistent with the carrier's warranty of seaworthiness.[28] This warranty had a fundamental character, making the carrier who failed to provide a seaworthy ship liable for damage to cargo attributable to the unseaworthiness, even if the bill of lading otherwise excluded the carrier's liability for the particular type of damage.[29]

U.S. courts also placed shipowners and carriers under the duty to provide a seaworthy vessel. Similar to the United Kingdom, the carrier's warranty of

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18. *Id.*

19. C. COM. 103 (current version at I-III C. COM. ch. III, art. L133-1) (*"Le voiturier est garant de la perte des objets à transporter, hors les cas de force majeure. Il est garant des avaries autres que celles qui proviennent du vice propre de la chose ou de la force majeure."*). More or less literal renditions of these provisions can be found in most commercial codes in the Continent and Latin America.

20. Sturley, *Basic Cargo Damage Law, supra* note 16, at 2-1 to 2-3.

21. *Id.*

22. *See* ANDRE GAUTIER, DES CLAUSES D'IRRESPONSABILITE EN MATIE'RE DE TRANSPORT MARITIME §§ 4–9, at 41–56 (1910) (presenting the key points of the debate concerning the admittance of disclaimers of liability or the limitation of liability clauses).

23. RODIÈRE, *supra* note 15, § 576; *see* GAUTIER, *supra* note 22 at 219–69 (comparing the effects of different forms of limitations of liability).

24. Sergio M. Carbone, *La Réglementation du Transport et du Trafic Maritimes dans le Développement de la Pratique Internationale, in* 166 RECUEIL DES COURS DE L'ACADEMIE DE LA HAYE 254, 297 (1981).

25. Sturley, *Basic Cargo Damage Law, supra* note 16, at 2-2.

26. Lyon v. Mells, (1804) 102 Eng. Rep. 1134 (K.B.).

27. *See id.* (finding an implied contractual term that the carrier's vessel is fit for the carriage of goods); *see also* Steel v. State Line Steamship Co., (1877) 3 App. Cas. 72 (H.L.) (appeal taken from S.C.) (finding an implied warranty of seaworthiness unless the contract specifies otherwise).

28. *Steel*, (1877) 3 App. Cas. 72 (H.L.). Thus, the courts would not release the carrier from the obligation to provide a seaworthy ship if the language invoked to exonerate the carrier was ambiguous. Nelson Line (Liverpool) Ltd. v. Nelson & Sons, Ltd, (1907) 2 K.B. 705.

29. Tattersall v. Nat'l S.S. Co., (1884) 12 Q.B.D. 297.

seaworthiness had the nature of a default rule and could be modified by contract.[30] Nevertheless, U.S. courts did not allow carriers to contract away liability for their own negligence.[31]

C. The Harter Act

Despite the hostility of U.S. courts towards exculpatory clauses, carriers continued to use them in the North Atlantic trade, counting on the more tolerant attitude of their own courts to enforce even the furthest reaching disclaimers of liability. In the view of shippers, the industry had reached a point where a carrier "accepted goods to be carried when he liked, as he liked, and wherever he liked."[32]

American shippers and cargo owners turned to Congress to repress what they regarded as an abuse of power by European carriers.[33] Shippers' reactions eventually resulted in passage of the Harter Act of 1893.[34]

The Harter Act imposed some of the traditional common law obligations on the carrier, and made it illegal to reduce these specific obligations in a bill of lading.[35] The Act voided any bill of lading seeking to relieve the carrier from negligence in proper loading, stowage, custody, care or proper delivery of the goods,[36] and also voided any clause purporting to reduce the obligation of the owner to exercise due diligence in providing a seaworthy vessel.[37] However, if the carrier exercised due diligence in furnishing a seaworthy vessel in all respects, the owner was exempt from liability for damage or loss resulting from faults or errors in navigation or in the management of the vessel.[38]

But there was a quid pro quo for the carrier, who was not liable for negligence in navigation or management of the ship ("nautical fault").[39] The main reason for this protection was that in early times, when sea carriage genuinely was a "common adventure" it might be difficult to establish negligence in a carrier, or even to establish what happened at all. Nor was such shipowner liable for perils of the sea, acts of God, acts of public enemies, inherent defects of the goods carried, seizure

30. *See* Word v. Leathers, 97 U.S. 379, 380 (1878) (holding that the guarantee of seaworthiness was an implied term of the contract of carriage "where the contrary does not appear").

31. *See* Phoenix Ins. Co. v. Erie & W. Transp. Co., 117 U.S. 312, 322 (1886) (declaring its "settled doctrine" to be that "an express stipulation in the contract of carriage, that a common carrier shall be exempt from liability for losses caused by the negligence of himself and his servants, is unreasonable and contrary to public policy, and therefore void."); *see also* Liverpool & Great W. Steam Co. v. Phoenix Ins. Co., 129 U.S. 397, 441–42 (1889) (holding that an express stipulation in a contract of carriage that exempts a carrier from negligence liability is contrary to public policy, and consequently void).

32. ARNOLD W. KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING 116 (4th rev. ed. 1953).

33. GERALD J. MANGONE, UNITED STATES ADMIRALTY LAW 78–79 (1997).

34. 46 U.S.C. app. §§ 190–96 (2005).

35. Sturley, *Basic Cargo Damage Law, supra* note 16, at 2-5.

36. 46 U.S.C. app. § 190 (2005).

37. *Id.* § 191.

38. *Id.* § 192.

39. *See* F. Sieveking, *The Harter Act and Bills of Lading Legislation*, 16 YALE L.J. 25, 25 (1906) (stating that, under the Harter Act, owners were not liable for navigational errors of their master and crew).

under legal process, acts or omissions of the cargo owners, and saving or attempting to save life or property at sea.[40]

The Harter Act represented, therefore, a compromise between conflicting carrier and shipper interests.[41]

D. Rail Transport

At the time the Harter Act was passed, major developments had taken place in inland transportation. Railroads had grown rapidly during the nineteenth century. Standardized transport documents for railway transport eventually led to a similar discussion concerning the conditions under which railways could limit or exclude their liability.[42] Both in the United States and in Europe, legislation was passed to protect the rights of shippers by setting minimum levels of carrier liability.[43] In Europe, unclear rules on jurisdiction with respect to international railway carriage and conflicting statutory standards of liability eventually led to a conference, convened by the Swiss government in 1874, to unify commercial conditions for the transport of goods by rail.[44] A series of intergovernmental meetings followed, culminating in the adoption of a convention on the international carriage of goods by railways (now known as the "CIM Convention"),[45] to which the majority of governments of continental Europe eventually adhered.[46]

That convention introduced a complete set of regulations to facilitate international railroad carriage, such as liberty of access and transit; obligations concerning the maintenance of railroad lines; publicity of railroad tariffs; calculation of freight charges; delivery periods; and procedure at borders.[47] In particular, the convention established a uniform system of collective responsibility of the carriers that, in most cases,[48] obliged courts of the Contracting States to execute judgments rendered in any other Contracting State.[49] The liability regime established by the CIM Convention, is sometimes described as one of "strict liability," but it would be erroneous to conclude that it is a liability system without fault.[50] Indeed, the CIM

40. 46 U.S.C. app. § 192 (2005).

41. Sturley, *Basic Cargo Damage Law, supra* note 16, at 2-5.

42. *See* Zamora, *supra* note 5, at 400–01 (discussing how countries intervened as a result of the trend among railroads and shipowners in Europe and the U.S. to "insert clauses in consignment notes and bills of lading…purport[ing] to exonerate the carrier from liability").

43. *Id.* at 420.

44. *Id.* at 421.

45. The French title for the Convention, from which it derives the initials "CIM," is "Convention Internationale Concernant le Transport des Marchandises par Chemins de Fer." CORNELIS CAREL ALBERT VOSKUIL, J. A. WADE & T.M.C. ASSER INSTITUUT, HAGUE-ZAGREB ESSAYS 3 X (1980). The current version is the Uniform Rules Concerning the Contract for International Carriage of Goods by Rail, Appendix B to the Convention concerning International Carriage by Rail, amended by the 1999 Protocol (CIM-COTIF Rules).

46. *See* AMOS JENKINS PEASLEE & DOROTHY PEASLEE XYDIS, INTERNATIONAL GOVERNMENTAL ORGANIZATIONS 182 (3d ed. 1976) (providing a list of the thirty-two member states, including Austria-Hungary, Belgium, France, Germany, Italy, Luxemburg, the Netherlands, Russia and Switzerland).

47. International Convention Concerning the Carriage of Goods by Rail [hereinafter CIM] arts. 1, 3, 5, 6, 28, Feb. 7, 1970, 1101 U.N.T.S. 226.

48. *Id.* arts. 26, 40.

49. *Id.* art. 50.

50. Zamora, *supra* note 5, at 424.

Convention expressly exempts the carrier from liability "to the extent that the loss or damage or the exceeding of the transit period was caused by the fault of the person entitled, by an order given by the person entitled other than as a result of the fault of the carrier, by an inherent defect in the goods (decay, wastage etc.) or by circumstances which the carrier could not avoid and the consequences of which he was unable to prevent."[51]

E. Complaints About Liner Conferences

Liner conferences spread very quickly throughout the world and within a few decades included most of the world's liner routes.[52] Typically, a separate conference governed each trade route, sometimes with different conferences controlling inbound and outbound cargo on the same route.[53]

Dissatisfaction with the conference system was as old as the conferences themselves. In the years before World War I, protests by shippers throughout the British Empire and antitrust charges brought against conferences in the United States led both the UK and the U.S. governments to initiate inquiries into the conference system within a few years of each other.[54]

Disadvantages found by the U.S. Congressional investigation derived from the monopolistic nature of conference agreements, the possibility of excess profit being earned, carrier indifference to delivering cargo in proper conditions, arbitrariness in the settlement of claims, failure to give adequate notice of rate changes, retaliation and discrimination of shippers, the secrecy with which conferences operated, and the unavailability of tariffs.[55] Notwithstanding those disadvantages of the conference system, the investigation acknowledged the necessity of the conference system to secure its advantages for shippers and to enable United States carriers and products to compete in parity with their foreign counterparts.[56] Despite its approval of conferences, the Committee recommended government supervision of conference practices.[57]

That report became the basis for the Shipping Act of 1916, which applied to all ocean liners, including conference carriers that called at U.S. ports.[58] The Act prohibited deferred rebates, "fighting ships," retaliation or discrimination against

51. CIM, *supra* note 47, art. 27.

52. *See* Sjostrom, *supra* note 8, at 111 (discussing how liner shipping has allowed for the proliferation of conferences).

53. ADEMUN-ODEKE, PROTECTIONISM AND THE FUTURE OF INTERNATIONAL SHIPPING 33 (1984).

54. In the UK, the inquiry started in 1906 under the authority of the Royal Commission on Shipping Rings, which issued its final report in 1909 ("the Royal Commission Report"). 42 AM. ACAD. OF POLITICAL AND SOC. SCI., ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE: INDUSTRIAL COMPETITION AND COMBINATION 195 (Emory R. Johnson ed., 1912). The investigation in the United States begun in 1911 and was done by the House of Representatives Committee on Merchant Marines and Fisheries. Representative Joshua Alexander chaired the Committee and its final report, which was issued in 1914, became known as "the Alexander Report." RENE DE LA PEDRAJA, A HISTORICAL DICTIONARY OF THE U.S. MERCHANT MARINE AND SHIPPING INDUSTRY 16 (1994).

55. MARX, JR., *supra* note 8, at 58.

56. *Id.* at 57.

57. *Id.* at 65.

58. *Contract Carriage by Common Carriers Under the Shipping Act of 1916*, 70 YALE L.J. 1184, 1186–89 (1961) (discussing the breadth of the Shipping Act of 1916).

any shipper, and unfair or unjustly discriminatory contracts with any shipper.[59] Further, it made it unlawful to: (1) unreasonably prefer any particular person, locality, or description of traffic, or to subject any of the foregoing to undue disadvantage; (2) permit transportation by less than the going rate through false billing, weighing, or other unfair means; (3) induce marine insurance companies to discriminate against a competitor; and (4) disclose information detrimental to shippers or consignees.[60]

F. The World After the Great War

Apart from the consequences of the collapse of the three European empires, the world's political outlook in the 1920s was not very much different from what it had been several decades before. The British Empire was still the largest conglomerate of territories ever seen in human history. The French colonies were scattered from the Caribbean to the Pacific and included large portions of Africa. Revolutionary Russia was still far from becoming the mighty Soviet Union. The United States was by now unquestionably the wealthiest and most powerful nation.

Forty-two States founded the League of Nations as a result of the 1919 peace treaties. Europe was still the largest group,[61] followed by Latin America,[62] with only seven countries from the Asia and the Pacific region[63] and two only from Africa.[64] The drafters of the Statute of the Permanent Court of International Justice, however, still divided the world into "civilized" nations and those undeserving of that distinction.[65]

The Panama Canal had been opened in 1914, and with it important new trade routes had been developed. Shipbuilding had developed further as a result of improvements made during the war effort, while telegraph and radio communications had enhanced safety and improved logistics. But the old battle over conditions of carriage continued.

G. The Hague Rules

While shipowners were powerful in Great Britain itself, the situation was reversed in the overseas Dominions. Australian, New Zealand and Canadian cargo

59. MARX, JR., *supra* note 8, at 106.

60. *Id.* at 107.

61. Indiana University League of Nations Photo Archive, http://www.indiana.edu/~league/1thordinaryassemb.htm (last visited Mar. 2, 2009) (consisting of Belgium, Czechoslovakia, Denmark, France, Greece, Italy, Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, United Kingdom, Kingdom of Serbs Croats and Slovenes (later Yugoslavia)).

62. *Id.* (consisting of Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela).

63. *Id.* (consisting of Australia, Republic of China, India, Japan, New Zealand, Persia (later Iran), Siam (later Thailand)).

64. *Id.* (consisting of Liberia, Union of South Africa).

65. Statute of the International Court of Justice, 1920 I.C.J. Acts & Docs. art. 38, para. 1(c).

interests had been powerful enough to move their governments to enact legislation similar to the Harter Act.[66]

The wave of legislation to protect shippers across the main dominions of the British Empire encouraged shippers to start another battle at home. The Imperial Shipping Committee was flooded with complaints that the liner conference system had empowered carriers with a position close to monopoly, and the possibility of imposing contract conditions unilaterally.[67] In 1921, the Imperial Shipping Committee submitted a report to Parliament in which it recommended, among other things, that "there should be uniform legislation throughout the Empire on the lines of the existing Acts dealing with shipowners' liability" which should be based more precisely on the Canadian Water Carriage of Goods Act 1910, with some adjustments.[68]

Now that the British government, thus far an opponent of international regulation that might curtail "freedom of contract," was moving to pass legislation to offer greater protection to shippers, the alternative of uniformity seemed more appealing to British shipowners. They therefore took the lead in resurrecting earlier work towards uniform international rules.[69]

In 1924, the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading,[70] commonly known as the Hague Rules, was adopted at a diplomatic conference held in Brussels and attended by twenty-six nations.[71]

The Hague Rules required the carrier "before and at the beginning of the voyage" to exercise due diligence to "make the ship seaworthy," "properly man, equip and supply the ship," and "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."[72] The carrier must further "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."[73] The Hague Rules otherwise released the carrier from liability if the loss or damage resulted from the ship's unseaworthiness, unless the damage resulted from the carrier's want of diligence in making the ship seaworthy.[74] The carrier is also released from liability if the loss or damage resulted from any of the events expressly

66. Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. MAR. L. & COM. 1, 18 (1991).

67. IMPERIAL SHIPPING COMMITTEE, REPORT OF THE IMPERIAL SHIPPING COMMITTEE ON THE LIMITATION OF SHIPOWNERS' LIABILITY BY CLAUSES IN BILLS OF LADING AND ON CERTAIN OTHER MATTERS RELATING TO BILLS OF LADING, Cmd. 1205, at 7 (1921).

68. *Id.* at 9.

69. *See* Sturley, *The History of COGSA and the Hague Rules, supra* note 66, at 19–20 (providing an overview of the work done in the early twentieth century and after the First World War by various groups, including the International Law Association).

70. International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading and Protocol of Signature, *opened for signature* Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155 (U.S. ratification proclaimed Nov. 6, 1937) [hereinafter Hague Rules].

71. *Id.* para. 1 (listing the nations in attendance, of which nearly four-fifths were European States (Germany, Belgium, Denmark, Spain, Estonia, Finland, France, United Kingdom, Hungary, Italy, Latvia, Norway, the Netherlands, Poland, Portugal, Romania, Yugoslavia, and Sweden)); slightly over one-fifth were American States (Argentina, Chile, Cuba, Mexico, Peru, United States and Uruguay) and only one sovereign State represented Asia (Japan)).

72. *Id.* art. 3, para. 1.

73. *Id.* art. 3, para. 2.

74. *Id.* art. 4, para 1.

mentioned in the Hague Rules, including the "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."[75] Lastly, the Hague Rules limited the amount recoverable from the carrier to the value of the goods up to a maximum of £100 per package or unit.[76] Like the Harter Act, the Hague Rules made void any clause in a bill of lading attempting to limit or exclude the liability of the carrier other than provided in the Hague Rules.[77]

The United Kingdom moved quickly to ratify the Brussels Convention and implement the Hague Rules throughout the Empire.[78] The U.S. Congress however did not show the same degree of interest, apparently due to lack of consensus in support of the Hague Rules.[79] Other countries hesitated to move ahead, and for several years it appeared that the Hague Rules might not enter into force. Impetus for ratification of the Hague Rules by the United States would eventually come from the judiciary. In a famous judgment rendered in 1933, the U.S. Supreme Court ruled that a carrier would only be exempted from liability for cargo loss or damage resulting from fault in the navigation or management of the ship under the Harter Act if it could prove that it had fulfilled its due diligence duty to provide a seaworthy vessel before the voyage, regardless of whether seaworthiness was the actual cause of the loss or damage.[80] The Hague Rules, in contrast, appeared to be much more favorable to carriers,[81] which gave new vigor to the movement for ratification of the Brussels Convention. The result was the passage of the U.S. Carriage of Goods by Sea Act (COGSA),[82] which enacted the Hague Rules in legislation and formally repealed the effects of the Supreme Court's ruling.

Other maritime powers soon followed, and by the beginning of World War II, the overwhelming majority of the world's shipping nations had adopted the Hague Rules.

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75. *Id.* art. 4, para. 2 (providing an entire list of "excepted perils":

> (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship; (b) Fire, unless caused by the actual fault or privity of the carrier; (c) Perils, dangers and accidents of the sea or other navigable waters; (d) Act of God; (e) Act of war; (f) Act of public enemies; (g) Arrest or restraint of princes, rulers or people, or seizure under legal process; (h) Quarantine restrictions; (i) Act or omission of the shipper or owner of the goods, his agent or representative; (j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general; (k) Riots and civil commotions; (l) Saving or attempting to save life or property at sea; (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods; (n) Insufficiency of packing; (o) Insufficiency or inadequacy of marks; (p) Latent defects not discoverable by due diligence; (q) Any other cause arising without the actual fault or privity of the carrier, or without the 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.).

76. Hague Rules, *supra* note 70, art. 4, para. 5.

77. *Id.* art. 3, para. 8.

78. Sturley, *The History of COGSA and the Hague Rules, supra* note 66, at 32.

79. *See id.* at 49 (outlining the opposition to the Hague Rules and Congress's unwillingness to act without unanimous support from interested parties).

80. May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, 290 U.S. 333, 344–45 (1933).

81. Sturley, *The History of COGSA and the Hague Rules, supra* note 66, at 52.

82. 46 U.S.C. §§ 1300–15 (2000).

H. Aviation

World War I had led to massive production of a new and truly visionary means of transport: the airplane. In the years following the war, efforts were under way to develop regular international airline services. Aviation, however, was still far from the modern standards of safety, and the infant aviation industry demanded protection against what at that time appeared to be an imponderable and possibly catastrophic liability exposure for which no functioning insurance market was in place.[83] Unlike its predecessors in the rail and sea carriages, the main objective of the Warsaw Convention was not to unify or harmonize conflicting laws, but to anticipate developments and to promote the development of a new industry.[84]

The Second International Conference on Private Aeronautical Law was held in Warsaw, from October 4 to October 12, 1929 and was attended by thirty-two nations.[85] The result of those negotiations was the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*.[86] In its original version, that convention contemplated a liability regime for the air carrier that was in many respects similar to the liability regime for ocean carriers under the Hague Rules.[87] With respect to carriage of goods or luggage, the Warsaw Convention relieved the carrier from liability if the carrier could prove "that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage."[88] The air carrier's liability for goods damaged or lost was limited to an amount equal to 250 golden francs per kilogram.[89]

II. THE LATER NORTH ATLANTIC YEARS: TRUCKS, CONTAINERS AND THE VISBY PROTOCOL

A. The World After the Second World War

A new international order emerged from the ruins left by World War II. Fifty-one countries signed the United Nations Charter in 1945.[90] There was a new division

83. Zamora, *supra* note 5, at 438.

84. *See id.* (explaining that because air transport was an international activity from the beginning, unlike the national industries of road and rail transport, there were not many regulations in conflict, allowing the delegates of the Warsaw Convention to focus on developing the industry by limiting the liability of air carriers); *see also* Paul Stephen Dempsey, *International Air Cargo and Baggage Liability and the Tower of Babel*, 36 GEO. WASH. INT'L L. REV. 239, 246–47 (2004) (discussing the purposes and goals of the Warsaw Convention).

85. SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, MINUTES, Oct. 4–12, 1929, Warsaw 5–11, 17, 31, 67, 103, 141, 181 (Robert C. Horner & Didier Legrez trans., 1975) [hereinafter Warsaw Convention].

86. Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 1 [hereinafter Warsaw Convention].

87. Zamora, *supra* note 5, at 440–42.

88. Warsaw Convention, *supra* note 86, art. 20, para. 2.

89. *Id.* art. 22, para. 2.

90. United Nations, Growth in United Nations Membership, 1945-Present, http://un.org/members/growth.shtml (last visited Mar. 2, 2009) (listing the signatories: Argentina, Australia, Belgium, Bolivia, Brazil, Belarus, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia,

based on strictly confronting social and political principles, separating the "Western" (or "capitalist") world from the "Eastern" (or "socialist") block. One more dividing line also became apparent: one between "rich" and "poor" countries, or between "North" and "South." For the first time, less developed countries outnumbered European powers and their more developed allies outside the continent.

The shipping industry, however, did not seem to be immediately affected by these changes. European companies still controlled world shipping and most trading routes. The conference system was quickly reestablished and would reach its peak during the 1950s.[91]

The period from 1947 to 1956 was generally one of favorable market conditions. The volume of oil and dry cargo carried by sea had increased in the meantime from approximately 200 million tons in 1900 to more than 500 million tons in 1950. That is, it doubled in some fifty years.[92] The world fleet itself had doubled between 1914 and 1950.[93] Seaborne trade grew rapidly from 550 million tons in 1950 to 910 million tons in 1956.[94] There were several improvements:

> Packaging was improved, and more varied. There were now steel drums, steel and cast iron cylinders, plywood boxes and drums, corrugated fiber cartons, waterproof bags, and more commodities in compressed bales. Most general goods, however, were still shipped in individual wooden boxes, crates, barrels, kegs, and cases, in solid fiber cartons, or in bales or sacks, generally light enough to be handled by two or three men.[95]

Three main events, however, were to radically change the maritime transport sector after World War II: the rise of the fleet flying flags of convenience, the increased use of containers and cargo reservation schemes introduced mainly by developing countries.[96] I will focus my remarks on the latter two issues.

B. The Container Revolution

Better road and rail infrastructure improved the conditions for combining ocean and inland carriage. Yet, cargo carried under conventional break-bulk methods still had a long way to go before arriving at its final destination. Goods were

> typically move[d] by one or more land carriers from an inland point to a port or terminal, then by ocean carrier, and finally, by other land carriers to an inland destination. Freight [was] subjected to at least six—and up to

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Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Poland, Saudi Arabia, South Africa, Syrian Arab Republic, Turkey, Ukraine, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Yugoslavia).

91. MARTIN STOPFORD, MARITIME ECONOMICS 350 (1988).

92. PIERRE BAUCHET, LES TRANSPORTS MONDIAUX, INSTRUMENT DE DOMINATION 65 (1998).

93. *Id.* at 125.

94. STOPFORD, *supra* note 91, at 55.

95. M. Bayard Crutcher, *The Ocean Bill of Lading–A Study in Fossilization*, 45 TUL. L. REV. 697, 713–14 (1971).

96. Guillaume Daudin, *La Logistique de la Mondialisation*, 87 REVUE DE L'OFCE 411, 425 (2003).

> twenty—successive handlings or sortings at different stages of the movement. Shippers were charged separate transportation rates for each portion of the movement.[97]

The decisive step to effectively link different modes of carriage into an integrated transport chain was to be achieved with the introduction of the container in the 1950s.[98]

> The container system eliminates the cost of unloading freight from rail cars or trucks to a place of rest . . . to the end of the ship's tackle prior to loading the ship. Most important, it cost far less to load or unload a full container of freight than individual packages or even packages on pallets.[99]

Thus, while it would have taken a conventional vessel three days to load and unload general cargo, a containership would take approximately eight hours to load and unload the same amount of containerized cargo.[100] Also, containers made it possible for carriers to eliminate multiple port calls in coastal areas and reduce the operating costs of vessels.[101] The smaller number of ships required to carry the same amount of cargo in containerized form resulted in further cost savings. Container ships were larger and more expensive than conventional ships, but were capable of carrying many times the amount of cargo.[102]

With the advent of containerization, cargo could move in successive hauls by land, ocean and air without rehandling. Goods could be loaded into containers at inland origins and remain untouched throughout the journey until the containers arrived at inland destinations. It has been estimated that by the end of the 1950s, containerization had led to a decrease in transport costs from 5 to 10 percent of the goods' value.[103]

C. Road Transport

The rationalization potential offered by containerization was further enhanced by the remarkable improvement in road carriage. Motor trucks were now carrying nearly a quarter of all goods moving between cities in the United States, and motor carriers were earning far more money than rail carriers.[104] Passage of the Federal-Aid Highway Act of 1956,[105] actively supported by President Dwight Eisenhower, set the foundation for the development and creation of the Interstate Highway System, which would later become the largest highway system in the world.[106]

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97. Edward Schmeltzer & Robert A. Peavy, *Prospects and Problems of the Container Revolution*, 1 J. MAR. L. & POL'Y 203, 210–11 (1970).

98. Arthur Donovan, *Intermodal Transportation in Historical Perspective*, 27 TRANSP. L.J. 317, 317 (2000).

99. Schmeltzer & Peavy, *supra* note 97, at 208.

100. *Id.*

101. *Id.*

102. *Id.*

103. Daudin, *supra* note 96, at 417.

104. Crutcher, *supra* note 95, at 722.

105. Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374 (June 29, 1956).

106. Great Structures of the World, Interstate Highway System, http://www.great-structures.com/great-structures/30-roadways/286-interstate-highway-system.html (last visited Feb. 15, 2009).

A similar development was also taking place in Europe. Although trucks had not yet displaced railways, they had become a key element in the continental transport logistics. European road haulers suffered, however, from the disparity of national laws governing the contract of carriage by road and the carrier's liability. Following preparatory work by the International Institute for the Unification of Private Law (UNIDROIT), European States adopted the *Convention on the Contract for the International Carriage of Goods by Road* (CMR)[107] under the auspices of the U.N. Economic Commission for Europe in 1956.

The CMR established uniform rules for the contract of carriage by road and a single liability regime for international road carriage. However, as essential as it was for inland transportation in Europe, the CMR was yet another piece in an increasingly complicated puzzle of liability regimes governing specific modes of transport. For instance, the carrier's liability under the CMR covered cargo loss or damage occurring between the time when the carrier took over the goods and the time of delivery,[108] while the Hague Rules only applied to damage that occurred during the time when the goods are loaded to the time they are discharged from the ship.[109] Furthermore, the CMR made the carrier liable for delay in delivery,[110] which was not expressly contemplated by the Hague Rules. The CMR generally relieved the carrier of liability

> if the loss, damage or delay was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.[111]

The CMR further relieved the carrier of liability when the loss or damage arose from the special risks inherent in certain circumstances,[112] which, besides being fewer in number, were not identical with the excepted perils under the Hague Rules.

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107. Convention on the Contract for the International Carriage of Goods by Road, May 19, 1956, 399 U.N.T.S. 189, amended by the 1978 Protocol [hereinafter CMR].

108. *Id.* art. 17, para. 2.

109. Hague Rules, *supra* note 70, art. 1(e).

110. CMR, *supra* note 107, art. 17, para. 1; *see also* Warsaw Convention, *supra* note 86, art. 19 (stating that under the Warsaw Convention the carrier shall be liable for delay in the air transportation of passengers, baggage, or goods).

111. CMR, *supra* note 107 art. 17, para. 2.

112. *Id.* art. 17, para. 4 (including the following circumstances:

> (a) Use of open unsheeted vehicles, when their use has been expressly agreed and specified in the consignment note; (b) The lack of, or defective condition of packing in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or when not properly packed; (c) Handling, loading, stowage or unloading of the goods by the sender, the consignee or person acting on behalf of the sender or the consignee; (d) The nature of certain kinds of goods which particularly exposes them to total or partial loss or to damage, especially through breakage, rust, decay, desiccation, leakage, normal wastage, or the action of moth or vermin; (f) Insufficiency or inadequacy of marks or numbers on the packages; (g) The carriage of livestock).

Lastly, the CMR established a limit of liability on the basis of the gross weight of the goods,[113] as compared to the limitation by unit under the Hague Rules.

D. The Visby Protocol

Uniform law had not anticipated those developments, and the liability limits established by the Hague Rules were based on the notion of the cargo unit. Taking advantage of the uncertainty of the legal framework, virtually all liner conferences serving U.S. ports limited their liability to U.S. $500 per container on the theory that the container was the "package or unit" within the meaning of the COGSA and the Hague Rules.[114]

With time, the notion of "package," combined with the devaluated liability limit in the Hague Rules,[115] gave rise to a significant amount of litigation.[116] The introduction of the container exacerbated the confusion and underscored the narrowness of the notions of "package" and "unit," as some courts considered an entire container, with its contents, to be one single "package" or 'unit," while others considered as such the goods carried within the containers.[117] Within a few years, courts in United States, Belgium, France and Federal Republic of Germany, for instance, were offering different approaches to the package limitation issue.[118]

How to deal with containers was only the most obvious and immediate problem that had arisen in the practical application of the Hague Rules. Other problems included the extent of protection afforded by Himalaya clauses, the scope of application of the Rules, the evidential effect of bills of lading, and the effect of the limitation period. Thus, in 1959, the CMI began work on limited technical amendments to the Hague Rules.[119] A diplomatic conference was finally held in Brussels from 1967 to 1968. That conference was attended by 53 countries and

113. *Id*. art. 23, para. 3 (limiting liability to 25 gold francs per kilogram of gross weight short).

114. Schmeltzer & Peavy, *supra* note 97, at 222.

115. On September 20, 1931, less than ten years after adoption of the Hague Rules, the British government had abandoned the gold standard. Contracting States of the Hague Rules, in which the pound sterling was not a monetary unit, reserved the right to translate the liability limits into terms of their own monetary system in round figures, eventually leading to the loss of a common denominator. Hague Rules, *supra* note 70, art. 9, para. 2. This generated wide disarray on the manner in which the liability limits of the Hague Rules were expressed in various national currencies, ranging from those that applied the original value of the Pound at the time of accession to the Hague Rules to those that retained the market value of gold as the basis for expressing the liability limits. *See* William Tetley, *Package & Kilo Limitations and the Hague, Hague/Visby and Hamburg Rules & Gold*, 26 J. MAR. L. & COM. 133, app. A (1995) (demonstrating differences in the liability limits in various countries).

116. In the United States, litigation was further encouraged by the insertion, originally for purposes of clarification, of the ambiguous phrase "or in case of goods not shipped in packages, per customary freight unit" in the domestic enactment of the Hague Rules, the Carriage of Goods by Sea Act (COGSA) (46 U. S. Code §§ 1300–15, 1304(5) (1936)). In an extreme case, ten locomotives were each considered to constitute one "unit," so that the carrier's liability for their loss was limited to 5,000 dollars only. Isbrandtsen Co. v. United States, 201 F.2d 281, 286 (2d Cir. 1953).

117. *See* Sturley, *Basic Cargo Damage Law, supra* note 16, at 16-57 to 16-67 (providing case examples of the various interpretations of the terms "package" and "unit").

118. Frank M.K. Wijckmans, *The Container Revolution and the Per Package Limitation of Liability in Admiralty*, *in* 22 EUROPEAN TRANSPORT LAW 505, 506 (Robert H. Wijffels ed., 1987).

119. Paul Myburgh, *Uniformity or Unilateralism in the Law of Carriage of Good by Sea*, 31 VICTORIA U. L. REV. 355, 360 (2000).

territories, of which approximately half were developing. Twenty-three countries sent observers.

In order to resolve the most obvious problems in the application of the Hague Rules, the negotiations over their modernization were initially aimed at a general overhaul, but this was deemed too radical an approach. Consequently, only a few points were "modernized," but no attempt was made to touch some of the more controversial points in the Hague Rules, such as the "nautical fault" concept.[120] The result of the Brussels conference was a Protocol amending certain provisions of the Hague Rules, known as the "Visby Protocol."[121]

The Visby Protocol, therefore, did not affect the basic principles governing the carrier's liability under the Hague Rules. Nevertheless, the Protocol modified them in several respects. The Visby Protocol chose the *Francs-or* (or *Franc-Poincaré*) as a replacement monetary unit to the British Pound.[122] The Visby Protocol also altered the basis of calculation of the carrier's limit of liability by adding the gross weight of the good as an alternative criterion. The liability limits were set at 10,000 *Francs-or* per package, or 30 *Francs-or* per kilogram of lost or damaged goods, whichever was higher.[123]

Furthermore, the Visby Protocol clarified the definition of "package" used by the Hague Rules by adding the provision that where a container, pallet, or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of the Hague Rules.[124] The Protocol also denied the carrier the right to limit its liability for intentionally-caused damage, or recklessly-caused damage where the carrier had knowledge that damage would result.[125] Other revisions introduced by the Visby Protocol included provisions barring the challenge of the recitals of conditions as set forth in the bill of lading once the bill has been transferred to a third party in good faith, allowing extensions of the limitation period for claims and defining the carrier as including the owner or the charterer who enters into a contract of carriage with a shipper.[126]

120. UNCTAD, The Economic and Financial Consequences of the Entry into Force of the Hamburg Rules and the Multimodal Convention at 11, UNCTAD Doc. TD/B/C.4/315/Rev.1 (1991).

121. Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading, Brussels (1968), *reprinted in* 2 REGISTER OF TEXTS OF CONVENTIONS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW, at 180 (1971).

122. David Michael Collins, *Admiralty—International Uniformity and the Carriage of Goods by Sea*, 60 TUL. L. REV. 165, 172 (1985) (explaining that the *Franc-Poincaré* is an imaginary unit of account that corresponds to 65.5 milligrams of gold of 900/1000 fineness).

123. UNCTAD, *supra* note 120, at 11. This represented a rather substantial increase of about 100 percent, as compared to the exchange value of 100 British Pounds. *Id.* In 1979, the Special Drawing Rights (SDR) Protocol brought about a further technical amendment to the package limitation units in the Hague-Visby Rules, replacing the archaic and problematic gold clause with SDRs. Protocol Amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Dec. 21, 1979, 1984 Gr. Brit. T.S. No. 28 [hereinafter SDR Protocol].

124. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, art. 2(c) [hereinafter Visby Rules].

125. *Id.* art. 2(e).

126. *Id.* art. 1.

The Visby Protocol was slow to find favor with maritime jurisdictions and could not attract the requisite number of ratifications until 1977.[127] The Visby Protocol entered into force in June 1977 and currently has 30 Contracting States, most of which were Contracting Parties to the 1924 Hague Rules.[128]

III. GALE OVER THE SOUTH SEAS: NEW INTERNATIONAL ECONOMIC ORDER, CODE OF CONDUCT, AND THE HAMBURG RULES

As one would expect, industry growth continued to follow the overall expansion of the world's economy and was not deterred by legal technicalities. Between 1950 and 1973, the volume of oil and dry cargo carried by sea had increased at a yearly average of 5.4 percent.[129] The world fleet grew to five times its initial size between 1950 and 1980.[130]

So far, regulatory changes affecting the shipping industry had been decided essentially among the same nations that traditionally controlled world shipping. That, however, would soon change.

A. Developing Countries and Liner Conferences

As the old colonial empires gradually broke up, there was mounting concern about the perceived discrepancy between the trade generated by developing countries and their involvement in the shipping of that trade.[131]

The developing countries were attracted to liner shipping with its higher earning potential but dissatisfied with the liner conferences, which were thought to exclude them from an area of decision making that they saw as vital to their development.[132] Moreover, many of the developing countries had balance of payment problems and were searching for solutions. Sea freight played an important part in the price of the primary exports on which most of them relied. In addition the freight itself was a drain on their scarce foreign currency reserves. Setting up national shipping lines seemed the obvious solution to both problems. However, the liner conferences were not generally sympathetic, and the emerging nations lacked the experience in the liner business to press their case.[133]

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127. NINIAN STEPHEN ET. AL., AUSTRALIAN MARITIME LAW 65 (2d ed. 2000).

128. *See* Comite Maritime International, *CMI Y.B. 2007–2008*, 38–89 (listing the contracting states to the Visby Protocol and Hague Rules), *available at* http://www.comitemaritime.org/year/2007_8/2007_8_idx.html. However, the countries that have not joined the Visby Protocol include some of the world's largest economies (such as India, Japan, and the United States), and represent about half of world's trade in goods, both in value and weight. The application of the Visby Protocol is further limited by the fact that bills of lading incorporating its terms typically do so only to the extent that the protocol is made compulsorily applicable by national law, otherwise, the original 1924 Hague Rules continue to be routinely chosen by carriers.

129. BAUCHET, *supra* note 92, at 65.

130. *Id.* at 125.

131. DAVID HILLING, TRANSPORT AND DEVELOPING COUNTRIES 282 (1996) (providing the example that in 1967, "developing countries accounted for 63 percent of world trade loaded and 19 percent of the goods unloaded, yet controlled only 7.4 percent of world shipping.").

132. *Id.* at 288.

133. STOPFORD, *supra* note 91, at 350.

Discrimination was another main complaint raised against liner conferences. Many developing countries asserted that the developed countries dominated the conference system, that liners from the economies of developing countries were excluded from conference membership, and that conferences harmed their economies due to the high price of conference shipping and lack of response to shipper needs.[134]

Developing countries as a whole did not expect their aspirations to participate in ocean shipping to materialize without political pressure and within the existing structure of the liner conference system. Inevitably, their grievances were voiced at the United Nations Conference on Development and Trade (UNCTAD), a forum in which developing countries felt they carried more weight, as opposed to organizations specifically devoted to maritime affairs.[135] Not surprisingly, traditional maritime powers were not enthusiastic about entertaining demands by developing countries to give up some of their shipping business, and their general mood was that there was not enough space in the trade for all the potential newcomers.[136] At the same time, however, industrialized countries were concerned that a flat refusal to deal with those and other complaints of the developing countries might lead them to turn their back on the established order and embrace a socialist utopia. From the perspective of traditional maritime powers, negotiating was the best way to keep matters under control. The negotiations at UNCTAD began in the 1960s and continued for several years despite an atmosphere of antagonism.[137]

The result was the Convention on a Code of Conduct for Liner Conferences,[138] which was adopted in 1974 and entered into force ten years later. The aspect of the Code of Conduct that attracted the most attention, and certainly the most dispute, was a market-sharing formula that ensured the participation of all parties by stipulating that in trade between any two countries, each should be entitled to carry 40 percent of the trade, with the remaining 20 percent available to third parties.[139]

With few exceptions, the Code of Conduct was strongly supported by the governments of most developing countries. Those that resisted the Code either had large "flag of convenience" fleets (for example, Liberia and Panama), and thus faced the prospect of losing significant revenues if vessels were forced to reflag, or they had highly efficient liner fleets (such as Taiwan and Singapore), which were already engaged in extensive cross-trading operations.[140]

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134. HILLING, *supra* note 131, at 288.

135. BRUCE FARTHING, INTERNATIONAL SHIPPING 111 (2d ed. 1993).

136. *See* René Rodière, *Les tendances contemporaines du droit privé maritime international*, 135 RECUEIL DES COURS DE L'ACADEMIE DE LA HAYE 329, 387–88 (1972) for an example of the sentiment towards developing countries. "Saving currency," wrote Rodière, leads developing countries to build up their own fleet to avoid resorting to shipowner nations, while "earning currency" would place themselves in the cross-trade. Both objectives, "earning and saving currency" are independent, but guide the actions of developing countries. The author's conclusion was clear: "Very well, but if all countries become carriers, whose goods are they going to carry if not their own?"

137. Anindya K. Bhattacharya, *The Influence of the International Secretariat: UNCTAD and Generalized Tariff Preferences*, 30 INT'L ORG. 75, 77 (1976).

138. HILLING, *supra* note 131, at 289.

139. *Id.*

140. Reuben Kyle & Laurence T. Phillips, *Cargo Reservation for Bulk Commodity Shipments: An Economic Analysis*, 18 COLUM. J. WORLD BUS. 42, 43 (1983).

Business circles in developing countries, however, were not unanimously supportive of cargo reservation. In Thailand, for example, representatives of shippers had questioned whether Thailand should have a merchant marine and urged that a factual assessment be made in that regard.[141] Similarly, Indian shippers had been vocal in their hostility to proposed legislation that would have required them to use national shipping lines, pointing out that Indian vessels were neither modern nor efficient, nor did they have adequate container capacity.[142] In South America, too, there was growing criticism of the expensive and inefficient way of protecting national flag shipping through the extreme forms of cargo reservation then prevailing in the region.[143]

The United States had consistently objected to the Code as a matter of principle, even though its position had some unique features.[144] The remaining member countries of the Organization for Economic Cooperation and Development (OECD), however, were divided, and despite some strong opponents of the Code, several countries were inclined to accept it.[145] The conflict between supporters and opponents of the Code of Conduct within the European Economic Community (EEC) was only resolved in 1979, when after a few years of internal negotiation, the EEC formulated a common response to the Code of Conduct.[146] This response, known as the "Brussels Package," enabled European states to ratify the code subject to reservations to bring the Code in line with EEC law and free trade principles advocated by OECD.[147] The Brussels Package thus sought to satisfy the demands of developing countries without discarding essential features of the conference system.[148]

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141. Lawrence Juda, *The UNCTAD Liner Code: A Preliminary Examination of the Implementation of the Code of Conduct for Liner Conferences*, 16 J. MAR. L. & COM. 181, 205 (1985).

142. *Id.* at 205–06. In the view of the All India Shippers Council (AISC), requiring the use of Indian shipping lines, if they could not provide competitive and timely service, would undercut the export potential of Indian goods. In freight rates were going to be higher from India than from alternative sources, Indian exporters would have to absorb the additional cost were Indian goods to remain marketable. While supporting the development of an Indian merchant fleet, the AISC insisted that the main question was whether national lines should strive on their own to get a reasonable share by providing competitive services, or whether they should be protected by legislation at the expense of shippers. *Id.*

143. HILLING, *supra* note 131, at 295.

144. Jose A. Gómez-Ibanez & Ivor P. Morgan, *Deregulating International Markets: The Examples of Aviation and Ocean Shipping*, 2 YALE J. ON REG. 107, 128 (1984) (explaining that despite its generally pro-competitive policy, the U.S. government had been protecting American shipping industry through a variety of anti-competitive mechanisms for a long time. Like most other nations, the United States had "cabotage" laws that restricted domestic and coastal shipping to its own ships. U.S. "cargo preference laws" also required that certain U.S. government agencies ship their freight on U.S. vessels. In addition, the U.S. government offered operating and construction subsidies to offset the difference between the cost of building and operating a ship in the United States and in a foreign country.).

145. FARTHING, *supra* note 135, at 119.

146. Alan W. Cafruny, *The Political Economy of International Shipping: Europe Versus America*, 39 INT'L ORG. 79, 115 (1985).

147. *Id.*

148. *See id.* at 115–16 ("Among important reservations to the UNCTAD code, the Brussels Package 'disapplie[d]' the protectionist, cargo-sharing or bilateral clauses in trades that include EEC states and other OECD states that can be induced to follow suit. It thus envisions two regimes: in trade between the OECD and [developing countries], 40 percent of cargo would be reserved for the [developing countries'] fleet, and the rest would be open to OECD states on a competitive basis. Similarly, in intra-EEC and OECD trades, cargo would be, in principle, subject to competitive bidding.").

Ratification by European countries eventually gave the Code the geographic coverage hoped for by its drafters.[149] However, by the time the Code came into force in 1984, much liner shipping had become containerized, which altered pricing policies in a manner not originally contemplated. There had also been a rapid growth in shipping by "outsiders" (i.e., carriers operating outside the conference system), thus reducing the share controlled by liner conferences.[150] The Code was further eroded by lack of ratification by some developing countries—mainly in Latin America—that pursued even more restrictive flag preference schemes that secured them a higher share of maritime trade than the 40 percent guaranteed by the Code.[151] "Arguably the Code was too late and in 1992 [it] was in effect abandoned"[152] even though it remains officially in force.

B. The Hamburg Rules

For the developing countries, reforming the structure of the world shipping industry and gaining access to the liner trade was not the whole agenda. For the developing countries, cargo reservation and greater control over the conference system did only part of the job. Until developing countries were able to build powerful national shipping capacity, they remained dependent on services provided by liner conferences controlled by traditional maritime nations. And these offered transportation services on the basis of rules that had been drafted decades ago by representatives of the "old order." Developing countries did not see the Visby Protocol as an acceptable solution, even though it modernized some of the rules governing carriage contracts. They perceived the entire system of the Hague Rules as a product of a carrier-dominated process. Instead of arcane rules, they believed the foreign trade of developing countries should be carried under terms to be established with their active participation.[153]

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149. For a list of the seventy-nine contracting parties, see Convention on a Code of Conduct for Liner Conferences, Apr. 6, 1974, 1334 U.N.T.S. 15 (Algeria, Bangladesh, Barbados, Belgium, Benin, Bulgaria, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chile, China, Congo, Costa Rica, Côte d'Ivoire, Cuba, Czech Republic, Democratic Republic of the Congo, Denmark, Egypt, Ethiopia, Finland, France, Gabon, Gambia, Germany, Ghana, Guatemala, Guinea, Guyana, Honduras, India, Indonesia, Iran (Islamic Republic of), Iraq, Italy, Jamaica, Jordan, Kenya, Kuwait, Lebanon, Liberia, Madagascar, Malaysia, Mali, Mauritania, Mauritius, Mexico, Montenegro, Morocco, Mozambique, Netherlands, Niger, Nigeria, Norway, Pakistan, Peru, Philippines, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Senegal, Serbia, Sierra Leone, Slovakia, Somalia, Spain, Sri Lanka, Sudan, Sweden, Togo, Trinidad and Tobago, Tunisia, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Uruguay, Venezuela (Bolivarian Republic of) and Zambia).

150. HILLING, *supra* note 131, at 289.

151. *See* Gómez-Ibanez & Morgan, *supra* note 144, at 126 ("Argentina and Brazil unilaterally applied cargo reservation to their trade routes with the United States in the 1970's. Several countries—including Venezuela, Korea, and the Philippines—have made similar requests.").

152. HILLING, *supra* note 131, at 289.

153. M.J. Shah, *The Revision of the Hague Rules on Bills of Lading within the UN System–Key Issues*, *in* THE HAMBURG RULES ON THE CARRIAGE OF GOODS BY SEA 1, 5 (Samir Mankabady ed., 1978) [hereinafter HAMBURG RULES] (explaining that:

> Agitation over the operation of the Rules in the inter-war years was confined to local shipper circles in developing countries. Dissidents had no effective international forum to which to appeal for sympathetic hearing. When after World War II the frustration of developing

Work towards the formulation of a new regime for ocean carriage to replace the Hague Rules started at UNCTAD in 1968, but the project was eventually passed to the newly established United Nations Commission on International Trade Law (UNCITRAL).[154] After several years of preparation at the UNCITRAL Working Group on Transport Law, a draft was eventually submitted to a diplomatic conference held at Hamburg, where the convention was adopted by sixty-eight states in favor, none opposed, and three abstentions of the seventy-eight states present at the conference.[155] By the time the Hamburg Rules were adopted, the United Nations already had 151 Member States.[156]

The Hamburg Rules introduced some important changes in the carrier's liability regime. They declared the carrier liable for loss resulting from loss of, or damage to, the goods, as well as from delay in delivery, if the cause of the loss, damage, or delay took place while the goods were in his charge.[157] The Hamburg Rules did not reiterate the carrier's obligation to make the ship seaworthy and did not establish a link between the breach of that obligation and the shipper's right to claim compensation for cargo loss or damage.[158] The long list of defenses provided in the Hague Rules was eliminated and reduced to only three: (1) the carrier took all reasonable measures to avoid the damage; (2) the loss, damage, or delay was caused by fire; or (3) the loss, damage, or delay was due to efforts of the carrier to save life or property at sea.[159]

There is no equivalent in the Hamburg Rules to the carrier's exoneration for damage caused by "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."[160] The prevailing view when the Hamburg Rules were negotiated was that whatever historical reasons had existed for protecting the carrier from liability for the consequences of acts of the master or crew, they were no longer justified in light of modern means of communication available to help navigation.[161] In fact, there had

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> countries over their failure to penetrate shipping markets—which they attributed to outmoded allocation of economic resources—came to a head in the international arena, first in the UN regional Economic Commission for Latin America and later within UNCTAD, it soon became apparent that concurrently with looking at the economic aspects of shipping, one ought also to look into its legal implications. The first of these aspects selected was a study of the Hague Rules.).

154. United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules), G.A. res. 48/34, 48 U.N. GAOR Supp. (No. 49) at 331, U.N. Doc. A/48/49 (1993), *Explanatory Note by UNCITRAL Secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg),* para. 8 [hereinafter Hamburg Rules], *available at* http://r0.unctad.org/ttl/docs-legal/unc-cml/CARRIAGE%20OF%20GOODS%20BY%20SEA%20HAMBURG%20RULES%201978.pdf.

155. Joseph C. Sweeney, *UNCITRAL and the Hamburg Rules: The Risk Allocation Problem in Maritime Transport of Goods*, 22 J. MAR. L. & COM. 511, 529 (1991).

156. *See* HAMBURG RULES, *supra* note 154 (proclaiming the adoption of the Rules in 1978); Growth in United Nations Membership, *supra* note 90 (noting that 151 states were Members of the United Nations in 1978).

157. Hamburg Rules, *supra* note 154, art. 5, para. 1.

158. Robert Cleton, *Contractual Liability For Carriage of Goods by Sea (The Hague Rules and Their Revision)*, *in* HAGUE-ZAGREB ESSAYS 3: CARRIAGE OF GOODS BY SEA, MARITIME COLLISIONS, MARITIME OIL POLLUTION, COMMERCIAL ARBITRATION 13–14 (C.C.A. Voskuland & J.A. Wade eds., 1980).

159. Hamburg Rules, *supra* note 154, art. 5, paras. 1, 4(a), 6.

160. Hague Rules, *supra* note 70, art. 4, para. 2(a).

161. Scott M. Thompson, *The Hamburg Rules: Should They Be Implemented in Australia and New Zealand?*, 4 BOND L. REV. 168, 169 (1992).

been growing opposition to the nautical fault defense since the Hague Rules were adopted.[162] Courts in many countries became clearly hostile to the nautical fault defense, as it was inconsistent with the general principle of vicarious liability of masters for the acts of their servants.[163] As a result, the courts started to impose conditions to the exercise of this defense to the extent that one might wonder whether there was still any practical room left for nautical fault.[164] Even the Warsaw Convention, which originally contained a defense of negligent navigation for cargo damage,[165] had been amended by the Hague Protocol of 1955 to eliminate the defense for air carriers.[166]

The Hamburg Rules confirmed the double system of the Visby Protocol but increased the liability limits to 835 special drawing rights (SDR) per package or 2.5 SDRs per kilogram of gross weight, whichever was the higher.[167] The Hamburg Rules also made the carrier liable for delay in delivery but only up to two and a half times the amount of freight charges.[168] Regarding the carriage of goods in containers, the Hamburg rules essentially reproduced the relevant provisions of the Visby Protocol.[169]

The Hamburg Rules supplemented the Hague Rules in a few other points as well. Their field of application was not limited to the issuance of a bill of lading, and its broad definition of "contract of carriage"[170] was meant to also cover non-negotiable transport documents such as sea waybills. Their scope of application was not limited to outbound shipments but also covered transport where the port of discharge was in a contracting State.[171] The Hamburg Rules also provided rules on court jurisdiction and arbitration.[172]

C. Reaction to the Hamburg Rules

In general, shipowners or their insurers strongly opposed the Hamburg Rules, which they claimed placed a commercially unreasonable level of liability on carriers and would inevitably lead to increased freight rates to the detriment of shippers. Opponents of the Hamburg Rules went as far as suggesting that the carrier's liability had become a strict one.[173] Supporters of the Hamburg Rules regarded that criticism

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162. John D. Honnold, *Ocean Carriers and Cargo; Clarity and Fairness: Hague or Hamburg?,* 24 J. MAR. L. & COM. 75, 94–98 (1993).

163. ALEXANDER VON ZIEGLER, HAFTUNGSGRUNDLAGE IM INTERNATIONALEN SEEFRACHTRECHT 339 (2002).

164. *Id.*

165. Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929 (Warsaw Convention 1929), art. 20, para. 2, *available at* http://www.jus.uio.no/lm/air.carriage.warsaw.convention.1929/portrait.pdf.

166. *See* Warsaw Convention as Amended at the Hague, 1955 and by Protocol No. 4 of Montreal, 1975, ICAO Doc. 7632, art. 18, para. 3 (discussing situations where a carrier is not liable).

167. Hamburg Rules, *supra* note 154, art. 6, para. 1.

168. *Id.* art. 6, para. 1(b).

169. *Id.* art. 6, para. 2(a).

170. *Id.* art. 1, para. 6.

171. *Id.* art. 2, para. 1(b).

172. *Id.* arts. 21–22.

173. *See*, *e.g.*, William Birch Richardson, Kaj Pineus & Hans Georg Röhreke, *The Maritime Carrier's Liability under the Hamburg Rules*, *in* RECHT ÜBER SEE: FESTSCHRIFT: ROLF STÖDTER ZUM 70.

as an obvious exaggeration, arguing that the basis of the carrier's liability under the Hamburg Rules, as clearly stated in the common understanding adopted at the Hamburg Conference, was "presumed fault," and by no means strict liability or liability without fault.[174] They also argued that, in practice, the interpretation given by the courts to the obligations of the carrier under the Hague Rules was already often close to a presumed fault system.[175] Furthermore, the mere absence in the Hamburg Rules of the list of exempted perils of the Hague Rules did not mean that the carrier could no longer invoke any of those perils as a defense in a cargo claim under the Hamburg Rules.[176] The harshness with which the Hamburg Rules was said to treat the carrier, therefore, was more perceived than real.[177]

Opponents of the Hamburg Rules also qualified them as a "political" instrument, inferior in quality to the "commercial" compromise reflected in the Hague Rules.[178] Even the more moderate commentators of the Hamburg Rules—who did not fail to recognize how much of the Hague Rules and the Visby Protocol had been retained by the Hamburg Rules—described the climate of the negotiations as a confrontation between those who saw in the Hague Rules "a set of principles to be defended in whole and, when the whole was lost, in each part," and those—the actual majority—for whom they were "a dragon to be slain."[179] This confrontation between opposing camps permeated the ensuing academic debate about the Hamburg Rules. Some commentators heavily criticized the new text for having abandoned the structure, style, and terminology of the Hague Rules,[180] while others applauded the Hamburg Rules for exactly the same reason.[181]

GEBURTSTAG 3, 10 (Hans-Peter Ipsen & Karl-Hartmann Necker eds., 1979) (defending the view that the carrier's basic liability is a strict one).

174. Hamburg Rules, *supra* note 154, ann. II, Common Understanding Adopted by the United Nations Conference on the Carriage of Goods by Sea (stating, "[i]t is the common understanding that the liability of the carrier under this convention is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of proof rests on the carrier, but, with respect to certain cases, the provisions of this Convention modify this rule.").

175. *See* Robert Force, *A Comparison of the Hague, Hague-Visby, and Hamburg Rules: Much Ado about Nothing?*, 70 TUL. L. REV. 2051, 2061–62 (1996) (explaining that under the Hague Rules, a clean bill of lading establishes a shipper's prima facie case, which shifts the burden of proof to the carrier and results in a "presumption of fault" in practice).

176. *Id.* at 2066.

177. *See id.* at 2085 ("In acknowledging these differences between Hamburg and Hague, one should not lose sight of the fact that, in many respects, the law under both Rules is identical or, at least, very similar. It must also be recognized that under many fact situations, even where differences exist, the variance between the two sets of the rules will be irrelevant to the outcome of the case.").

178. *See* David C. Frederick, *Political Participation and Legal Reform in the International Maritime Rulemaking Process: from the Hague Rules to the Hamburg Rules*, 22 J. MAR. L. & COM. 81, 100, 105 (1991) (explaining that later criticism of the Hamburg Rules suggests that the essential objective of developing countries was to demand the right to participate in the formulation of rules governing maritime affairs).

179. John C. Moore, *The Hamburg Rules*, 10 J. MAR. L. & COM. 1, 5 (1978).

180. *See id.* at 10–11 (describing the conflict of law issues that will arise with the Hague Rules); George F. Chandler III, *After Reaching a Century of the Harter Act: Where Should We Go From Here?*, 24 J. MAR. L. & COM. 43, 44–45 (1993) (criticizing the Hamburg Rules for leaving disputed clauses vague or ambiguous).

181. *See* Sweeney, *supra* note 155, at 520 (lauding the Hamburg Rules as "a successful product of the science of comparative law"); Honnold, *supra* note 162, at 83 (declaring the Hamburg Rules more clear and uniform); C.C. Nicoll, *Do the Hamburg Rules Suit a Shipper-Dominated Economy?*, J. MAR. L. & COM. 151, 152 (1993) (discussing the potential changes if New Zealand adopts the Hamburg Rules); Douglas A. Werth, *The Hamburg Rules Revisited: A Look at U.S. Options*, 22 J. MAR. L. & COM. 59, 72–73 (1991) (discussing the arguments posed by supporters of the Hamburg Rules).

Shipowning interests feared that the application of the Hamburg Rules would favor cargo interests, leading to an increase in claims, resulting in increased carrier liability.[182] They also argued that because the Hamburg Rules raised the liability limits, the amount of damages recovered from carriers would be higher, causing an increase in insurance costs and inevitably higher freight rates.[183] There was also a great deal of discussion on the increase in monetary limits of carrier liability, the potential increase in the amount of litigation that was feared due to the allegedly ambiguous drafting of the Hamburg Rules, and the removal of extensive defenses available to carriers under the Hague Rules.[184] It was also argued that the volume of litigation involving the interpretation of the limitation of liability clauses would increase, raising the administrative costs of the carriers' mutual associations offering protection and indemnity insurance ("P&I Clubs") "to an extent which will cause an overall net increase in costs to the ultimate consumer of the goods carried by sea."[185] The debate on the likely effect of the Hamburg Rules on insurance premiums and freight rates continued for several years, despite the striking absence of empirical support for either proposition.[186]

Even among developing countries there was resistance to the Hamburg Rules. At a time when a substantial portion of their foreign trade was being carried by their own ships, often under State ownership, national lines were not necessarily sympathetic to a regime that seemed to increase their liability, as compared with the Hague Rules.[187] There was also a coalition of interests with domestic cargo insurers, wary of the potential loss of business to foreign P&I Clubs.[188]

The Hamburg Rules entered into force on November 1, 1992 and currently have thirty-four State Parties.[189] However, nearly all industrialized countries,

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182. *See*, *e.g.*, J.P. Honour, *The P. & I. Clubs and the New United Nations Convention on the Carriage of Goods by Sea*, *in* THE HAMBURG RULES ON THE CARRIAGE OF GOODS BY SEA 239, 242 (Samir Mankabady ed., 1978) ("The new Convention has attempted to give some effect to the conclusions reached by UNCTAD by (*inter alia*) transferring certain risks from cargo owners to shipowners…").

183. *See id.* at 240–41 (discussing how the Hamburg Rules will not only increase already rising insurance premiums, but will also rob shipowners of accuracy in passing these costs along to the customer); *see also* B. K. Williams, *The Consequences of the Hamburg Rules on Insurance*, *in* THE HAMBURG RULES ON THE CARRIAGE OF GOODS BY SEA 251, 254–55 (Samir Mankabady ed., 1978) (arguing that insurance costs imposed by the Hamburg Rules will be passed along to the user of the goods, not the owner of the cargo).

184. Honour, *supra* note 183, at 240.

185. Richardson, Pineus & Röhreke, *supra* note 173, at 20 (referring to a 4 percent legal cost under the Hague Rules as "a system where the legal problems have been largely resolved").

186. Michael F. Sturley, *Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence*, 24 J. MAR. L. & COM. 119, 121–22 (1993).

187. *See* ALICIA GAST PINEDA, EFECTOS LEGALES Y PRÁCTICOS DE LAS REGLAS DE HAMBURGO: EL PUNTO DE VISTA NAVIERO 74 (1989) (reproducing a statement issued by the Shipowners attending the Maritime Law Seminar held in Cartagena (Colombia) on September 14 to September 16, 1989, urging the Latin American governments not to ratify the Hamburg Rules).

188. *Id.* at 35 ("There can be no doubt that, in our countries, forcing the shipowner to assume most risks that up to now have been shared would only harm our incipient cargo insurance industry and lead to a loss of currency to the benefit of the English and Norwegian P&I Clubs.").

189. *See* UNCITRAL, Status: 1978—United Nations Convention on the Carriage of Goods by Sea—the "Hamburg Rules," http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html (last visited Mar. 10, 2009) (listing the date the Hamburg Rules entered into force for each State Party, starting on November 1, 1992).

unquestionably the dominant consumers of shipping,[190] eventually decided not to implement the Hamburg Rules for various reasons. Therefore, their direct impact has remained limited. It is interesting to note that some of the countries such as Australia[191] and Canada,[192] that have not ratified the Hamburg Rules have nevertheless incorporated various provisions into their domestic laws. The Nordic countries have also adopted many parts of the Hamburg Rules that are not incompatible with the text and underlying policies of the Hague-Visby Rules.[193]

D. Multimodal Transport Regulation

Even before the Hamburg Rules were adopted, efforts were under way to solve the puzzle created by the various unimodal conventions through the formulation of a global regime to govern multimodal carriage.[194]

Once more, UNCTAD took the initiative to prepare such an international instrument. The developing countries initially wanted a convention that would prevent their own carriers from losing business to foreign multimodal operators.[195] But in view of the combined effects of "controversies already developed in the context of both the Code of Conduct for Liner Conferences and the Hamburg Rules," a much narrower concept prevailed.[196] The new convention would address only private law matters relating to contracts for multimodal carriage.[197] Intergovernmental negotiations took place between 1973 and 1979, and a draft convention was submitted to a United Nations conference that met twice in Geneva in 1979 and 1980.[198]

The final text was adopted as the United Nations Convention on International Multimodal Transport of Goods ("the Multimodal Convention").[199] This convention

190. Susan Strange, *Who Runs World Shipping?*, 52 INT'L AFF. 346, 352 (1976).

191. Carriage of Goods by Sea Act, 1991, No. 160, Part 3 (Austl.) (current version, Carriage of Goods by Sea Act No. 109 (2006)), *available at* http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/9DEB6AB9BDA1E327CA2572040004203A?OpenDocument. The Act came into force on October 31, 1991. *Id.*

192. Carriage of Goods by Water Act, R.S.C., ch. 21, Part II (1993) *repealed by* 2001 S.C., ch. 6, sec. 130 (Can.).

193. *See* Jan Ramberg, *New Scandinavian Maritime Codes*, *in* IL DIRITTO MARITTIMO 1222, 1222 (1994) (describing the acceptance by Nordic Countries of the notion of the freight forwarder as a contracting carrier).

194. Already in the 1960s, the CMI had been concerned about the proliferation of different liability systems. In 1965, it undertook the task of developing a suitable legal regime for multimodal transport (then still known as "combined transport"). This resulted, in 1969, in the so-called Tokyo Rules. Subsequently, following a series of round-table meetings under the auspices of UNIDROIT, which had produced a draft called the "Rome Draft," the TCM draft convention was presented in 1971. The TCM, however, never went beyond the drafting stage. Several factors contributed to its failure. While most countries in Europe supported its proposed liability regime, the United States of America and some other countries felt that it was unsatisfactory. UNCTAD, *supra* note 120, at 23.

195. *Id.* at 23–24.

196. *Id.*

197. *Id.*

198. *Id.*

199. U.N. Convention on International Multimodal Transport of Goods, Geneva, Switz., May 24, 1980, U.N. Doc. TD/MT/CONF/16 [hereinafter Multimodal Convention].

created the figure of the "Multimodal Transport Operator" (MTO).[200] The general basis of liability was very similar to the one provided for in the Hamburg Rules,[201] but the liability limits were increased to 920 SDRs per package or other shipping unit, or 2.75 SDRs per kilogram, whichever was higher,[202] unless the loss, damage, or delay occurred during an identifiable segment of transportation where another international treaty, convention, or law established a higher liability.[203] The Multimodal Convention requires thirty contracting parties before entry into force.[204] By now, only thirteen States have done so,[205] and it seems unlikely that the required number of ratifications could be achieved in the near future.

IV. DAWN OVER THE PACIFIC: INDUSTRY CHANGE, COMPUTERS AND THE NEW UNCITRAL PROJECT

When the Hamburg Rules finally entered into force in 1992, technological and market changes were about to transform shipping into a different industry from what it was when the rules were negotiated in the 1970s. The competitive environment was rapidly changing and new solutions were being sought for some of the controversial issues of the preceding decades.

A. New Business Models in International Shipping

After the recession caused by the oil crisis in the 1970s, the volume of sea carriage began to increase again in 1985, although at a slower rate (1 percent per year).[206] The overall traffic volume was to reach 4,790 million tons in 1996.[207] The world's merchant fleet reached 723 million tons by January 1997.[208]

Containerization was then already widespread.[209] It had simplified shipping, saved enormous amounts of time, reduced pilferage and theft, and sped up shipping.[210] With the help of computer technology, carriers were able to keep track of locations and plan voyages more efficiently. This eventually led to a

200. Conference on Trade and Development, Geneva, Switz., Nov. 12–30, 1979, *United Nations Conference on a Convention on International Multimodal Transport*, pt. 1(B), art. 1(2), U.N. Doc. TD/MT/CONF/17.

201. Multimodal Convention, *supra* note 199, art. 16, para. 1 (noting that the MTO was to be liable for loss resulting from loss or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage, or delay in delivery took place while the goods were in its charge, unless the MTO could prove that it, its servants, or agents had taken all measures that could reasonably be required to avoid the occurrence and its consequences).

202. *Id.* art. 18, para. 1.

203. *Id.* art. 19.

204. *Id.* art. 36.

205. *See* Multilateral Treaties Deposited with the Secretary General: United Nations Convention on International Multimodal Transport of Goods (listing the thirteen states: Burundi, Chile, Georgia, Lebanon, Liberia, Malawi, Mexico, Morocco, Norway, Rwanda, Senegal, Venezuela, and Zambia), *available at* http://r0.unctad.org/ttl/docs-legal/unc-cml/status/UNConventionMTofGoods,1980.pdf.

206. BAUCHET, *supra* note 92, at 65.

207. *Id.*

208. *Id.* at 125.

209. *Id.* at 134.

210. *Id.* at 4.

transformation of port infrastructure. Ports' organization changed as loading and unloading no longer particularly involved longshoremen but used ship and land-based cranes instead. Ships became bigger and bigger, with their size only limited by the locks of the Panama Canal. The impact of containers was not limited to the shipping industry itself—the improved logistics eventually made "just-in-time" manufacturing possible on an international basis.[211]

Large ocean carriers were becoming intermodal operators with interests in warehousing, consolidating and distributing freight by its own land transport. This allowed a company to control the transport chain from origin to destination.[212] Maritime agents, too, were assuming the transport of containers inland to their clients by road, rail, or barge, thereby earning inland freight.[213] Whether or not it directly engaged as a multimodal carrier, the "ocean carrier" was increasingly becoming a complex commercial agent; this development was also being observed in air traffic.[214]

B. Evolving Regulatory Environment

As business models for international carriage of goods were evolving, in the mid-1980s regulators in the United States and Europe re-examined the liner conference system. The 1984 U.S. Merchant Shipping Act reaffirmed the antitrust immunity granted by the 1916 Shipping Act to liner conferences serving U.S. ports.[215] The Merchant Shipping Act also legitimized intermodal ratemaking, which despite the approval by the Federal Maritime Commission (FMC), had been under attack by the U.S. Department of Justice.[216]

Another important change made by the 1984 Shipping Act involves the standard of FMC review of conference agreements. The 1916 Shipping Act subjected the approval of liner conference agreements to a "public interest" standard.[217] The Supreme Court interpreted the understanding of the FMC such that agreements which "interfere with the policies of antitrust laws" were "contrary to public interest."[218] As such, only capable of approval if the conferences could demonstrate that the restraints on competition were required "by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act."[219] Carriers had complained that the "public interest" standard impeded the formation of ratemaking, joint ventures, service rationalization, and other types of agreements. The Shipping Act of 1984

211. *Id.* at 364.

212. BAUCHET, *supra* note 92, at 141.

213. *Id.*

214. *Id.*

215. *See* Peter A. Friedmann & John A. DeVierno, *The Shipping Act of 1984: The Shift from Government Regulation to Shipper "Regulation,"* 15 J. MAR. L. & COM. 311, 313 (1984) (stating that under the Shipping Act of 1984 carriers may receive antitrust immunity for the collective setting of rates).

216. *See* United States v. Fed. Mar. Comm'n, 694 F.2d 793, 796 (D.C. Cir. 1982) (rejecting the Department of Justice's (DOJ) claim that the FMC lacked the authority to grant intermodal rate-making authority to conferences under the Shipping Act of 1916 and remanding the case for further consideration by the FMC, reflecting that the conflict has yet to be resolved).

217. Fed. Mar. Comm'n et. al. v. Aktiebolaget Svenska Amerika Linien [Swedish American Line], 390 U.S. 238, 246 (1968).

218. *Id.* at 243.

219. *Id.*

eliminated the "public interest" standard and shifted the burden of proof to the commission.[220] Liner conference agreements were no longer subject to an approval process, but instead could be contested by the FMC when, by a reduction in competition, they were likely to produce "an unreasonable reduction in transportation service or an unreasonable increase in transportation cost."[221]

The 1984 Shipping Act included several provisions designed to increase shipper leverage with conferences. First, all conference agreements were required to permit member carriers to offer a rate different from the conference rate and remain a conference member.[222] Second, the 1984 Shipping Act legalized "service contracts," that is contracts between shippers and ocean carriers or an agreement in which the shipper "makes a commitment to provide a certain volume or pattern of cargo over a fixed time period, and the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features."[223]

In 1986, the European Community also revised its initial regime for liner conferences with the simultaneous promulgation of four Regulations.[224] Council Regulation (EEC) Nos. 4055/86 and 4058/86 ensured the application of the principle of freedom of services to the maritime transport sector.[225] Council Regulation (EEC) No. 4057/86 aimed to eliminate distortion of competition coming from third country carriers.[226] Finally, the central instrument was Regulation (EEC) No. 4056/86, containing a block exemption from EU competition rules in favor of liner conferences, with special procedural rules.[227] While the system was still generally protective of liner conferences, the antitrust immunity was subsequently interpreted in rather narrow terms and placed under significant restrictions, including the European Commission's refusal to authorize intermodal ratemaking by conferences.[228]

C. Decline and Fall of National Liners in the Developing World

In the meantime, it was becoming clear that the adoption of the Code of Conduct had been a Pyrrhic victory for developing countries. Private investment in shipping had remained relatively modest in most developing countries, except for the more advanced Eastern Asian countries.[229] Many of the state-owned lines suffered

220. Shipping Act of 1984 § 6(h), 46 App. U.S.C. § 1701 (2002).

221. *Id*.

222. *Id.* § 5(b)(8).

223. *Id.* § 3(19).

224. Commission of the European Communities, *Report from the Commission on Implementation of Council Regulation (EEC) No. 4055/86 of 22 December 1986 Applying the Principle of Freedom to Provide Services to Maritime Transport Between Member States and Between Member States and Third Countries,* at 1, SEC (1994) 1570 final (Oct. 5, 1994).

225. Council Regulation 4055/86, 1986 O.J. (L 378) 1 (EC); Council Regulation 4058/86 O.J. 1986 (L 378) 21 (EC).

226. Council Regulation 4057/86, 1986 O.J. (L 378) 14 (EC).

227. Council Regulation 4056/86, 1986 O.J. (L 378) 4 (EC)

228. *See generally* Philip Ruttley, *International Shipping and EEC Competition Law*, 12 EUR. COMPETITION L. REV. 5 (1991).

229. *See* COMISION ECONOMICA PARA AMERICA LATINA Y EL CARIBE NACIONES UNIDAS [CEPAL], LOS CONCEPTOS BÁSICOS DEL TRANSPORTE MARÍTIMO Y LA SITUACIÓN DE LA ACTIVIDAD EN

from lack of investment, unsuitable tonnage for changing demands of trade, high operating costs and poor management, and the high-cost service that was only sustained by various forms of cargo reservation for national flag ships.[230]

The challenges for merchant fleets of developing countries were already visible by the mid-1970s. At that time, the average size of tankers and bulk carriers had multiplied by a factor of about ten. Technology had made it possible to build, operate, and load and unload much larger, faster ships, with the result that costs per ton-mile had fallen dramatically, especially over the longer distances. This had once more increased the position of relative dominance held by the industrialized economies.[231] Another trend was the emergence of hierarchical structures in the global transport system with hub-and-spoke patterns of movement,[232] moving some ocean lines away from ports of lesser strategic importance.

Unfortunately, the participation of carriers from developing countries in the liner conference system had not stimulated improved management of their national carriers. On the contrary, in many cases the protection from competition by other conference members and the captive business provided by cargo reservation[233] placed many companies in an illusory state of security.[234] Conference rate-setting further contributed to eliminate the incentive to ensure operational profitability.[235] Indeed, rate-setting in a cartelized liner conference system often covered the cost of the least efficient conference member, but was excessive for the more efficient members.[236] While the infant shipping industry of the developing countries was struggling to cover its costs or to build up a fleet, the leading carriers from the old maritime powers were able to direct their earnings in certain trades to counterbalance the high capital investment required by industry transformation.

The structural problems of national carriers from developing countries made them even more vulnerable to competition from open registry countries. For a long time, developing countries had counted on the support of most OECD countries in their attempts within UNCTAD to achieve a "phasing out" of open registry systems

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AMÉRICA LATINA [BASIC CONCEPTS OF MARITIME TRANSPORT AND ACTIVITY IN LATIN AMERICA] 90 (1986), for examples of the lack of private investment in Latin American developing countries. In the 1980s, the three main Brazilian carriers were state-owned, and so were the two larger carriers in Argentina, the three largest carriers (in tonnage) in Venezuela, and the biggest carriers in Mexico, Peru, Chile, and Ecuador.

230. For an overview of government protection and state-ownership in shipping, *see* ADEMUN-ODEKE, SHIPPING IN INTERNATIONAL TRADE RELATIONS 217–94 (1988).

231. Strange, *supra* note 190, at 352.

232. HILLING, *supra* note 131, at 311.

233. *See id.* ("For the Developing Countries there are in these trends the possible dangers of further marginalization, reduced control over transport services—the reverse of everything for which they strive.").

234. *See* S.G. Sturmey, *Economics and International Liner Services*, 1 J. TRANSP. ECON. & POL'Y 190, 202 (1967) (stating that the conference rates do not always result in profits and can attract competition).

235. *See id.* at 203 (stating that the arbitrary nature of the rates destroy the deterrent effect of the overall pricing structure).

236. Even authors that question the accusation that liner conferences consistently follow a profit-maximizing policy concede that liner rates may be "a compromise designed to suit the needs of lines with differing costs. Clearly, the lines with higher costs are always more vulnerable than those with lower costs." *Id.* at 202.

and to impose a worldwide "genuine link" test for registration of ships.[237] However, by the 1980s OECD nations were also beginning to rethink their position:[238]

> The world shipping scene was by that time markedly different from that in the early 1970s before the OPEC-induced oil crisis. Overtonnaging was severe, freight rates were low, even derisory, particularly in the bulk trades, costs were increasing in respect of both crews and operational items like bunkers, and there seemed no early possibility of a better balance in the market, and some degree of profitability returning. Thus shipowners in the traditional maritime world were turning away from their previous opposition to open registries and were beginning to consider, with their governments, in what ways they could cut their costs by "flagging out" to other less costly registers.[239]

An international convention to establish stricter conditions for registration of ships, including the "genuine link" test was eventually adopted by a diplomatic conference held in Geneva from January 20 to February 7, 1986 under the auspices of UNCTAD, but until now it has received only fourteen ratifications and is not yet in force.[240]

In many developing countries, infrastructure investment made during the 1970s, including investment in building up a merchant fleet, had been possible due to large-scale borrowing of hard currency then available at very attractive interest rates. This development model came to an abrupt, albeit predictable, end when economic conditions deteriorated in the 1980s. The steady increase in interest rates during those recession years brought many countries to the verge of bankruptcy. Defaults on loans were followed by adjustment programs, fiscal austerity, and expenditure cutting, often followed by repeated default, new restructuring, and so on. In many developing countries financial crisis became nearly endemic, lasting for over a decade.

Whether as a result of domestic policies or pressure from international lenders, developing countries "adopt[ed] structural readjustment programs which invariably involved strict control of foreign exchange and the imposition of sound commercial practice on state enterprises. This made it difficult to embark on new transport projects, which typically bring little or no immediate financial return, and existing services had to pay their way."[241] Badly needed investment to modernize port infrastructure, in many developing countries hopelessly outdated, could not be financed, and this, in turn, kept transportation costs high, leaving many countries lagging further behind in the overall trend towards greater containerization.

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237. FARTHING, *supra* note 135, at 121–25.

238. *Id.* at 123.

239. FARTHING, *supra* note 135, at 123. The 1980s turned out to be years of severe depression for the shipping industry. Overcapacity approached 40 percent for tankers, 20 percent for dry bulk and 6 percent for general cargo. About 10 percent of the world's fleet was idle in the 1980s, as compared to 1 percent in the year 1970. PIERRE BAUCHET, LE TRANSPORT INTERNATIONAL DANS L'ÉCONOMIE MONDIALE [INTERNATIONAL TRANSPORT IN THE GLOBAL ECONOMY] 178 (2d ed. 1991).

240. United Nations Convention on Conditions for Registration of Ships, Feb. 7, 1986, 26 I.L.M. 1229 (listing the current ratifying countries: Albania, Bulgaria, Côte d'Ivoire, Egypt, Georgia, Ghana, Haiti, Hungary, Iraq, Liberia, Libyan Arab Jamahiriya, Mexico, Oman, and Syrian Arab Republic).

241. HILLING, *supra* note 131, at 316–17.

The decline of national liners was accelerated by the destabilization of the liner conference system during the 1990s.[242] In 1998, the U.S. government enacted the Ocean Shipping Reform Act (OSRA), which developed further some of the reforms introduced by the 1984 Merchant Shipping Act.[243] OSRA provided further encouragement for shippers and carriers to engage in long-term confidential contracts that circumvent conference pricing.[244] OSRA was felt to have signaled "the death knell for conferences in US trade lanes."[245] Liner conferences no longer provided the best economic framework for the international shipping industry, and carriers started looking at other options to face a changing competitive environment. OSRA was believed to have given a clear boost to industry concentration through consortia and alliances, which were to become a major trend in the following years.[246]

Elsewhere, things did not look brighter for liner conferences:

> In the Trans-Pacific market, conferences were completely disbanded, while in the Transatlantic, the Trans-Atlantic Conference Agreement (TACA) shrunk from a market share of approximately 80 percent of all US-Europe liner trade in the early 1990s to under 50 percent in 2002 and, perhaps in anticipation that significant reform in ocean shipping regulation would target the liner conference system, large carriers began forming global alliances in 1996.[247]

Few developing countries were still willing to continue supporting national liners operating at a loss or sponsoring expensive cargo reservation schemes. Out of ideological preference, international pressure or a pragmatic sense of necessity, many developing countries abandoned flag preference and embraced deregulation of international carriage. Deregulation of the liner sector destabilized the conference system and exposed many national liners to competition for which they were not prepared. Without protection, their share of business dropped dramatically,[248] and many companies entered into a process of rapid decay.[249] As a sad illustration of

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242. *Id.* at 293.

243. *See generally* Chris Sagers, *The Demise of Regulation in Ocean Shipping: A Study in the Evolution of Competition Policy and the Predictive Power of Microeconomics*, 39 VAND. J. TRANSNAT'L L. 779, 785–802 (2006) (summarizing "the history of the ocean shipping industry and the legal background of its regulation").

244. *Id.* at 815.

245. Mike Fusillo, *Is Liner Shipping Supply Fixed?*, 6 MAR. ECON. & LOGISTICS 220, 222 (2004).

246. *See* Paul S. Edelman, *The Ocean Shipping Reform Act of 1998*, 9 CURRENTS: INT'L TRADE L. J. 65, 68 (2000) ("One can expect a wave of mergers, with bigger combinations. Associations will proliferate. There will be a need for vessel sharing and inter-modal cooperation. There will be more pressure on inefficient and high cost operators. Rates will be lower in certain areas where there is excess shipping capacity. All in all, only the swift, innovative and strong will survive. These survivors, however, will benefit from the freer market and less governmental intrusion.").

247. Fusillo, *supra* note 245, at 222–23.

248. *See, e.g.*, HILLING, *supra* note 131, at 295 ("Brazil's shipping had in 1978 carried 30 per cent of the country's trade but by 1993 this was down to 3.2%"); Luciano Otávio Marques de Velasco & Eriksom Teixeira Lima, *A Marinha Mercante*, BNDES SETORIAL 247, 254 tab. 6 (1997) (noting that the Brazilian merchant fleet dropped from 8.3 million tons (169 ships) in 1986 to 4.5 million tons (51 ships) in 1995), *available at* http://www.bndes.gov.br/conhecimento/Bnset/marinha.pdf.

249. *See, e.g.*, HILLING, *supra* note 131, at 294–95 ("The Nigerian National Line in 1993 was in default on premium payments for insurance cover and in recent years there have been frequent reports of its vessels being arrested for non-payment of debts. In 1995 the company went into liquidation. By 1994, Ghana's Black Star Line from a peak of 12 vessels was down to three, dating from the early 1980s, with

those conditions, by the mid-1990s, South American coastal waters became notorious as a "dump for old ships."[250]

D. The UNCITRAL Draft Convention

Industry-specific developments went hand in hand with major social and economic changes, as our post-industrial world entered the era of the "information society,"[251] in which intensive application and wide use of information and communication technology (ICT) made know-how the principle force of production.

The advantages of enabling the use of ICT applications for business transactions soon became obvious.[252] The shipping industry saw the potential of information technology and started to move away from paper transport documents. At the same time, the greater speed of modern ships meant that goods could actually arrive at a destination before transport documents did. This was particularly a problem in connection with traditional bills of lading, which need to be physically transferred to the final consignee, possibly along a chain of buyers and banks. Unavailability of bills of lading by the time a vessel was ready to discharge the cargo at destination could cause costly delays.

In an effort to minimize the problems associated with delayed arrival of bills of lading, commercial parties were encouraged to use sea waybills rather than bills of lading in all cases where sale of goods in transit was not envisaged.[253] A number of standard contractual clauses were developed, which sought to equip sea waybills with some security features by providing for limits to the shipper's right of control over the goods.[254] The applicability of the Hague Rules to those transport documents was, however, questionable, because they do not constitute "documents of title."[255]

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heavy fuel consumption, high maintenance costs and large, 41-men crews."); Okechukwu C. Iheduru, *The State and Maritime Nationalism in Cote d'Ivoire*, 32 J. MOD. AFR. STUD. 215, 237 (1994) (detailing how, in Côte d'Ivoire, by 1992 the fleet of the state-owned carrier *Sitram* "had dropped to six vessels from a high of 23 in 1980 . . . In addition, the privatisation or commercialisation of state-owned enterprises in the shipping sector—such as *Port autonome d'Abidjan* in 1988 and *Sitram* in 1989—begun at the insistence of the International Monetary Fund (I.M.F) and the World Bank means that these companies must now be financially independent and charge market-related prices for their services.").

250. HILLING, *supra* note 131, at 298 (quoting LLOYD'S LIST).

251. The term comes from JEAN-FRANÇOIS LYOTARD, LA CONDITION POST-MODERNE: RAPPORT SUR LE SAVOIR (1979).

252. *See*, *e.g.*, U.N. Econ. Comm'n for Eur. [UNECE], *A Roadmap Towards Paperless Trade*, 4, U.N. Doc. ECE/TRADE/371 (2006) (explaining that besides the evident efficiency and productivity gains offered by the speed and worldwide reach of electronic communications, the potential savings of replacing paper-based trade documentation by electronic means can be illustrated by data provided by the International Air Transport Association (IATA), according to which the average cost of processing paper airway bills is US$ 30 per bill, which, by an average of 35 million airway bills being issued every year, amounts to a total cost of some US$1 billion every year in this industry).

253. *See* U.N. Econ. Comm'n for Eur. [UNECE], U.N. Centre for Trade Facilitation and Electronic Business [UN/CEFACT], *Recommendation No. 12*, *Second Edition*, U.N. Doc. ECE/TRADE/240 (2001) (encouraging parties to use the non-negotiable sea waybill of the bill of lading when goods are not traded in transit).

254. See the Comité Mar. Int'l [CMI], *Uniform Rules for Sea Waybills*, R. 6(ii), (1990), *available at* http://www.comitemaritime.org/cmidocs/rulessaway.html, for examples of clauses that are designed to be incorporated into commercial contracts and also set out a mechanism for the transfer of the right of control from shipper to consignee. Rule 6(ii) provides:

Early analysis of the legal basis for the negotiability of documents of title had indicated that "[t]here is generally no statutory means in place by which commercial parties, through the exchange of electronic messages, can validly transfer legal rights in the same manner possible with paper documents."[256] Moreover, the legal regime of negotiable instruments "is in essence based on the technique of a *tangible original paper document*, susceptible to immediate visual verification on the spot. In the present state of legislation, negotiability cannot be divorced from the physical possession of the original paper document."[257] The main obstacle to accommodating electronically transmitted documents of title is to devise procedures that assure the holder that "there is a document of title in existence, that it has no defects upon its face, that the signature, or some substitute therefore is genuine, that it is negotiable, and that there is a means to take control of the electronic document equivalent in law to physical possession."[258]

Many attempts were then made by a number of international organizations, whether intergovernmental or non-governmental, and by various groups of users of electronic communication techniques, to reproduce the functions of a traditional paper-based bill of lading in an electronic environment.[259] Besides various technical and commercial challenges, those projects faced one nearly insurmountable obstacle: both international and domestic rules on shipping had been conceived against the background of paper documents and would either require the direct issue of a bill of lading in paper form or assume its existence for various functions, in particular, the transfer or pledge of rights over goods in transit.[260]

The difficulty of establishing legal equivalence for electronic transport documents also had more general roots. Internationally unified maritime transportation law—whether pursuant to the Hague or to the Hamburg Rules—left a number of important aspects of maritime transportation unregulated and, therefore, referred them to national law. As the need for deeper unification of maritime transportation law became evident, new hope emerged about the feasibility of revisiting liability regimes *in tandem* with the harmonization process in those new

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> The shipper shall have the option, to be exercised not later than the receipt of the goods by the carrier, to transfer the right of control to the consignee. The exercise of this option must be noted on the sea waybill or similar document, if any. Where the option has been exercised the consignee shall have such rights as are referred to in subrule (i) above [right to give instructions to the carrier in relation to the contract of carriage] and the shipper shall cease to have such rights. Id.

255. Jane Andrewartha & Zelda Stone, *English Maritime Law Update: 2004*, 36 J. MAR. L. & COM. 307, 320–23 (2005).

256. Jeffrey B. Ritter & Judith Y. Gliniecki, *International Electronic Commerce and Administrative Law: The Need for Harmonized National Reforms*, 6 HARV. J.L. & TECH. 263, 279 (1993).

257. K. Bernauw, *Current Developments Concerning the Form of Bills of Lading-Belgium*, *in* OCEAN BILLS OF LADING: TRADITIONAL FORMS, SUBSTITUTES AND EDI SYSTEMS 87, 115 (A.N. Yiannopoulos ed., 1995).

258. Donald B. Pedersen, *Electronic Data Interchange as Documents of Title for Fungible Agricultural Commodities*, 31 IDAHO L. REV. 719, 726 (1995).

259. For an overview of various developments, *see* Marek Dubovec, *The Problems and Possibilities for Using Electronic Bills of Lading as Collateral,* 23 ARIZ. J. INT'L & COMP. L. 437 (2006). *See* U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group on Electronic Data Interchange, *Electronic Data Interchance*, paras. 66–81, U.N. Doc. A/CN.9/WG.IV/WP.69 (Jan. 31, 1996), for information on earlier initiatives, such as the Sea Docs experiment, and the CMI Rules for Electronic Bills of Lading can be found in earlier studies done by UNCITRAL.

260. Dubavec, *supra* note 259, at 447.

areas, and outside the almost traditional polarization created by the two competing conventions.[261] These and other questions eventually convinced countries the time had come for a fresh look at international conventions on the carriage of goods.

At its twenty-ninth session, in 1996, UNCITRAL considered a proposal to include in its work program a review of current practices and laws in the area of the international carriage of goods by sea, aiming to establish uniform rules where no such rules existed and to achieve greater uniformity of laws.[262] In the meantime, the CMI entrusted a working group to prepare a study on a broad range of issues in international transport law with the aim of identifying the areas where unification or harmonization was needed by the industries involved.[263] UNCITRAL and CMI engaged in consultations with a broad base of stakeholders.[264] There was general consensus that, with the changes brought about by the development of multimodalism and the use of electronic commerce, the transport law regime was in need of reform to regulate all transport contracts, whether applying to one or more modes of transport and whether the contract was made electronically or in writing.[265]

In the light of the consultations and preliminary work, UNCITRAL decided at its thirty-fourth session in 2001 to entrust the project to its Working Group on Transport Law. The Working Group has held thirteen sessions since 2002, with broad participation by governments from member[266] and observer States,[267] as well as

261. Alexander von Ziegler, *The Present State of Research Carried Out by the English-speaking Section of the Centre for Studies and Research*, *in* THE INTERNATIONAL LAW OF MARITIME TRANSPORT 1999, at 75, 118–19 (2001).

262. U.N. Comm'n on Int'l Trade Law [UNCITRAL], *Report of UNCITRAL on the Work of its Twenty-Ninth Session*, para. 210, U.N. Doc. A/51/17 (Aug. 14, 1996).

263. U.N. Comm'n on Int'l Trade Law [UNCITRAL], *Report of UNCITRAL on the Work of its Thirty-Second Session*, para. 413, U.N. Doc. A/54/17 (May 17, 1999).

264. *See id.* paras. 410–18 (including, in addition to Governments, the international organizations representing the commercial sectors involved in the carriage of goods by sea, such as the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS) and the International Association of Ports and Harbors).

265. *See id.* (discussing the findings of the CMI working group regarding a lack of harmonization in electronic commerce).

266. Membership of UNCITRAL is structured to ensure that the various geographic regions and the principal economic and legal systems of the world are represented. U.N. Comm'n on Int'l Trade Law [UNCITRAL], *Report of UNCITRAL on Work of its First Session*, paras. 1–3, U.N. Doc. A/7216 (1968). Thus, the 60 member States include 14 African States, 14 Asian States, 8 East European States, 10 Latin American States, and 14 from the group of West European and other States. G.A. Res. 57/20, para. 3, U.N. Doc. 57/20 (Jan. 21, 2003). The current members of UNCITRAL are: Algeria, Armenia, Australia, Austria, Bahrain, Belarus, Benin, Bolivia, Bulgaria, Cameroon, Canada, Chile, China, Colombia Czech Republic, Ecuador, Egypt, El Salvador, Fiji, France, Gabon, Germany, Greece, Guatemala, Honduras, India, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Latvia, Lebanon, Madagascar, Malaysia, Malta, Mexico, Mongolia, Morocco, Namibia, Nigeria, Norway, Pakistan, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Serbia, Singapore, South Africa, Spain, Sri Lanka, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe. Press Release, General Assembly, General Assembly Concludes HIV/AIDS Debate, Elects Members to Peacebuilding Organizational Committee, International Trade Law Commission, U.N. Doc. GA/10596 (May 22, 2007).

267. In addition to its sixty member States, UNCITRAL also invites other Member States of the United Nations as observers. Observer States may participate in discussions to the same extent as members.

international organizations.[268] Despite political differences and conflicting economic interests, the UNCITRAL negotiations have by and large preserved an eminently technical and cooperative character. By tradition, decisions taken by UNCITRAL and its working groups reconcile the different positions represented by its members and other participants by way of consensus, not by vote.[269]

The last session of the Working Group was held in Vienna from January 14 to January 25, 2008, when it approved the "Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea."[270] The Draft Convention has been circulated to governments for comments and submitted to the plenary UNCITRAL, which it will consider it at its upcoming forty-first session (New York, June 16 to July 3, 2008).[271] After approval by UNCITRAL, the Draft Convention will be submitted to the U.N. General Assembly, which will be requested to adopt the final text of the Convention, acting as a conference of plenipotentiaries, at its 63rd annual session (likely during the last quarter of 2008).[272]

As described by this issue's other authors, the UNCITRAL Draft Convention deals with a wide range of issues, most of which are novel terrain for a uniform transport law instrument. No previous convention, for example, had attempted to offer detailed rules on delivery, right of control and transfer of rights in goods. As regards matters already dealt with in earlier instruments, the UNCITRAL Draft Convention aims at enhancing legal certainty by codifying decades of case law and practice or clarifying earlier texts, where necessary. The UNCITRAL Draft Convention, therefore, does much more than merely revising the liability regime for door-to-door carriage.

The need for a comprehensive regime governing door-to-door carriage had become acute in view of the variety of regimes governing particular modes of carriage and the increasing risk that, in the absence of a truly global multimodal instrument, countries might undertake to regulate multimodal transport unilaterally or develop a patchwork of regionally harmonized regimes. Various U.N. bodies

268. *See* G.A. Res. 31/99, para. 10(c), U.N. Doc. A/RES/31/99 (Dec. 15, 1976); G.A. Res. 36/32, para. 9, U.N. Doc. A/RES/36/32 (Nov. 13, 1981). Besides governments, UNCITRAL also invites as observers selected international and regional organizations (both intergovernmental and non-governmental) with an interest in the topics under discussion at annual sessions and working groups. Observer organizations are encouraged to offer their technical advice and expert contribution during UNCITRAL negotiations. Organizations that participated in the most recent negotiating sessions of the Working Group included the following: UNCTAD, U. N. Economic Commission for Europe (UNECE), Asian-African Legal Consultative Organization, Council of the European Union, European Commission, Intergovernmental Organization for International Carriage by Rail, the League of Arab States, Association of American Railroads, BIMCO, CMI, European Shippers' Council, Ibero-American Institute of Maritime Law, ICC, ICS, FIATA, International Group of Protection and Indemnity Clubs, International Road Transport Union, International Multimodal Transport Association, IUMI, the Maritime Organization of West and Central Africa, and the World Maritime University.

269. *Report of UNCITRAL on Work of its First Session*, *supra* note 266, para. 18. The basis of consensus is that efforts are taken to address all concerns so as to make the final text acceptable to all. It should not be understood as giving any State the power to veto what is otherwise the prevailing view of the meeting.

270. U.N. Comm'n on Int'l Trade Law [UNCITRAL], *Report of Working Group III (Transport Law) on the Work of its Twenty-First Session*, paras. 1–10, U.N. Doc. A/CN.9/645 (Jan. 30, 2008).

271. *Id.* para. 290.

272. CHESTER D. HOOPER & VINCENT M. DEORCHIS, REPORT OF THE UNCITRAL MEETINGS IN VIENNA, OCTOBER 2007 (2007), *available at* http://www.mlaus.org/archives/library/1019.doc.

warned about the disadvantages of developing regional multimodal transport instruments. For example, as early as 2001 UNCTAD noted that:

> The lack of a widely acceptable international legal framework on the subject [of multimodal transport rules] has resulted in individual governments and regional/subregional intergovernmental bodies taking the initiative of enacting legislation in order to overcome the uncertainties and problems which presently exist. Concerns have been expressed regarding the proliferation of individual and possibly divergent legal approaches, which would add to already existing confusion and uncertainties pertaining to the legal regime of multimodal transport.[273]

In more recent studies, UNCTAD has noted that the current liability framework for international multimodal transport "does not reflect developments that have taken place in terms of transport patterns, technology and markets," and that "[n]o international uniform regime is in force to govern liability for loss, damage or delay arising from multimodal transport."[274] Instead, the present legal framework was found to consist of "a complex array of international conventions designed to regulate unimodal carriage, diverse regional/subregional agreements, national laws and standard term contracts. As a consequence, both the applicable liability rules and the degree and extent of a carrier's liability vary greatly from case to case and are unpredictable."[275] UNCTAD further notes that, since the adoption of UNCTAD's 1980 United Nations Convention on the International Multimodal Transport of Goods,

> globalisation, together with significant developments in technology and communication and resulting changes in demand, has led to increased emphasis on multimodal transportation. In response to these developments, and in view of the absence of international uniform regulation of liability, there has, at the same time, been a proliferation of diverse national, regional and subregional laws . . . creating a trend of further 'disunification' at the international level.[276]

It is true that some have qualified the UNCITRAL Draft Convention as a "maritime plus" regime rather than a truly multimodal one.[277] A quick look at the world map may, however, suffice to recognize the legitimacy of including in a new

273. U.N. Conference on Trade and Dev. [UNCTAD] Secretariat, *Implementation of Multimodal Rules*, para. 9, U.N. Doc. UNCTAD/SCTE/TLB/2 (June 25, 2001).

274. U.N. Conference on Trade and Dev. [UNCTAD] Secretariat, *Multimodal Transport: The Feasibility of an International Legal Instrument*, para. 11, U.N. Doc. UNCTAD/SDTE/TLB/2003/1 (Jan. 13 2003).

275. *Id.*

276. *Id.* para. 13. Further examples of the problems created by resort by national Governments and regional and subregional bodies, particularly those of developing countries, to widely divergent solutions to the problem of a lack of a global approach to modern multimodal transport have been identified by UNCTAD. U.N. Conference on Trade and Development [UNCTAD], Trade and Dev. Bd., Comm'n on Enter., Bus. Facilitation and Dev., *Efficient Transport and Trade Facilitation to Improve Participation by Developing Countries in International Trade*, paras. 28–32, U.N. Doc. TD/B/COM.3/60 (Oct. 3, 2003).

277. Michael F. Sturley, *The United Nations Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress*, 39 TEX. INT'L L.J. 65, 77 (2003).

door-to-door instrument a number of considerations of particular concern for maritime carriage. Indeed, except for some regions—mainly Europe—where maritime transport occurs in a short sea leg, and for a few well-defined transport corridors across countries of continental dimension (United States, China, and Russia), most international multimodal transport involves a long leg of ocean carriage as its predominant part.

Needless to say, many commentators focus their attention primarily on the liability rules set forth in the UNCITRAL Draft Convention. This paper does not allow an extensive discussion of the new rules on carrier liability. Nonetheless, a few comments are needed.

The liability regime of the UNCITRAL Draft Convention maintains the principle—implicit in the Hague Rules and explicit in the Hamburg Rules—of presumed fault of the carrier for damage incurred during the carrier's custody of the goods.[278] Indeed, the UNCITRAL Draft Convention makes the carrier liable for the loss of or to the goods, as well as for delay in their 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."[279] Under the UNCITRAL Draft Convention, the initial burden of proof—that is the burden of proving the damage and the time it occurred—rests with the cargo interests,[280] as was already the case under both the Hague Rules and the Hamburg Rules.[281] The basic assumption of the UNCITRAL Draft Convention is that there can be no damage without a cause and that, if the cause remains unexplained or unexplainable, liability falls automatically on the carrier.[282]

Once the claimant has proved the damage, the carrier can still be relieved of liability if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or the fault of a performing party.[283] Alternatively, the carrier may prove that one or more of the exempting events or circumstances listed in the Draft Convention caused or contributed to cause the loss, damage, or delay.[284]

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278. *See* U.N. Comm'n on Int'l Trade Law [UNCITRAL], *Report of Working Group III (Transport Law) on the Work of its Twelfth Session*, para. 90, U.N. Doc. A/CN.9/544 (Oct. 6–17, 2003) [hereinafter Report of the Working Group of Twelfth Session] ("Strong support was expressed [within the UNCITRAL Working Group] for the view that the nature of the liability in draft article 14 should be based on presumed fault.").

279. U.N. Comm'n on Int'l Trade Law [UNCITRAL], Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, art. 17, para. 1, *reprinted in Report of the U.N. Commission on International Trade Law*, Annex I, U.N. Doc. A/63/17 (July 3, 2008) [hereinafter Draft Convention].

280. *Id.*

281. William Tetley, *The Burden and Order of Proof in Marine Cargo Claims, in* MARINE CARGO CLAIMS 31, 42 (4th ed. 2008), *available at* http://www.mcgill.ca/files/maritimelaw/burden.pdf.

282. *See* Report of the Working Group of Twelfth Session, *supra* note 278, para. 90 ("The Working Group was in general agreement with the approach that the carrier should be responsible for unexplained losses occurring during its period of responsibility, but that the carrier should then have an opportunity to prove the cause of the damage.").

283. Draft Convention, *supra* note 279, art. 17, para. 2.

284. *Id.* art. 17, para. 3. In deciding to retain, with some adjustments, the list of "excepted perils" of the Hague Rules, the UNCITRAL Working Group took into account the fact that, in its origin, the list was the result of a "compromise position taken at the time in order to accommodate both the civil law and common law systems. Several views were expressed that the list of excepted perils was not necessary in many countries, but that there was no objection to their continued inclusion in the draft instrument in order to accommodate all legal systems and to preserve the general body of law that had developed with the widespread use of the Hague and Hague-Visby Rules." Report of the Working Group of Twelfth

The defenses available to the carrier are essentially the same as those recognized by the Hague Rules. However, like the Hamburg Rules, the UNCITRAL Draft Convention does not exempt the carrier from liability for loss, damage, or delay resulting from unseaworthiness of the ship or caused by fault in its navigation or management.[285]

Despite the defenses, the carrier will be liable in whole or in part for the loss, damage, or delay if the claimant proves that: (a) the fault of the carrier or of a person for whose acts the carrier is liable under the Draft Convention caused or contributed to the event or circumstance on which the carrier relies; or (b) an event or circumstance other than one of the carrier's defenses contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault.[286] Furthermore, the carrier would still be liable if the claimant proves that the loss, damage, or delay was, or was *probably* caused by or contributed to by, the unseaworthiness of the ship.[287] The UNCITRAL Draft Convention follows the principle already set forth in the Hamburg Rules[288] that, in case of concurrent causes for the damage, the carrier is liable only for that part of the loss that is attributable to its negligence.

As a whole, the rules on defenses and exemption of liability in the UNCITRAL Draft Convention are more elaborate than in any of the previous instruments. This is the result of a fundamental concern of the countries participating in the UNCITRAL negotiations to clarify the burden of proof under the various circumstances involved in a cargo claim. While maintaining a system that is familiar to the countries that have ratified and adopted the Hague Rules, the UNCITRAL Draft Convention improves the overall structure and, like the Hamburg Rules, modernizes it. For example, the UNCITRAL Draft Convention extends the carrier's period of responsibility beyond "tackle-to-tackle" by making the due diligence obligation to provide a seaworthy ship a continuous one and by eliminating the defense based on fault in navigation and management of the ship.[289]

The UNCITRAL Draft Convention follows the structure of the Hamburg Rules and the Visby Protocol, regarding both the double criterion for calculation of liability limits and the treatment of containers carrying goods. The liability limits

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Session, *supra* note 278, para. 118.

285. Draft Convention, *supra* note 279, art. 18. The first possibility had become moot by the Working Group's decision to transform the carrier's obligation to provide a seaworthy ship into a continuous obligation applying throughout the voyage. The second possibility was the subject of intense debate and was eventually deleted from the UNCITRAL Draft Convention. Report of the Working Group of Twelfth Session, *supra* note 278, paras. 117, 127.

286. Draft Convention, *supra* note 279, art. 18, para. 4.

287. *Id.* art. 17, para. 5. These provisions do not require the claimant to positively prove unseaworthiness. Cargo claimants may not be in the best position to do for lack of access to the relevant evidence, usually in the carrier's possession. Recognizing that difficulty, the UNCITRAL Draft Convention only requires the claimant to show a certain nexus between the ship's alleged unseaworthiness and the damage suffered by the goods.

288. Hamburg Rules, *supra* note 154, art. 5, para. 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.").

289. Draft Convention, *supra* note 279, arts. 12, 15(a); Report of Working Group of Twelfth Session, *supra* note 278, paras. 117, 127.

contemplated in the Draft Convention represent relatively little change from the limits provided for in the Hamburg Rules.[290] The UNCITRAL Draft Convention also admits liability of the carrier for delay,[291] but the UNCITRAL Working Group has agreed to limit this liability to cases where the parties have agreed on a time for delivery.[292] In such cases, the carrier's liability is limited in a similar manner as under the Hamburg Rules.[293]

Apart from the basis of liability, one of the issues most extensively debated within the Working Group was the role of freedom of contract in the Draft Convention. Unlike the strictly mandatory regime of previous instruments, the Draft Convention provides parties a "volume contract"[294] to derogate from its provisions under some conditions.[295] There was some controversy over the principle of freedom of contract, which in earlier versions of the draft was said to be excessively liberal for a field that had always been characterized by mandatory law.[296]

Will the freedom of contract allowed by the UNCITRAL Draft Convention, in the form of volume contracts, result in widespread disclaimer of liability and erosion of the Convention's own regime? Some have expressed that fear. Most are satisfied, however, that the last round of negotiations at the Working Group provided a workable set of checks and balances to avoid abuse.

Only time will tell whether past mistakes will be repeated. In the early days of liner conferences, a carrier would be likely to exploit every inch of liberty to its own advantage. One must hope, however, that our times are not the same as the early 1920s. Liner conferences are not as powerful as they were eighty years ago. In many countries, they no longer enjoy any protection from antitrust legislation. The industry itself has changed. We are moving from cartelized monopolies toward highly competitive markets.

Moreover, a large portion of international shipments is accounted for by big corporations, capable of demanding better contract terms from carriers. As for

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290. *See* Hamburg Rules, *supra* note 154, art. 6, para. 1 (limiting liability to "835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher"); *See* Draft Convention, *supra* note 279, art. 59, para. 1 (limiting liability 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").

291. *Id.* art 17, para. 1.

292. G.A., U.N. Comm'n on Int'l Trade Law, *Report of the Working Group III (Transport Law) on its Nineteenth Session (Vienna)*, paras. 182, 184, U.N. Doc. A/CN.9/621 (Apr. 16–27, 2007).

293. Hamburg Rules, *supra* note 154, art. 20; Draft Convention, *supra* note 279, art. 62.

294. Draft Convention, *supra* note 279, art. 1 (defining a volume contract as "a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time").

295. *Id.* art. 82. The volume contract must contain "a prominent statement that it derogates from this Convention." The volume contract must also (a) be individually negotiated or (b) prominently specify the sections of the volume contract containing the derogations. The shipper must in any event have "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." Lastly, the derogation may not be "incorporated by reference from another document" or be "included in a contract of adhesion that is not subject to negotiation." *Id.* art. 82, para. 2. Furthermore, derogations are not binding on third parties, such as the holder of a transport document, unless the holder received notice of the derogation and consented to it. *See id.* art. 80 (setting out rules regarding derogations).

296. *See* G.A. Res. 39/1, U.N. Doc. A/CN.9/612 para. 6 (May 22, 2006) (stating that the proposed drafts offer considerable scope to freedom of contract and represent a major change from a fundamentally mandatory regime).

smaller shippers, in a number of countries they are currently organized in shipper councils, which collectively consult with carriers and bargain with them over conditions of transport. Lastly, competition authorities, a U.S. oddity when the Hague Rules were adopted, are now active in most countries. The recent decision by the European Union to abolish antitrust immunity for liner conferences,[297] following a general recommendation by the OECD to that effect,[298] suggests that concerted action to the detriment of shippers may be subject to close scrutiny in the future.

V. CONCLUSION

An international convention is the result of extensive and, at times, difficult international negotiations. Seeking consensus inevitably leads to compromise solutions and a delicate balance between different viewpoints, legal traditions, and interest groups. The compromises arrived at in international conferences often produce texts with some ambiguity or deliberate silence, something that outsiders often fail to appreciate.299 International conventions on carriage of goods are no exception to this general rule. Nevertheless, the eminently international nature of maritime transport makes international harmonization absolutely necessary, despite its well-known imperfection.

International conventions also reflect the time in which they are negotiated. When the Hague Rules were drafted, the agreement of less than thirty countries was enough to create rules that would eventually apply to bills of lading for the whole world.300 Carriers from the same countries owned the biggest merchant fleets of those days and effectively controlled international shipping. Pooling their strengths in maritime conferences, and protected by official or hidden support by their governments, European shipowners dictated liner schedules, conditions of carriage, and freight rates. It is no surprise that the Hague Rules came to be widely regarded as a very carrier-friendly regime.

Little more than half a century later, seventy-eight countries participated in the conference that adopted the Hamburg Rules.301 Most of them were developing countries with little or no tradition in ocean shipping. Those were, however, years of deep political divide in the world and of coordinated effort by the developing

297. *See* Council Regulation 1419/2006, 2006 O.J. (L 269) (repealing Regulation (EEC) No 4056/86 (laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 with respect to the extension of its scope to include cabotage and international tramp services).

298. ORG. FOR ECON. CO-OPERATION AND DEV., DIRECTORATE FOR SCIENCE, TECHNOLOGY AND INDUSTRY, COMPETITION POLICY IN LINER SHIPPING: FINAL REPORT 2, OECD Doc. DSTI/DOT(2002) (Apr. 16, 2002).

299. Roy Goode, *Reflections on the Harmonization of Commercial Law,* 1 UNIFORM L. REV. 54, 73 (1991) (stating that "those who pick to pieces the open texture or verbal infelicities of an international convention rarely pause to consider how, when legislation prepared in a single legal system is generally so verbose, obscure and generally badly drafted, one can reasonably expect more of the product of many hands drawn from widely differing legal systems with different cultures, legal structures, and methods of legal reasoning and decision making, entailing maximum flexibility, co-operation and compromise.").

300. Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155, art. 30, para. 1.

301. Shah, *supra* note 153, at 2 n. 1.

countries, with the support—occasionally effective, often merely rhetoric—of the socialist countries, toward replacing the existing financial and trade regimes with a "new international economic order." As an essential piece in the logistics of international exchanges, ocean carriage was a target of the new actors in the international scene, which had the dual objective of abolishing a liability system that in their eyes favored the carriers from their old colonial powers and securing an equitable share of shipping business for their infant maritime industries.[302] The Hamburg Rules and the UNCTAD Code of Conduct are two products of that era and reflect the desire of developing countries to achieve a substantial reform of the then-existing legal framework.

Today's world is very different from the world at the time the Hague Rules and even the Hamburg Rules were negotiated. Ownership of the international merchant fleet has changed dramatically in the few last decades. Although many European countries still maintain their position as maritime powers, ten of the world's twenty largest containership operators come from countries in the Far East.[303] The shipping industry itself has gone through a process of unprecedented concentration. Except for the more advanced countries in the Far East, the merchant fleets of most developing countries have either totally disappeared or have been relegated to domestic cabotage. Maritime conferences no longer enjoy legislative protection in most developed countries, and cargo-reservation schemes advocated by the Code of Conduct (the famous 40:40:20 formula) have either been abandoned or have become largely illusory for an industry as transnational as today's shipping industry.[304]

Speaking for UNCITRAL, I must confess to our disappointment that the time, resources, and effort spent in the preparation of the Hamburg Rules met with limited success. And yet, if we look back at the Hamburg Rules from a broader perspective, it should become clear that those efforts were not in vain. Without necessarily subscribing to the Hegelian deterministic view of human history, one could say that the antithetical opposition of the Hamburg Rules to the Hague/Visby system might have been a necessary step to arrive at the synthesis that is now reflected in the UNCITRAL Draft Convention.

The redistribution of interests and the new balance of forces in today's world were reflected in UNCITRAL's negotiations on the new convention. Some of the old opponents of the Hamburg Rules have moved to accept some of its basic principles, while some new maritime powers seek to preserve the carrier's acquired privileges under the Hague Rules. The concentration of the world's merchant fleet has narrowed the scope of protectionist interests and favored in many countries a move towards greater protection for shippers. At the same time, the traditional champions of the Hamburg Rules have come to accept the value many countries attach to the stability that would result from preserving, to the extent possible, time-honored concepts, principles, and an entire body of jurisprudence that developed on the basis of the Hague Rules.

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302. *Id.*

303. *Trade and Freight Markets*, REV. OF MAR. TRANSPORT (U.N. Conference on Trade and Development), 2006, at 64 tab. 4 (listing the largest containership operators: A.P. Moller Group (Denmark), MSC (Switzerland), P&O Nedlloyd (United Kingdom/Netherlands), Evergreen (Taiwan, China), CMA-CGM Group (France), NOL/APL (Singapore), China Shipping (China), COSCO (China), Hanjin/DSR-Senator (Republic of Korea and Germany), NYK (Japan), OOCL Hong Kong (China), CSAV (Chile), MOL (Japan), K Line (Japan), Hapag Lloyd (Germany), Zim (Israel), Hamburg-Sud (Germany), Yang Ming (Taiwan, China), CP Ships Group (Canada), and Hyundai (Republic of Korea)).

304. Special Session of the Council for Trade in Services, *Maritime Transport Services*, para. 11, S/C/W/62 (Nov. 16, 1998).

The atmosphere during the negotiations of the UNCITRAL Draft Convention was one of cooperation rather than political confrontation. Carriers and shippers are too conscious of the obsolescence of the original Hague Rules when it comes to meeting the needs of today's shipping industry and of the limited success of the Hamburg Rules. The final text that is taking shape indicates an effort to build consensus and arrive at common denominators—not necessarily the lowest, as the liability limits show.

If successful, this consensus will be able to eliminate the anachronism that currently stains the liability regime for ocean carriers without impressing on it the stigma of revenge or controversy.

Even more important may be the contribution of the new Draft Convention to the modernization of maritime law. The formulation of uniform rules for a number of issues not addressed in previous international instruments (e.g., right of control, delivery, and shipper's obligations), which the many distinguished authors that join me will address, is a big step toward establishing a sound foundation for shipping in the years to come. Furthermore, by taking into account both the multimodal nature of modern logistic chains and offering rules to support the use of computer-based, dematerialized transport documents, the new Draft Convention opens the way for a reconciliation of the law with commercial reality.

At the end of the nineteenth century, the United States took the lead in a movement to modernize the law for ocean carriage. At the dawn of the twenty-first century, the world looks again to the United States for a sign that the time is ripe for new rules in what is now a new trade in a new world.