

IV. INTERNATIONAL SHIPPING LEGISLATION

United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)^a: note by the Secretariat (A/CN.9/306) [Original: English]

INTRODUCTION

1. The United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) (hereinafter referred to as the "Hamburg Rules") was adopted on 31 March 1978 by a diplomatic conference convened by the General Assembly of the United Nations at Hamburg, Federal Republic of Germany. The Convention is based upon a draft prepared by the United Nations Commission on International Trade Law (UNCITRAL).

2. The Hamburg Rules establish a uniform legal regime governing the rights and obligations of shippers, carriers and consignees under a contract of carriage of goods by sea. Their central focus is the liability of a carrier for loss of and damage to the goods and for delay in delivery. They also deal with the liability of the shipper for loss sustained by the carrier and for damage to the ship, as well as certain responsibilities and liabilities of the shipper in respect of dangerous goods. Other provisions of the Hamburg Rules deal with transport documents issued by the carrier, including bills of lading and non-negotiable documents, and with limitation of actions, jurisdiction and arbitral proceedings under the Convention.

3. As of 16 February 1988, twelve countries had ratified or acceded to the Convention. They are: Barbados, Botswana, Chile, Egypt, Hungary, Lebanon, Morocco, Romania, Senegal, Tunisia, Uganda, and United Republic of Tanzania. Twenty ratifications or accessions are needed for the Convention to come into force.

I. Background to the Hamburg Rules

A. *The Hague Rules*

4. The Hamburg Rules are the result of a movement to establish a modern and uniform international legal regime to govern the carriage of goods by sea. For many years, a large proportion of the carriage of goods by sea has been governed by a legal regime centred

^aThis note has been prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for informational purposes only; it is not an official commentary on the Convention.

around the International Convention relating to the Unification of Certain Rules relating to Bills of Lading, adopted on 25 August 1924 at Brussels, otherwise known as the "Hague Rules".

5. The Hague Rules establish a mandatory legal regime governing the liability of a carrier for loss of or damage to goods carried under a bill of lading. They cover the period from the time the goods are loaded on to the ship until the time they are discharged. According to their provisions, the carrier is liable for loss or damage resulting from his failure to exercise due diligence to make the ship seaworthy, to properly man, equip and supply the ship or to make its storage areas fit and safe for the carriage of goods. However, the Hague Rules contain a long list of circumstances that exempt the carrier from this liability. Perhaps the most significant of these exemptions frees the carrier from liability if the loss or damage arises from the faulty navigation or management of the ship.

6. The Hague Rules have been amended twice since their adoption, first in 1968 (by means of a protocol hereinafter referred to as the "Visby Protocol") and again in 1979 (by means of a protocol hereinafter referred to as the "1979 Additional Protocol"). These amendments deal mainly with the financial limits of liability under the Hague Rules. They do not alter the basic liability regime of the Hague Rules or the allocation of risks effected by it.

B. *Dissatisfaction with the Hague Rules system*

7. There emerged over the course of time increasing dissatisfaction with the Hague Rules system. This dissatisfaction was based in part upon the perception that the overall allocation of responsibilities and risks achieved by the Hague Rules, which heavily favoured carriers at the expense of shippers, was inequitable. Several provisions of the Hague Rules were regarded as ambiguous and uncertain, which was said to result in higher transportation costs and to add further to the risks borne by shippers. The dissatisfaction with the Hague Rules was also based upon the perception that developments in conditions, technologies and practices relating to shipping had rendered inappropriate many features of the Hague Rules that may have been appropriate in 1924.

C. *Steps towards revising the law governing the carriage of goods by sea*

8. The question of revising the law governing the carriage of goods by sea was first raised by the delegation of Chile at the first session of UNCITRAL in 1968. Shortly afterwards, the General Assembly recommended that UNCITRAL should consider including the question among the priority topics in its programme of work. UNCITRAL did so at its second session in 1969.

9. At about the same time, the law relating to bills of lading and the carriage of goods by sea had come under study within a working group of the United Nations Conference on Trade and Development (UNCTAD). The Working Group concluded that the rules and practices concerning bills of lading, including those contained in the Hague Rules and the Hague Rules as amended by the Visby Protocol, should be examined and, where appropriate, revised and amplified and that a new international convention should be prepared. The objective of that work would be to remove the existing uncertainties and ambiguities in the existing law and to establish a balanced allocation of responsibilities and risks between cargo interests and the carriers. The Working Group recommended that the work be undertaken by UNCITRAL. In 1971, UNCITRAL decided to proceed accordingly.

10. By 1976, UNCITRAL had finalized and approved the text of a draft Convention on the Carriage of Goods by Sea. Thereafter, the General Assembly convened the diplomatic conference at Hamburg, which adopted the Hamburg Rules in 1978.

II. Salient features of the Hamburg Rules

A. *Scope of application*

11. In order to achieve international uniformity in the law relating to the carriage of goods by sea, the Hamburg Rules have been given a relatively wide scope of application—substantially wider than that of the Hague Rules. The Hamburg Rules are applicable to all contracts for the carriage of goods by sea between two different States if, according to the contract, either the port of loading or the port of discharge is located in a Contracting State, if the goods are discharged at an optional port of discharge stipulated in the contract and that port is located in a Contracting State, or if the bill of lading or other document evidencing the contract is issued in a Contracting State. In addition to those cases, the Hamburg Rules apply if the bill of lading or other document evidencing the contract of carriage provides that the rules are to apply. The application of the Rules does not depend upon the nationality of the ship, the carrier, the shipper, the consignee or any other interested person.

12. The Hamburg Rules do not apply to charter-parties. However, they apply to bills of lading issued pursuant to charter-parties if the bill of lading governs

the relation between the carrier and a holder of the bill of lading who is not the charterer.

13. Unlike the Hague Rules, which apply only when a bill of lading is issued by the carrier, the Hamburg Rules govern the rights and obligations of the parties to a contract of carriage regardless of whether or not a bill of lading has been issued. This is becoming increasingly important as more and more goods are carried under non-negotiable transport documents, rather than under bills of lading.

B. *Period of responsibility*

14. The Hague Rules cover only the period from the time the goods are loaded onto the ship until the time they are discharged from it. They do not cover loss or damage occurring while the goods are in the custody of the carrier prior to loading or after discharge.

15. In modern shipping practice carriers often take and retain custody of goods in port before and after the actual sea carriage. It has been estimated that most loss and damage to goods occurs while the goods are in port. In order to ensure that such loss or damage is the responsibility of the party who is in control of the goods and thereby best able to guard against that loss or damage, the Hamburg Rules apply to the entire period the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.

C. *Basis of carrier's liability*

16. The basis of the carrier's liability under the Hague Rules system was one of the principal concerns of the movement for reform that eventually resulted in the Hamburg Rules. While the Hague Rules provide that the carrier is liable for loss or damage resulting from his failure to exercise due diligence to make the ship seaworthy, to properly man, equip and supply the ship or to make its storage areas fit and safe for the carriage of goods, a long list of circumstances exempts the carrier from this liability. These provisions are based upon exemption clauses that commonly appeared in bills of lading when the Hague Rules were adopted in the early 1920s. Perhaps the most significant of these exemptions frees the carrier from liability if the loss or damage arises from the faulty navigation or management of the ship, the so-called "nautical fault" exception. As a result of these exemptions, the shipper bears a heavy portion of the risk of loss of or damage to his goods.

17. The original justifications for this liability scheme, and in particular the nautical fault exception, were the inability of the shipowner to communicate with and exercise effective control over his vessel and crew during long voyages at sea, and the traditional concept of an ocean voyage as a joint adventure of the carrier and the owner of the goods. However, subsequent developments in communications and the reduction of

voyage times have rendered those justifications obsolete. The liability scheme has no parallel in the law governing other modes of transport. Moreover, it is viewed as contrary both to the general legal concept that one should be liable to pay compensation for loss or damage caused by his fault or that of his servants or agents, and to the economic concept that loss should fall upon the party who is in a position to take steps to avoid it.

18. The Hamburg Rules effect a more balanced and equitable allocation of risks and responsibilities between carriers and shippers. Liability is based on the principle of presumed fault or neglect. That is, the carrier is liable if the occurrence that caused the loss, damage or delay took place while the goods were in his charge, and he may escape liability only if he proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. This principle replaces the itemization of the carrier's obligations and the long list of his exemptions from liability under the Hague Rules, and eliminates the exemption from liability for loss or damage caused by the faulty navigation or management of the ship. The liability of the carrier under the Hamburg Rules corresponds with the liability imposed upon carriers under international conventions governing carriage of goods by other modes of transport, such as road and rail.

D. Deck cargo

19. Sea cargo carried on deck was traditionally subject to high risk of loss or damage from the elements or other causes. For this reason the Hague Rules do not cover goods carried on deck by agreement of the parties, permitting the carrier to disclaim all liability for such cargo. However, developments in transport and packaging techniques, and in particular containerization, have made it possible for cargo to be carried on deck with relative safety. It is common for containers to be stored on deck in modern container ships.

20. The Hamburg Rules take these developments into account. First, they expressly permit the carrier to carry goods on deck not only if the shipper so agrees, but also when such carriage is in accordance with the usage of the particular trade or if it is required by law. Second, they hold the carrier liable on the basis of presumed fault or neglect for loss, damage or delay in respect of goods that he is permitted to carry on deck. If he carries goods on deck without being permitted to do so, he is made liable for loss, damage or delay resulting solely from the carriage on deck, without being able to exclude that liability by proving that reasonable measures were taken to avoid the loss, damage or delay.

E. Liability for delay

21. Historically, sea voyages were subject to innumerable uncontrollable hazards, which frequently resulted in delays and deviations. Because of this unpredictability,

the Hague Rules do not cover the liability of the carrier for delay in delivery. However, as a result of modern shipping technology, the proper charting of the oceans and sophisticated and efficient methods of navigation, voyages have become less subject to delays and more predictable. Shippers have come to rely upon and expect compliance with undertakings by carriers to deliver the goods within a specified period of time. Thus, the Hamburg Rules govern the liability of the carrier for delay in delivery in the same manner as liability for loss of or damage to the goods; i.e., in accordance with the principle of presumed fault or neglect.

F. Financial limits of liability

22. The Hamburg Rules limit the liability of the carrier for loss of or damage to the goods to an amount equal to 835 units of account per package or other shipping unit, or 2.5 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher. The carrier and the shipper can agree to limits higher than those, but not to lower limits.

23. The unit of account is the Special Drawing Right (SDR) as defined by the International Monetary Fund (IMF). The Rules set forth detailed provisions as to the manner in which the limits expressed in units of account are to be converted into national currencies with special provisions for certain States that are not members of the IMF. The limits of liability under the Hamburg Rules are 25 per cent higher than those established under the 1979 Additional Protocol, which also uses the SDR as the unit of account. In the Hague Rules and the Visby Protocol the limits of liability are expressed in units of account based upon a certain quantity of gold. Because national currencies no longer have fixed values in relation to gold, the values of those limits in national currencies vary.

24. The Hamburg Rules maintain the dual per package/per kilogram system established in the Visby Protocol. The purpose of this system is to take account of the fact that the value/weight ratios of goods carried by sea differ markedly. Sea cargo ranges from cargo such as bulk commodities, which have a low value relative to their weight, to cargo such as complex heavy machinery, which has a much higher value/weight ratio.

25. Under the dual system, the relatively low limit of 2.5 units of account per kilogram would apply to unpackaged commodities carried in bulk, while the higher per-package limit would apply to items carried in packages or other shipping units. The break-even point is 334 kilograms: if a package or shipping unit is under that weight, the per-package limit would apply; above that weight, the per-kilogram limit would apply. For the purpose of calculating the limits of liability, the packages or shipping units contained in a container are deemed to be those enumerated in the bill of lading or other transport document evidencing the contract of carriage.

26. The liability of the carrier for delay in delivering the goods is limited to 2½ times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage.

27. The Hamburg Rules contain an expedited procedure for revising the limits of liability in the event of a significant change in the real value of the limits resulting, for example, from inflation.

G. Rights of carrier's servants and agents

28. If a servant or agent of the carrier proves that he acted within the scope of his employment, he is entitled to avail himself of the defences and limits of liability that the carrier is entitled to invoke under the Hamburg Rules.

H. Loss of benefit of limits of liability

29. A carrier loses the benefit of the limits of liability if it is proved that the loss, damage or delay resulted from an act or omission of the carrier done with intent to cause the loss, damage or delay, or recklessly and with knowledge that the loss, damage or delay would probably result. A servant or agent of the carrier loses the benefit of the limits of liability in the event of such conduct on his part.

I. Liability of the carrier and actual carrier; through carriage

30. A carrier may enter into a contract of carriage by sea with a shipper but entrust the carriage, or a part of it, to another carrier. The contracting carrier in such cases often includes in the bill of lading a clause that exempts him from liability for loss or damage attributable to the actual carrier. Shippers face difficulties in legal systems that uphold those exemption clauses because they have to seek compensation from the actual carrier; that carrier might be unknown to the shipper, might have effectively restricted or excluded his liability or might not be subject to suit by the shipper in an appropriate jurisdiction. The Hague Rules do not deal with the liability of the actual carrier.

31. The Hamburg Rules balance the interests of shippers and carriers in such cases. They enable the contracting carrier to exempt himself from liability for loss, damage or delay attributable to an actual carrier only if the contract of carriage specifies the part of carriage entrusted to the actual carrier and names the actual carrier. Moreover, the exemption is effective only if the shipper can institute judicial or arbitral proceedings against the actual carrier in one of the jurisdictions set forth in the Hamburg Rules. Otherwise, the contracting carrier is liable for loss, damage or delay in respect of the goods throughout the voyage, including loss, damage or delay attributable to the

actual carrier. Where the contracting carrier and the actual carrier are both liable, their liability is joint and several.

J. Liability of the shipper

32. Under the Hamburg Rules a shipper is liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, only if the loss or damage was caused by the fault or neglect of the shipper, his servants or agents.

33. Particular obligations are imposed upon the shipper with respect to dangerous goods. He is obligated to mark or label the goods in a suitable manner and, where he hands over dangerous goods to a carrier, he must inform the carrier of their dangerous character and, if necessary, of the precautions to be taken. Failure to meet these obligations could, in particular cases, entitle the carrier to be compensated for loss suffered from the shipment of the goods. The carrier may be entitled to dispose of dangerous goods or render them innocuous without compensating the shipper if the shipper fails to meet his obligations with respect to the goods, or if the goods become an actual danger to life or property.

K. Transport documents

1. Bills of lading

34. Under both the Hague Rules and the Hamburg Rules, the carrier must issue a bill of lading if the shipper requests one. However, the Hamburg Rules take into account modern techniques of documentation by providing that a signature on a bill of lading not only may be handwritten but also may be made by any mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.

35. The Hamburg Rules itemize the types of information required to be set forth in the bill of lading. Among other things, these include the general nature of the goods, the number of packages or pieces, their weight or quantity, and their apparent condition. The itemization is more extensive than that under the Hague Rules, since the additional information is needed in order to implement the liability regime of the Hamburg Rules, which is more comprehensive than that of the Hague Rules.

36. Under the Hamburg Rules the absence of one of the required particulars does not affect the legal character of the document as a bill of lading. This resolves a question which is not dealt with in the Hague Rules and which has been resolved in disparate ways in national legal systems.

37. Under the Hamburg Rules as well as the Hague Rules, the information set forth in the bill of lading is *prima facie* evidence of the taking over or loading by the carrier of the goods as so described. The Hamburg

Rules and the Visby Protocol further provide that the description of the goods is conclusive in favour of a third-party transferee of the bill of lading who in good faith has acted in reliance on the description. The Hamburg Rules provide that if the carrier did not note the apparent condition of the goods on the bill of lading, they are deemed to have been in apparent good condition. This, too, resolves a question that is uncertain under the Hague Rules.

38. If the carrier knows or reasonably suspects that information in the bill of lading concerning the general nature of the goods, the number of packages or pieces, or their weight or quantity, is not accurate, or if he had no reasonable means of checking that information, he may, under the Hamburg Rules, insert in the bill of lading a reservation specifying the inaccuracies, grounds of suspicion or the absence of reasonable means of checking. The *prima facie* or conclusive evidentiary effect of the bill of lading is not applicable in respect of such information. These provisions are more explicit than comparable provisions of the Hague Rules.

39. Sometimes, a shipper asks the carrier to issue a "clean" bill of lading (i.e., without inserting a reservation) even though the carrier may have grounds to question the accuracy of information supplied by the shipper for insertion in the bill of lading or may have no reasonable means of checking the information, or may have discovered defects in the condition of the goods. In return, the shipper agrees to indemnify the carrier against loss suffered by him as a result of issuing the bill of lading without a reservation. The Hamburg Rules provide that such an agreement is valid as against the shipper, unless the carrier intends to defraud a third party who relies on the description of the goods in the bill of lading. However, the agreement has no effect as against a third-party transferee of the bill of lading, including a consignee.

2. Other transport documents

40. There is a growing practice in maritime transport for carriers to issue non-negotiable transport documents, such as sea waybills, rather than bills of lading. Although non-negotiable documents have been used in certain trades for some time, the use of such documents is spreading to other trades. Non-negotiable documents avoid certain problems that have arisen in connection with the use of bills of lading, such as the arrival of the goods at their destination before the bill of lading reaches the consignee.

41. The Hamburg Rules accommodate these developments; first, by applying to contracts for carriage of goods by sea regardless of whether or not a bill of lading is issued, and secondly, by providing that a transport document issued by the carrier, which is not a bill of lading, is nevertheless *prima facie* evidence of the conclusion of the contract of carriage by sea and of the taking over of the goods by the carrier as described in the document.

42. Since the Hague Rules apply only when a bill of lading has been issued, they do not deal with other types of transport documents.

L. Claims and actions

43. The Hamburg Rules contain provisions governing judicial as well as arbitral proceedings brought under the Rules. They expressly permit the parties to agree to submit their disputes under the Convention to arbitration. This is important because some legal systems preclude the settlement by arbitration of disputes relating to the carriage of goods by sea. Arbitration has become recognized as an effective means of resolving such disputes; thus the Hamburg Rules contain provisions to settle questions such as limitation of actions and jurisdiction in connection with arbitration. The Hague Rules do not provide for arbitration.

1. Limitation of actions

44. A claim under the Hamburg Rules must be brought in judicial or arbitral proceedings within a two-year limitation period. The period may be extended by the party against whom the claim is made. Under the Hague Rules suit must be brought within one year. The Hamburg Rules further provide that a party held liable under the Hamburg Rules has an additional period of time after the expiration of the two-year period to institute an action for indemnity against another party who may be liable to him. Comparable provisions are not contained in the Hague Rules, but were added by the Visby Protocol.

2. Jurisdiction

45. The Hamburg Rules require judicial or arbitral proceedings to be brought in one of the places specified in the Rules. The specified places are broad enough to meet the practical needs of the claimant. These include the following: the principal place of business or habitual residence of the defendant; the place where the contract of carriage was made, if made through the defendant's place of business, branch or agency there; the port of loading; the port of discharge; any other place designated in the contract of carriage or arbitration agreement. Judicial proceedings may also be instituted in a place where a vessel of the owner of the carrying vessel has been validly arrested, subject to the right of the defendant to have the action removed to one of the places mentioned in the preceding sentence. Notwithstanding those options, if, after a claim has arisen, the parties by agreement designate a place where the claimant may institute judicial proceedings, the proceedings must be instituted in that place; the same is true with respect to an agreement as to the place of arbitral proceedings, if the agreement is otherwise valid. The Hague Rules do not contain provisions with respect to jurisdiction.

M. Selected provisions

46. The Hamburg Rules are mandatory in the sense that the parties to a contract of carriage by sea may not by agreement reduce the carrier's responsibilities and obligations under the Rules. However, those responsibilities and obligations may be increased.

47. Other provisions of the Hamburg Rules pertain to the relationship between the Rules and the law of general average and other international conventions. Upon becoming a party to the Hamburg Rules, a State that is a party to the Hague Rules or the Hague Rules as amended by the Visby Protocol must denounce them. Under certain conditions the denunciation may be deferred for a period of up to 5 years.

III. Uniformity of law

48. The Hamburg Rules offer the potential of achieving greater uniformity in the law relating to the carriage of goods by sea than do the Hague Rules. First, since the Hague Rules apply only when a bill of lading is issued, the significant and growing portion of maritime transport in which bills of lading are not issued is not covered by them. Secondly, even when the Hague Rules do apply, many aspects of the rights and obligations of

the parties to a contract of carriage are not dealt with. A question or issue that is not covered by the Hague Rules will be resolved by rules of national law, which often produce disparate solutions, or by clauses in bills of lading, which may unfairly favour one of the parties and which may be given effect to differing degrees in national legal systems.

49. The Hamburg Rules, by comparison, deal much more comprehensively with the rights and obligations of the parties to a contract of carriage. In order to achieve their potential for uniformity of law in this area, they must be adhered to by States world-wide.

IV. Further information about the Hamburg Rules

50. Further information about the Hamburg Rules may be obtained from:

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