Topic:

A Current Assessment of the Hamburg Rules

A Paper To The Department Of Commercial Law In Partial Fulfilment Of The Requirements For The Degree of **the Master Of Law**

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1. Introduction

Trade has been booming. The WTO (World Trade Organisation) estimated that world trade in goods grew 8 % in volume terms last year, this being four times the growth of world GDP (Gross Domestic Products). During the 1990s international trade has grown far faster than world output, showing that national economies are becoming more closely linked. Foreign direct investment, another gauge of international economies integration, is also soaring: last year, estimated the United Nations Conference on Trade and Development, cross border investment increased by 40%, to $315 billion[1].

Actors in the international trade arena are the international merchants. The shift to international trade requires a legal landscape for these international merchants, in which to operate. During the eighteenth and nineteenth centuries the emergence of national states' separate legal codification's often overlooked the requirements of international trade. The international lex mercatoria of the middle ages and its application to maritime matters was rather ignored during this period. In the early twentieth century, however, a re-emergence of the lex mercatoria can be observed.

Conventions are regarded as an important source of international lex mercatoria.[2] In particular the transport conventions moved towards legal standardisation. International transport is the kingpin around which international trade turns; it provides the physical basis without which international trade cannot take place. It encompasses the transport by air, road, rail and sea. The international carrier is the link, both physically and legal, between the seller in one country and the purchaser in the other.

By its very nature international transport crosses international borders and involves different national systems. Without an international legal regime to govern international transport, each national leg would be governed by a different legal system.

To avoid a possible conflict between the application of different legal systems, international convention have been drafted. International transport by air, road and rail is covered by one convention which enjoys a high degree of acceptance and dissemination. In relation to carriage by sea, however, a number of different legal conventions exists. The Hamburg Rules, as adopted in 1978, attempt to open the way to uniformity. But only 25 states have ratified the convention so far[3], and none of them are major maritime states. Since the convention was intended to replace the current conventions which the majority of other states apply, it was and still is controversial.

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[1] Economist, "All free traders now?", issue 07-12-96

[2] Hercules Booysen " International Transactions and the International Law Merchant" P. 48 (herein "Booysen")

[3] Uncitral home page http://www.un.or.at/uncitral

Question has been asked whether this new regime is needed at all and whether it is appropriate and acceptable.

This paper will examine the necessity of the Hamburg Rules. This will be examined in light of the competing interests between carrier (ship) and shipper (cargo). Its failure or success and its prospects for the future will be assessed. This will include, inter alia, a historical summary of the rules, the background against which they were drafted, their important amendments, the pros and cons of these amendments, their acceptance within the maritime world, the problems that arise when different regimes co-exist and the contribution of the Rules to a standardisation or a international lex mercatoria, facilitating international trade.

2. The Historical Background of the Hamburg Rules

2.1. Wooden sailing ship age

Both the English and the Roman Law defined the common carrier as a person, or an association of persons, who in the course of business publicly hold himself out to take goods of everybody, provided he has room in his conveyance, at a standard rate, or at least a reasonable one. The common carrier was, in contrast to the private carrier, under a duty to accept goods tendered to him for carriage[4].

From early on and well into the last century, the carrier's liability was governed in the civil law countries by the old Roman law concept of receptum nautarum[5], which imposed an absolute liability on the shipmaster, owner or charterer, and the innkeeper and stablekeeper. A reason for the introduction might have been the difficulty of proof for the shipper. Carriers were regarded as insurer of goods entrusted to them and their liability was absolute and hence independent of fault. Limited exceptions for the carrier were recognised such as: casus fortuitus, damnum fatale and vis maior[6]. All the exceptions contained elements of unavoidability, unexpectedness and irresistibility.

In the common law countries liability of the carrier was very similar. It was the age of town and family based operations where cargo carried was owned, at least in part, by the shipowner himself. Theory and reality united in the description of a voyage as a common venture and the shipment of cargos as a joint venture of cargo owners and shipowners. This common venture idea was already illustrated in earlier times by the presence of representatives of cargo owners on board the vessel in order to look after the goods and arrange for their sale at the destination. It was the time where no demand for bulk cargos existed since large manufacturing plants had yet to be build[7].

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[4] Chorley & Giles "Shipping Law" eighth edition, P. 166(herein "Chorley & Giles")

[5] William R.A. Birch Reynardson/Kaj Pineus/Hans Georg Röhreke "The Maritime Carrier's Liability under the Hamburg Rules" in Festschrift für Rolf Stödter, P.3(8)(herein "Reynardson", "Pineus" or "Röhreke")

[6] Booysen, supra 2, P. 246

[7] Joseph C. Sweeney "UNCITRAL and the Hamburg Rules-The risk Allocation Problem in Maritime Transport of Goods" in Journal of Maritime Law and Commerce 1991, P. 511(512)(herein "Sweeney")

The carrier was liable for what he had taken into custody and he was relieved of his liability only in cases of act of God, inevitable accident, inherent vice, latent defect and defective packaging[8].

The French law was very similar to the common law with exceptions to liability being based largely on force majeure.

Hence the shipowner's liability under both the common law and the civil codes was in theory strict. Until the end of the 19th century the shipowner and the shipper were in apparent agreement that the shipowner was responsible for carrying and delivering safely the goods in like good order and condition. At that time the bill of lading emerged as the document which specified the goods and formed the basis for any claims for non-delivery and damage[9].

Towards the end of last century in Germany this "strict" liability was transformed and based on the principle of fault[10].

The question whether maritime law is fairly balanced between cargo and carrier was until as late as the 19th century not regarded as of pressing importance, since the only available vessels were small sailing ships, and cargos were not usually of a perishable nature. In the rare cases where damage to the cargo arose, it was caused mostly by storms which was considered as force majeure[11]. A certain amount of damage to the cargo was expected as an incident of every ocean voyage and very little litigation found its way into the courts until the mid 19th century. Further, until the advent of steam, the absence of the modern need for speedy despatch of vessels in port, fostered a tolerance of more leisurely methods of cargo handling and tallying ashore. This factor in turn afforded greater opportunity for more careful ship-side tallies than is perhaps possible today; disputes were reduced as to where and when any loss or damage was caused.

2.2. Second half of the 19th century

This was the age of technical and economical propulsion and of iron ships. Freight increased visibly, the circulation accelerated which made the control more difficult. Transport by sea became more independent from the force of nature. Besides the shipowner/captain and the shippers, more and more people were involved, like the consignee and the endorsee, and the Bill of lading became a running document. The perils of collisions increased because of the growing density of traffic and with it the costs of the damages. Loss or damage to the cargo couldn't always attributed to vis maior, act of God or force majeure. Thus the liability based on the principle of fault became a huge risk for the business of the carrier.

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[8] Reynardson, supra 5 , P.8
[9] W.E. Astle "Hamburg Rules" P.3 (herein "Astle")
[10] Sec 607 of the German Commercial Code of May 31,1861
[11] Prüßmann/Rabe "Seehandelsrecht" 3.Auflage, Vor § 556 I A (herein "Prüßmann/Rabe")

The shipowners then took advantage of their monopoly position. The carriers liability had always been subject to the principle of freedom of contract which enabled a shipowner to carry goods "when he liked, as he liked, and wherever he liked"[12]with the result that, in their Bills of lading, carriers inserted quite a number of exceptions, the most important of them being that they were not liable for error in the navigation and management of the ship. This was a remarkable shift Transferring risk of loss or damage of goods on to the shippers. Also, the legislature in England in 1734 and in the USA in 1851 (the Fire Statutes) came to the aid of the carrier excluding the carriers liability for loss or damage arising from fire on board.

The pendulum of liability had swung from the owner to the shipper.

2.3. Fight for the contracting out clause

Because of the shift of liability, discontented shippers of cargo, their bankers, and their underwriters pressed for statutory reform throughout the latter half of the nineteenth century. But shipowner interests dominated the parliaments of the big shipowner countries such as Britain, France and Germany, and until the early 1920s, neither judges nor lawmakers in these countries paid much heed to the complaints of the cargo owners.

In the United States shipowning interests were few. This was the result of British domination of the American export business. American cargo interests became increasingly vulnerable to clever lawyering on behalf of British shipowners at a times, when ocean trade became more sophisticated; through the elaboration of shipping documents, banker's drafts, bills of lading, insurance policies, and methods arose to subrogate tort and contract claims for damages and to avoid or defend such claims. Litigation exposed vast differences amongst the attitudes of American, English, and European courts concerning the nature of the carrier's obligations and the property of contracts exonerating carriers from their general maritime liabilities. The European and English courts routinely upheld contracts of exoneration, but American courts typically struck them down by helding that carriers' bill of lading clauses that disclaimed responsibility for negligence violated public policy[13]. In the United States, powerful cargo-shipping interests were less able to bring claims because English carriers included choice of law and forum clauses in their bills of lading that shifted the focus of the litigation from America to Britain. American shippers worked diligently for statutory protection of their position resulting in the passage of the Harter Act of 1893. It forbade clauses of exoneration, which shipowners as a matter of course had inserted in bills of lading to escape liability. The response abroad was mixed. Dominions of the British Empire, notably Australia(Carriage of Goods Sea Act in 1904), New Zealand (Carriage of Goods by Sea Act in 1908), and Canada(Canadian Water Carriage Act in 1910), essentially copied the Harter Act into their own statutes.

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[12] David C. Frederick "Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules" in Journal of Maritime Law and Commerce 1991, P. 81(83) (herein "Frederick")

[13] John O. Honnold "Ocean Carriers and Cargo; Clarity and Fairness-Hague or Hamburg?" in Journal of the Maritime Law and Commerce 1993, P. 75(77) (herein "Honnold")

The effect of these laws in England was minimal, where due to the presence of marine insurance and shipowning interests, much admiralty litigation occurred. The power of the shipowning interests mitigated the overall international impact of the attempted reform.

But then the British Empire emerged from World War I with diminished power and the British carrier interests entered the 1920s in a weakened financial state[14]. Besides that there was also an oversupply of shipping space. This changed economic circumstances which impelled carriers to accept shippers' bill of lading proposals for the first time. Cargo interests from Canada, Australia, and New Zealand, still tied to the crown, took advantage of the glut in cargo-carrying capacity to press for equity in commercial maritime transactions.

2.4. Bill of lading Clauses and the Hague/Hague-Visby Rules

With the growth of international trade and the hazard of ships moving from port to port and being subject to arrest in conjunction with maritime liens to satisfy outstanding claims, the practical value of uniformity was very much needed as a basis for the bills of lading, contracts of sale of goods, marine insurance on cargo and on liability. Accordingly the subject was taken up by the Comite Maritime International("CMI"), a private law organisation composed of many national associations devoted to the development of uniformity in international maritime law. The CMI, originally a committee of the international Law Association, was formed in 1897 for the purpose of promoting world-wide uniformity of maritime law, and has since had its own separate existence[15].

After considerable discussion among the leading shipowners, underwriters, shippers, and bankers of the major maritime nations, a set of rules were finally drafted by the Maritime Law Committee of the International Law Association at a meeting held at the Hague in 1921 and which came to be known as the Hague Rules. The rules contained several principals of the Harter Act. The rules were drafted in the form of a uniform bill of lading in the hope that the shipping companies would adopt them voluntarily and that similar enterprises would soon follow suit. One or two shipping companies did adopt the rules, but generally the companies were not prepared to give up their extensive immunities from liability under the then existing laws of many countries. It was soon apparent that legislation would be necessary to make the uniform Rules part of bills of lading[16].

The Hague rules were amended at the London Conference of the CMI in 1922, and thereafter agitation for legislative action on the lines of the Rules continued. A diplomatic conference on Maritime Law was held in Brussels in 1922, and a draft convention was drawn up which was amended at the Brussels Convention in 1923. The Belgian Government then invited all interested governments to participate in the

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[14] Frederick, supra note 12, P. 86

[15] John C. Moore "The Hamburg Rules" in Journal of Maritime Law and Commerce 1978, P.1(2) (herein "Moore")

[16] Astle, supra note 9, P.8

Fifth Maritime Diplomatic Conference, which was held at Brussels in August, 1924, at which the convention was signed on August 25, 1924[17]. Despite the widespread agreement in 1924 in the maritime industry concerning the need for this international convention , it did not come into force until 1931, one year after the deposit of ratifications by four states: the United Kingdom, Spain, Belgium and Hungary. Today 72 Contracting parties have ratified the Rules, including a large number of developing countries[18]. The list and the corresponding year of adhesion to the Convention show that quite a number of these countries are Contracting Parties simply because they inherited the Hague Rules from their position as colonies.

With the principle that the carrier should bear the commercial but not the navigational risks and that he could avoid the liability thus established, a compromise had been found. The language of the Hague Rules is the language of business or, more precisely, the language of Bills of Lading. The main features of the Hague Rules are

- -immunities in favour of the carrier
- -the requirement to produce a seaworthy ship and the requirement that the shipowner exercise due diligence
- -limitation of the liability of the carrier
- -not contracting out unless to the advantage of the shipper

One of the problems the Hague Rules set out to solve was the limit of liability per package or unit. This was fixed at pound 100 sterling gold value. Already in the year 1925 the pound was to loose its convertibility into gold. This upset the carefully negotiated system of the carrier's liability. As a result, each contracting State converted the x 100 in its own way, leading, after the Second World War, to totally conflicting rules.

Eventually, it became obvious that technological progress had made it necessary for the rules to be amended. Some time later, containerisation began to play a steadily increasing role in world cargo transport, thereby accelerating the need for correction. The CMI therefor met in 1959(at Rijeka) to consider reforms to the Convention[19]. A second meeting was held in 1963 in Stockholm and a document signed in Visby, a ancient port on the Swedish island Gothland in the Baltic Sea[20]. Finally a diplomatic conference was held in Brussels in 1967-68. This conference was attended by 53 countries and territories, of which approximately half were developing. The Brussels Protocol of Amendments to the Hague Rules was finally signed on February 23,1968. The Protocol was named the Visby Rules. The Protocol came into force with the tenth instrument of ratification on June 23, 1977. The key issue in the protocol was the amount and method of fixing the unit limitation of liability[21]. The maximum liability of the carrier increased to 200 pounds or an amount determined by a factor derived from

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[17] Astle, supra note 9, P. 8

[18] UNCTAD Report by the UNCTAD secretariat "The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and The Multimodal Transport Convention" figure 6 (herein "UNCTAD Report"), with a list of all member states and the year when the Rules came into effect

[19] UNCTAD Report, supra 18, P.13

[20] Captain Lüddeke "Seminar on the Hamburg Rules", P.3 (herein "Lüddeke")

[21] the Visby Protocol has 19 Contracting Parties according to UNCTAD Report, supra 18, P. 8; all the Contracting Parties to the Visby Protocol were also Contracting Parties to the Hague Rules

the mass of the goods and the gold franc. Other amendments dealt with the application of the Rules, the extension of the bill of lading limitations and exceptions to stevedores and agents of the carrier, and the rule that statements in bill of lading are to be regarded as conclusive evidence when they have been transferred to third parties.

Unfortunately, the international monetary system's bench-mark, the Bretton Woods system broke down soon afterwards, and it became necessary again to amend the monetary limits, and so a new diplomatic conference was held in Brussels. This conference was attended by 37 countries, of which a number were developing, and a new protocol was elaborated, the 1979 Protocol to the Visby Protocol. It came into force in February 1984 and has 11 Contracting Parties, none of which is a developing country. The protocol is named the SDR-Protocol(SDR for "Special Drawing Rights") and has the effect of expressing the monetary limits in terms of special drawings rights as opposed to the rather complicated gold francs formulae in the original Hague-Visby Rules[22].

2.5. Hamburg Rules

The Hamburg Rules marks a change of a movement towards international uniformity on the area of shipping law. For over a half century, conventions to shipping law were drafted by the CMI. This private institution convened practitioner and science of the shipping law from the main maritime countries for analysing new problems; it often was able to propose provisions close to the praxis. The drafts by the CMI shaped then the objects of state conferences, which since 1910 took place in Brussels at irregular intervals.

This development found an end in 1968 with the adoption of the Visby Rules[23]. Since that time international legislation has been exclusively adopted in the framework of international state organisations. Thus, shipping law has followed a development which has already been taken place in other legal areas.

Besides the fact that thorough proposals to amend the Hague Rules were defeated in discussions within the CMI, the most important reason for this shift away from IMO was of a political nature. The stress on international legal uniformity had created new organisations, which now took care even on merchant shipping:

-the Inter-Governmental Maritime Consultative Organisation(IMCO)- now International Maritime Organisation(IMO)
-the United Nations Commission on International Trade Law (UNCITRAL)
-the United Nations Commission on Trade and Development(UNCTAD).

The development concerning IMO was triggered by the perils caused by the oil transport on sea. Although CMI had already focused on this problem, it was the effort

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[22] Jane Martineau "Hague, Hague-Visby and Hamburg Rules" in The International Journal of Shipping Law 1996, P.12 (herein "Martineau")

[23] Rolf Herber "Gedanken zur internationalen Vereinheitlichung des Seehandelsrechts" in Festschrift Stödter P. 55(60), (herein "Herber" FS)

by IMO which lead to the International Convention on Civil Liability for Oil Pollution Damage 1969 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage in 1971. Even in other fields the IMO became active. The IMO virtually overtook the function of the Brussels- Conferences[24]. But maritime transport law broke the operational framework of IMO, which mainly was engaged with public law. However it fitted exactly into the mandate of UNCITRAL, founded in 1968.

But first it was Unctad, organised in 1964, which adopted to the problem of maritime transport law. On its second meeting in 1969, the UNCTAD Working Group on international shipping legislation was established. In 1971 its task was extended to examine certain key-problems of the carriage of goods by sea. In UNCTAD a considerable dissatisfaction with traditional maritime law prevailed among the "colonist" powers. This dissatisfaction stemmed from the belief that the operation of traditional maritime law(along with other aspects of international trade law) continued to impair the balance of payment position of developing states so as to contribute to continued poverty and under-development in an industrial age[25]. The emerging nations, which were not in existence when the Hague Rules were negotiated, encountered a commercial system based upon principles formulated well before these economic and political changes. Shipping played an important role in the economic development of the new states because exports to industrialised nations accounted for a high percentage of their gross national product. Thus the developing countries insisted on a greater role in the decisionmaking process that governed commercial maritime rules. They pressed for reform of the current law within the context of existing United Nations organs and benefited from a two-third majority in the UNCTAD. At that time the developing countries accounted for 64.7 percent (in terms of weight) of all maritime shipments, but owned only 7.6 percent of the world's maritime fleet. This disparity had a dramatic impact on balance of trade. The International Monetary Fund estimated that the deficit created by shipping costs alone produced approximately one third of the developing world's entire balance of payments deficit[26]. This choice of forum arguably reflected both a distrust of the network established by the traditional maritime powers and a confidence in the United Nations as a organ dedicated to the international problem-solving. But nevertheless the Hamburg rules were not merely the product of developing states as they could never have been achieved without the co-operation of the developed states: Australia, Canada, France, Norway and the United States[27].

Although in the beginning UNCTAD was responsible for this problem. It was considered prudent to shift the legal question arising out of bills of lading to the expertise of UNCITRAL, while UNCTAD's activities in the area of shipping focused on economic issues. UNCITRAL, a world-wide representative body with the mandate to reduce barriers to international trade resulting from conflicting and inadequate laws, has established an enviable reputation for professional, non-political and successful

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[24] Herber FS supra 23, P. 61(62)
[25] Sweeney supra 7, P. 520
[26] Frederick supra 12, P. 103
[27] Sweeney supra 7, P.523; Rolf Herber "Gedanken zum Inkrafttreten der Hamburg-Regeln" in Transportrecht November/Dezember 1992 P.381(384) (herein "Herber 92")

work[28]. UNCITRAL was<already faced at its first meeting with three big issues: the uniformity of the rights of international payments; the international sale of the goods and the carriage of goods at sea. Its work-products include, inter alia, the Vienna Convention which established a uniform law for the international sale of goods and the widely-used Uncitral Arbitration Rules(1976). In retrospect, the foresight of the decision to instruct UNCITRAL with the task has proven fruitful that it produced a draft convention free of the political and economic discord which sometimes burden the decision-making process of UNCTAD.

Besides political reasons, factual reasons also exists for the activity by UNCITRAL. The technical development like that concerning containerisation and the strong differences of national legislation ratifying the Hague Rules, call for a reform[29]. The Visby-Protocol hasn't answered these calls.

The uncertainties in the Hague Rules produced two expensive consequences for the developing nations. Firstly, the Rules obligated the owner of the goods to insure against contingencies or other ill-defined risks that bills of lading failed to anticipate, and the companies in the developing world were financially less able to shoulder this burden. Secondly, ambiguities in the Hague Rules or their failure to anticipate technological developments often caused disputes between shippers and carriers that required arbitration or litigation.

UNCITRAL, following its established procedures, created a Working Group of 21 States, representing each region and legal system. The negotiations differed from the Hague Rules negotiations in several key respects. No Talks in backrooms amongst carriers, cargo owners, bankers, and insures which reflect commercial, rather than political, realities were held. The negotiations that marked the Hamburg Rules took on a distinctly political hue. The delegates, selected under political auspices, formally represented countries and voted on specific draft provision as such. United Nations practices dictated that UNCITRAL decisions be reached by consensus with indicative voting kept to a minimum. Majority rule prevailed[30]. After five years of sustained effort, this Working Group, with the active participation of intranational organisations with expertise in this field, completed a draft convention which the secretary-general transmitted to all governments and interested international organisations for comments. The full Commission conducted an intensive review of this draft and in 1976, without dissent, approved a Draft Convention on the Carriage of Goods by Sea; the secretary-general transmitted this draft to all Governments and interested international organisations for further comments. In 1978 a diplomatic conference of seventy-six States and eight governmental and seven non governmental organisations[31] met at Hamburg. It was the first UN-Conference on German soil (Germany had acceded to the UN Conference in 1973). On March 30, 1978, 68 voted in favour without dissent and there were 4 abstentions (Canada, Greece, Liberia, and Switzerland) to adopt the UN Convention on the Carriage of Goods by Sea-the "Hamburg Rules". It was then

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[28] Honnold, supra 13, P. 79
[29] Rolf Herber 92, P. 381(383)
[30] Frederick supra 12, P. 104
[31] Lüddeke, supra 20, P.12

signed by 27 States[32]. The Convention provided that it would enter into force a year after adherence by 20 States; the Convention entered into force on November 1, 1992.

The Hamburg Rules have now been ratified by the following 25 States[33]:
Austria, Barbados, Botswana, Burkina Faso, Cameroon, Chile, Czech Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, Senegal, Sierra Leone, Tanzania, Tunisia, Uganda, Zambia[34].

3. Shortfalls of the Hague Rules

A lot has already been said about the political motivation behind the draft of the Hamburg Rules. The convention, however, is primarily addressed to international trade and its participants as it deals with private law aspects. Thus, its success, indicated by the number of ratifications, links to its economic suitability. Here it must also be taken into account, that no state can be forced to ratify the Rules and that only with the approval of the maritime groups will a ratification on national level be realistic.

To judge the work done by UNCITRAL and all its participating groups and delegates which resulted in the Hamburg Rules, a consideration of its commercial practicability and scientific value is only possible when one first examines the shortfalls of the Hague Rules.

The law of carriage of goods belongs covers a wide range of legal areas. This necessitated an adjustment of the applicable national laws, since they were often different. These differences initiated the drive for standardisation through international conventions. The Convention International Concernant le Transport des Marchandises par Chemins de Fer(CIM), concluded at Bern in October 1890, stood at the beginning of the standardisation of trade law. It was followed by the Hague Rules(1924) concerning the carriage of the goods, the Convention for the Unification of Certain Rules Relating to International Transportation by Air-the Warsaw Convention of 1929, and the Convention on the contract for the International Carriage of Goods by Road(CMR) of 1959, together constituting, with some subsequent protocols, the major pillars of the international law of carriage. Most of these conventions on carriage contain one, at least unilateral provision, in favour to the cargo owner, which relates to the liability of the carrier for damages suffered by cargo between acceptance of the goods and their delivery, unless the carrier can prove that it wasn't his or his servants fault. This liability is always limited to a certain amount and was dependant on average value of the goods and the kind of transport used. Only the maritime law area with its Hague Rules was the cargo owner not so favourably treated, even if one considers the Visby-Protocol. A list of shortfalls follows:

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[32] Lüddeke, supra 20, P.10

[33] International Union Of Marine Insurance "IUMI Position Paper 'Hamburg Rules' ", P.4 (herein "IUMI")

[34] Martineau, supra 22, gives on pages 25,26,27 the dates when the Rules came into effect in the single countries

a) The carrier by sea is imperatively just liable for damages which occur during then time while the goods are on board (Article 1(e) Hague Rules). This is the so-called "tackle to tackle" principle. For the time on land in between occupation and before deliver the carrier is able to exclude for liability contractually. This is the object of all international bills of lading. The shipper has no choice. This didn't cause problems in ancient times when the shipper normally delivered his cargo in the port, on the dock, underneath the ship's hook.
The "critical point" was at the ship's rail. Nowadays the critical point moves ashore, were the goods are containerised and the carrier might take delivery of the container right at the shipper's factory. Both the Incoterms and the documentary practise have accommodate to this situation, in contrast to the Hague Rules.

b) According to the Hague Rules the carrier isn't liable for an act, neglect or default of the master, mariner, pilot, or other servants in the navigation or in the management of the ship. To categorise areas of responsibility and immunity opens up many areas for uncertainty. Since the Hague Rules do not address the problems that result from the interplay of its complex lists of carrier immunities and responsibilities, interpretations in other countries come to divergent conclusions, which lead to complex and unpredictable problems of conflict of laws and more grounds for forum-shopping.

c) No liability exists for cargos carried on deck as the Hague Rules do not considered them as goods according to the definition in article I(c). If cargo is carried on deck but this is not stated on the bill of lading and this bill of lading is transferred to a third party, then the carrier is fully liable for all damages without any limitations.

d) The Hague-Visby Rules only apply after the issue of a bill of lading. This "document of title" limitation has generally been understood to cover a document that must be surrendered in exchange for the goods. The increased speed of ocean transport and current payment and financing arrangements have led to shipment under contracts (often called "waybills") that do not require the contract to be surrendered before the goods can be unloaded and delivered - a development that avoids difficulties in delivery that may result from delayed arrival or loss of a "document of title". By using a "waybill" or by refraining from using other contracts as documents at all-which often happens today with the use of electronic data processing- the carrier is free in determining the rules relating to liability.

e) The insufficiency of the low limitation amount in the Hague Rules is still applied in a lot of countries. It had, in accordance with existing practice, been set at Pound 100 gold/sterling per package or shipping unit and converted into other currencies at the rates of exchange prevailing in the 1920's and early 1930's. Over the years, inflation had eroded the value of pound 100 gold, differential rates of inflation had created international disparities, with potential conflict of law problems, and technological developments had increased the size of packages from those which could be man-handled by two men to the 40-foot container, weighing, with its contents, up to 35 tons. The question of what was and what was not a "package" has created chaos in many countries[35]. Accordingly the Visby Protocol introduced the weight alternative

[35] Moore, supra 15, P.3

and has increased the limit of liability. The SDR Protocol again has faced the problem concerning the inflation.

f) The paragraph II of the protocol allowed countries different possibilities of national adoptions[36]. Thus the same Rule out of the Hague shell document could be interpreted differently in one state from another state also interpreting the Rules in its national law with individual amendments.

g) The Hague Rules normally apply only to outbound shipments, which creates difficulties, when, as usual, damage is not discovered until the cargo is unloaded and the shipments arrives from a non-Contracting State to a state who has adopted the Hague Rules. Attempts to avoid this result by invoking conflict rules resulted in uncertainties[37]. This problem has been partly tackled by the Visby Rules which extended the application to every carriage when the Bill of Lading is issued in a contracting state, or the contract provides the application of the Rules.

h) The Rules cover to problems that arise from transhipment, where container traffic is organised in collection and distribution patterns around transhipment centres and different carriers can be included without knowledge when the bill of lading was issued.

i) The Hague's special immunities create practical difficulties when, as is increasingly common, carriage to a destination requires different types of transport-road, rail, sea and air. None of the other international conventions grants the carrier immunity for negligent loss or damage. These radical differences in the responsibility of connecting carriers create difficulties for shippers and consignees in fixing responsibility and enforcing claims.

The differences with international conventions governing other modes of transport also hampered the creation of a convention on multimodal transport.

The number of shortfalls caused a call for the creation of a new convention rather than just another amendment.

4. Innovations by the Hamburg Rules

Besides the political circumstances mentioned earlier it was above all the latter mentioned shortfalls which induced many states to work towards improvements of the liability regime. It wasn't only the developing countries which pushed for improvement. Even industrialised countries like the United States, Canada, Australia and France[38], also participated. They all however primarily represent cargo interests. These countries even determined the factual negotiation at UNCITRAL and finally the

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[36] Karl-Hartmann Necker "Zur Statutenkollision im Seefrachtrecht" in Festschrift Stödter, P.90 (herein "Necker")
[37] Honnold, supra 13, P. 85
[38] Herber 92, supra 27, P. 384

diplomatic conference in Hamburg[39]. Of course, since the sixtieth the influence of the developing countries on international conferences under the auspices of the UN is considerable. In these countries the international traders suffered more under the shortcomings of the existing rules than in industrialised countries since they do not have a functional insurance system which makes the shortfalls of liability bearable by the concerned shipping industry. Nevertheless, the delegates from these countries were reluctant to impose by their numerical majority an international regime unacceptable to the industrial countries. The actual legal changes in the new Rules are insignificant when compared to the political transformation in the international maritime rulemaking process that accompanied the promulgation of the Hamburg Rules[40].

The solutions by the Hamburg Rules for the problems are manifold:

1. Concerning the period of coverage: The Rules provides that they are operative throughout "the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge" according to Article 4.1. The carrier will generally be responsible from when he takes over the goods at the loading port until he hands them over at the discharge port(article 4.2). Accordingly, responsibility under the Hamburg Rules may well arise before and/or after the time then when responsibility under the Hague and Hague-Visby Rules would be applicable.
2. Under the Hamburg Rules there is no exemption in case of fault of the carriers servants or agents in the course of the navigation or management of the vessels. Article 5 of the Hamburg Rules provides that the carrier is liable for cargo damage unless he proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. This signifies an abolition of the defence of nautical fault and a shift of risk of loss towards the carrier. The pendulum again has been moved, this time in favour of the shipper.
3. The carrier is liable for deck cargo according to Article 1. 5. Deck cargo is permissible provided deck carriage is authorised by the shippers or it is a custom of the trade. Unless the bill of lading expressly states that the shipper agrees to carriage of the cargo on deck, the onus lies on the carrier to prove the authorisation by the shipper. If the carrier ships cargo on deck contrary to an agreement or the custom of the trade, he is liable " for loss of or damage to goods as well as delay and delivery resulting solely from the carriage on deck".
4. The Rules apply to any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another according to Article 1.6 . This includes sea waybills, booking notes and any other non-negotiable documents.
5. The limits of liability are increased to 835 SDR per package or 2.5 SDR per kilo according to Article 6, which means an increase by approximately 25 per cent over the Hague-Visby limits. This agreement is part of the "package solution"[41].
6. The Hamburg Rules must be ratified as a uniform code. Any amendments must be sought out in a conference according to Art 32 of the rules[42]. Furthermore Art 3 provides a policy on how the convention should be interpreted, namely with regard

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[39] Herber 92, supra 27, P. 384
[40] Frederick, supra 12, P. 82
[41] see below under heading 5.10.
[42] Necker, supra 36, P. 94

to its international character and to the need to promote uniformity. This method has already been adopted in the United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention of 1980).

7. The Hamburg Rules also apply to inward voyage according to Article 2 by making the Convention applicable, inter alia, when either "the port of loading or the port of discharge" is in a Contracting State[43].
8. In handling transhipment problems Hamburg deals separately with the responsibility of a "carrier", defined as one who makes a "contract of carriage of goods by sea" and an "actual carrier", defined as one to whom all or part of "the performance of the carriage has been entrusted"[44]. Hamburg 10(a) provides that the contracting carrier "remains responsible for the entire carriage" even though all or part of the carriage "has been entrusted to another carrier". This modernisation of rules governing transhipment between ocean carriers has been one of the many measures in the Hamburg Rules to lessen the disparity between the responsibility of ocean carriers and other modes of transport carriers[45].
9. The preparation of uniform law for intermodal transport, transport which links different modes of transport together as transport on road, rail, air and sea, has been impeded by the wide disparity between the responsibilities of ocean carriers and other modes of transport carriers. Because of the successful development in 1978 of the Hamburg Rules, it was possible in 1980 to conclude an International Convention on Multimodal Transport[46] (Convention on International Multimodal Transport of Goods).

Besides the solutions listed above, there is still one other remarkable innovation, the compulsory jurisdiction provisions provided for in Article 21 of the Hamburg Rules[47].

When mentioning the innovations of the Hamburg Rules one should also refer to the systematic structure of the convention. With regard to the structure and definitions of legal terms, the rules follow the more abstract method of the Continental-European countries with their civil law traditions than the Hague Rules which were more influenced by contract and bills of lading clauses.

5. Assessment of the innovations

Since the adoption of the Hamburg Rules in 1978, a lot has been debated and written about them - some of it is vehemently in favour of the Hamburg Rules, some of it and vehemently against.

What everyone seems to agree on is that the Hague Rules are no longer sufficient to meet the demands of modern conditions of ocean carriage, that the Visby amendments standing alone are some improvements; and that the Hamburg Rules are a mixed bag

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[43] for further three (additional) basis of application see below under heading 8.1.1.
[44] see Gaudalajara Convention and Athena Convention (passenger) of 1974, cited in Herber 92, supra 27, P.384
[45] Honnold, supra 13, P.87
[46] Honnold, supra 13, P.87
[47] see below heading 8.2.1.

of improvements and regressions. Beyond these points, there is however little agreement[48].

Opponents of the Hamburg Rules describe them as "revolutionary", "radical", and an ill-advised product of the "economic warfare" mentality of developing countries[49].

Proponents of the Hamburg Rules view them as a welcome change, signifying a more equitably distribute risk of loss between carriers and cargo.

While predominately approved of by lawyers, the economy sector rejects them[50], and it is exactly this fact that generates vague objections from economic circles participating in maritime law, since the legislation- especially at that relating to trade law- is surely not exclusively or even primary the business of lawyers. This suspicion is easily corroborated by the view that the civil servants of the international agencies supported by the innovation seeking scientists were only acting to create something new. New rules are always a challenge for the economy, even when the old ones have not been successful; each amendment of existing rules already causes loss of time, power and money and bears risks[51].
Consequently, amendments deserve an elaborate examination. But it is a crucial question , which criteria should be employed to assess the new rules. The main criteria must be whether the new rules improve the performance of maritime trade operations to the benefit of world trade and facilitate the settlement of international contracts.

So, no doubt that the considerations of efficiency and cost effectiveness do play an important role[52].

Furthermore the opinion exists, that equity and fairness are not tasks of a liability regime[53] and should be excluded as criteria. This, however, misconstrues one of the main functions of law, namely to achieve legal peace among the contractparties. This can only be generated by balancing the mutual rights and obligations in marine cargo liability regimes and the risk-allocations. Otherwise, an unbalanced regime leads to dissatisfaction by one party and eventually to a rejection of the regime[54]. Hence, equity and fairness are also requirements for a liability regime[55]

From the judicial point of view one also has to look at the clarity and certainty of the law, the contribution to uniform international rules, and to aspects of legal policy.

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[48] Douglas A. Werth "The Hamburg Rules Revisited-A Look at U.S. Options" in Journal of Maritime Law and Commerce 1991, P.59(69) (herein "Werth")
[49] Frederick, supra 12, P. 69
[50] Herber 92, supra 27, P. 381
[51] Herber 92, supra 27, P. 381
[52] Herber 92, supra 27, P. 385; Honnold, supra 13, P. 75; Lüddeke, supra 20, P.14
[53] Lüddeke, supra 20, P. 14
[54] Honnold, supra 13, P. 75 for the consideration of equity and fairness
[55] William Tetley "Package & Kilo Limitations and The Hague, Hague/Visby and Hamburg Rules & Gold" in Journal of Maritime Law and Commerce 1995, P. 133(133), (herein Tetley 95)

By taking these criteria into account a discussion follows of the most controversial points:

5.1. Additional court cases and legal costs

The most persistent criticism of the Hamburg Rules is that the proposed Rules too readily discard existing law and that their novelty will lead to increased claims settlement and litigation costs, or so-called "friction"[56]. Their language were novel, unclear, and unknown to the maritime law. The rules would mean a drawback and the maritime community would be throwing away the work of clarification done by the courts over the years and would be creating uncertainty and ambiguity in areas where none existed before[57].

This argument shows, however, that the Hague and Visby themselves in the past have caused a huge amount of litigation. So, obviously the fault lies in Hague-Visby Rules.

There is a consensus, that the Hague Rules failed to address several points- including the carrier's responsibility during custody before and after loading, the modern contract that do not qualify as document of title, and the law applicable to inbound shipments[58]. These points triggered the necessity for litigation.

On the other hand the Hague's long list of defences and complicated burden of proof provisions have created uncertainty and litigation[59]. It is really doubtful whether it is correct in saying that cargo owner knows under the Hague Rules which risk is excluded and which risk his insurance covers. These questions have occupied the courts plenty of times. Hamburg has eliminated most of the Hague defences and adopted a unitary fault standard, coupled with simplified burden of proof rules. The provisions might be abstract but they make it easier for the cargo owner to attribute loss or damage to the carrier in the case of negligence. This might reduce litigation and other "friction" costs at least in the long term.

Besides that, the existing court decisions are not a guarantee for certainty in the future, firstly, since they are only applicable in the issued country, and secondly, because over and over again cases with new and different facts can arise which need to be litigated; the testing of rules and regulations is an ongoing process where time and new points of view may change earlier judgements. Even old arguments are not free of being reopened with new and startling results.

Furthermore, only the experienced shippers and consignees with access to very competent maritime lawyers have an understanding of the controversial points held by

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[56] Frederick, supra 12, P. 70

[57] Diamond (cited by Frederick, supra 12, P. 70 or Diamond "The Hague-Visby Rules, 1978 Lloyd's Mar. & Com.L.Q.225,263); IUMI, supra 33, P. 7

[58] for further examples see Honnold, supra 13, Fn 92

[59] Frederick, supra 12, P. 73

the courts[60]. It is said, that the value of the case-law is not its clarity but its ambiguity as a basis for plausible but questionable resistance to cargo claims[61].

One also has to take into account that the Hamburg Rules were not made out of whole new cloth, but rather embody to a large extent, wording, language and legal concepts from the Hague Rules and Visby Amendments[62]; it has been modelled on the Harter Act[63], the Warsaw Convention to carriage of air (application and liability[64]) with their voluminous amount of case law, and on the CMR Convention to carriage by road with which the carriers, insurers and cargo owners have lived for over 30 years without mayor controversy and with very little litigation[65]. Thus , much interpretative case law exists which fleshes out the language of Hamburg. Also the decisions on whether the carrier exercised due care of the cargo, as contrasted with fault and neglect applicable under Hamburg Rules will be equally useful under Hamburg.

The argument that the Hamburg Rules will increase litigation by altering years of time-honoured tradition, is always advanced by those who oppose change. But when shortfalls and eventually inequity exists, the argument that the current regime is "time-honoured" is not the only reason to permit its continuance.

To sum up, it is of course difficult to predict whether additional court cases will be triggered after the Hamburg rules comes into effect. There are some convincing arguments that this will not happen to the degree it has happened with the Hague Rules. Nevertheless, there are some new clauses which will need to be interpreted and it is a common view that the language of Hamburg is not always clear[66]. The reason was the urge to find compromises for the settling of disputes.

Unclear language certainly gives space for different interpretations. But it is not always a unclear phrase or sentence which causes problems. From some essays written on the Hamburg Rules it emerges that the abstract style of the Rules raises problems for lawyers and authors with a common law background. Especially the technique for interpreting a single provision in the light of the other rules isn't familiar to them. When Art 5.1 of the Hamburg Rules, for instance, says, that the carrier has to prove that with regard to loss or damage he "...took all measures that could reasonably be required to avoid the occurrence and its consequences..." it implies, that he has to prove that after an occurrence which causes damage he also must prevent further damage. His duty to exercise proper care doesn't stop with the occurrence but

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[60] UNCTAD Report, supra 18, figure 39; the report is from 1987 and contains additional to the historical background of the Hamburg Rules a report about the economical and commercial implications of the entry into force of the Hamburg Rules and a article-by- article commentary on the Hamburg Rules

[61] Honnold, supra 13, P. 102

[62] see the 'container clause' of Hamburg (Article 6.2.(a)) and Hague-Visby (Article IV 5(c) or their 'loss of right to limit the liability clauses' of Hamburg (Article 8.1) and Hague-Visby (Art IV 5 e), which are nearly identical

[63] see above under heading 2.3.

[64] Booysen, supra 2, P. 262/263

[65] UNCTAD Report, supra 18, figure 35; Mr Justice Mustillhas, cited in UNCTAD Report, supra 18, figure 41

[66] Rolf Herber, cited by Lüddeke, supra 20, P. 12; William Tetley "The Hamburg Rules-A commentary" 1979 in Lloyd's Maritime & Commercial Law Quarterly, P. 1(5) (herein "Tetley-com")

continues beyond it. This commitment is a result of the carriers obligation towards the goods in his possession and is a ground rule of the Hamburg Rules. By taking this into account it shouldn't be a problem to interpret this rule in a proper way[67]. Or, giving another example, when Art 8 of the Hamburg Rules says that "...the carrier is not entitled to the benefit of the limitation..." when he has caused damage "...with the intent...or recklessly and with knowledge..." it is surprising that this wording could be considered unclear[68]. The civil law has used this kind of phrase for centuries without any particular problems.

It generally is a problem to draft international rules which are to be applicable to Continental-European countries with civil law background as well as to countries with common law backgrounds like in the Anglo-American legal sphere. But it is agreed that international conventions are necessary[69], than the common law must make the sacrifice to agree to the application of provision formulated in an abstract style, since this seems to be the suitable kind of establishing conventions. While the application of precedent cases is far more developed in common law countries, the countries with civil law have more experience to create conventions.

For applying conventions one should consult the special technique provided by certain common understanding provisions. The interpretation of the Hamburg Rules is facilitated by the Common Understanding provision[70]. Even if this is not law, it points the direction for interpreting controversial provisions. Interpretations start with the wording and the context of the provision, but the intention of the drafters must be considered. It is helpful that Unctad as a co-author of the Hamburg Rules has published a booklet with explanations, clarifications and an article by article discussion. In this booklet Unctad refers in this booklet to the preparatory and final work of the conference[71].

5.2. Increase of transport costs

It is also said that Hamburg's shift of risk of loss from cargo interests to carriers, along with the increased "friction" costs (increase claim settlement, litigation costs), will result in greater overall insurance costs, for which the ultimate consumer will eventually pay [72]. The shift in risk of loss to carriers will result in higher P&I insurance costs with or without a corresponding reduction in cargo insurance rates. The shift will be detrimental to developing countries since, while they compete in the cargo insurer markets, they do not insure carrier risks and thus will lose business as risks shift from cargo to carrier[73].

To examine these concerns, one has to consider, that the transport insurance can simply be divided between either cargo insurance taken out by cargo interests with

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[67] Adv. D.J. Shaw "The Hamburg Rules" on the occasion of a seminar to the Hamburg Rules 1991, seems to have a problem with this rule, P. 8 (herein "Shaw")
[68] Lüddeke, supra 20, P. 27
[69] this seems to exist, see below under heading 7
[70] Annex II of the Hamburg Rules
[71] Lüddeke, supra 20, P.13
[72] Werth, supra 48, P.71
[73] Werth, supra 48, Fn 80

cargo insurance companies or liability insurance taken out by carriers mainly through their mutual P&I Clubs. In practice, loss or damage to cargo is in the first place indemnified by the cargo insurer and the role of liability regime is mainly to determine the right of recourse of the insurer against the carrier. As the carrier insures his cargo liability with his P&I Club, the carriage of goods often involves overlapping insurance coverage. Other authors maintain that the expression of a "dual system of insurance" would be better[74], since there are some cases where the liability insurer will not be involved because the carrier is really not liable, or because the particular risk is not covered by the P&I Club, or because cargo insurance covers specified events irrespective of any liability towards a third party, or because cargo owner has not taken out cargo insurance.

With regard to the concerns of the cargo insurer in loosing business one has to note that even with the likely shift of risk of loss to carriers does not mean that the Hamburg Rules make the shipowner liable for all cargo loss or damage without any limitation. Specific limitations still exist, such as war, riots, civil commotion. Even when the carrier can prove that he or his servants are not responsible for the damage or loss, than cover by the insurance remains necessary. For this reason it is most likely that cargo interests will continue to insure with their cargo insurers. No data or other specific information exists or at least are not released by the insurers so far to the impact in the amount of insurance written, but it is said that no dramatic reduction by the cargo insurers will occur[75]. But certainly there will be a change from cargo insurance to liability insurance.

Whether the insurance premiums will go up, down or remaining more or less as before is a key issue. To put this question into perspective, it must be taken into account, that the amount of premiums only amounts to one quarter percent of the landed value of the goods shipped[76].

One has to note that the coming into force of the Hamburg Rules will not change the total risk, nor will it result in more loss of or more damage to cargo. It might rather result in less damage since shipowners might be induced to take better care of their cargos owing to the increase in their liability. Consequently the total compensation paid will either remain unchanged or will decrease with the lower amount of damage. The debate focuses therefore not so much on the amount but on who will have to pay.

Because of the slight change in the balance of liability, which is caused by the introduction of the principle of presumed fault, the number of claims against the carrier might increase. Consequently the carriers' claim-handling costs would go up and possibly higher liability(P&I) insurance costs would occur. This again could result in higher premiums for the shipowners. With regard to this chain of causality it must be added, as has been said above- that an increase of costs will probably induces the shipping companies and the P&I Clubs to pay more attention to the causes of damage and force the costs down again through improved loss prevention measures and standards of cargo care. In that case cost increases are likely to be temporary. But

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[74] UNCTAD Report, supra 18, figure 45
[75] UNCTAD Report, supra 18, figure 47
[76] UNCTAD Report, supra 18, figure 46

even an increase in cargo claims in the order of say 25 per cent would produce only a relatively small increase in the overall total of cargo claims payable by the liability underwriter and on this basis the effect on the overall cost of liability insurance would probably not remarkable[77]. An investigation has shown that with regards to various categories of claims, for example claims for short delivery, cases of routine damage, serious damage, damage to cargo in collision and general average, no effect is likely to be experienced[78].

Shipowners and their P&I Clubs fear that because of the moderate though conservative shift in the balance of risk from cargo to ship, the P&I Clubs will have to bear a greater share of this expense. The fear has reached such an extent, that the P&I insurers currently refuse to indemnify their customers for claims if these customers have voluntarily accepted the Hamburg rules[79]. The fear by the shipowners and the P&I Clubs is justified in the case where the cargo insurers make greater use of their subrogation rights. But, as shown above, this increase is likely to be temporary until prevention measures are improved, and also will not be remarkable in relation to the overall costs of liability insurance.

The fear by cargo insurance companies that they will consequently be faced with the reduction of their premiums is realistic, although function will still be needed. Nevertheless the fear of losing stakes by one participant in maritime activity cannot be a reason to prevent changes of law, especially when this is to the benefit of another original participant, here the shipper. Interestingly, insurers have accepted risk-allocation like Hamburg's under international conventions governing other transport modes (e.g., rail, road, air)-apparently because the same segment of the industry insures both shippers and carriers[80].

On the other hand, argument often used against the Hamburg Rules has been that while the P&I costs will go up, cargo insurance premiums will not go down and that this will increase the total transport cost.

In reply to the part of statement that the cargo insurance premiums will not go down[81], one has to say, that the insurance premiums will either go down or they will remain the same, but they cannot do both at the same time. However, it is rather likely that the premium will decrease according to the general acceptance that the Hamburg Rules may encourage the cargo insurers to use their subrogation rights in greater use of the recourse action, a remedy which may even improve their position in settlement negotiations where costs are rather small[82]. The amount of the premiums depends on the risk being borne by the insurance. This is confirmed by the Mercer Management Consulting Report " Legal Liability in Maritime Transport with Particular Reference to Short Sea Shipping and the Hamburg Rules" prepared in 1994, which figured that it is likely that shippers will be able to reduce their cargo insurance coverage, and/or accept

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[77] UNCTAD Report, supra 18, figure 49, cited Goldie

[78] C.W.H. Goldie "Effect of the Hamburg Rules on Shipowners' Liability Insurance" in Journal of Maritime Law and Commerce 1993, P. 111(113-115) (herein "Goldie")

[79] IUMI, supra 33, P. 8

[80] Honnold, supra 13, P. 106

[81] so the International Chamber of Commerce, cited by Lüdekke, supra 20, P. 18

[82] UNCTAD Report, supra 18, P.57

increased deductibles in exchange for lower insurance rates[83]. A decrease of risk must result in a decrease in premiums. This development would be only fair. A statement that it is unlikely that the premiums will reduce[84], must be seen rather as a attempt to prevent the introduction of the Hamburg Rules, especially if it comes from the insurance side. An increase of the total transport cost is thus not expected from this sight.

An increase of the transport costs through higher premium costs charged by P&I and subsequently higher freight cost is likely to take place only temporarily, but even this is questionable. When assessing an increase of costs one has to consider two other factors which may have meaningful influences. Firstly, it is likely that over the coming years the volume of claims will increase whether or not the Hamburg Rules are adopted and secondly that P&I Clubs cover even claims other than those for cargo loss or damage and that these claims will also increase from year to year. The four main types of risks covered by P&I Clubs are

(a) Liability for loss of life and personal injury,
(b) Liability for loss of or damage to cargo,
(c) ¼ collision liability, and
(d) Wreck removal, damage to fixed objects, oil pollution, etc.

Of the risk covered by the P&I Clubs, the payment of cargo claims amount to 30 per cent of the total. Since cargo risks play such a relatively limited role in the total risks assumed by the P&I Clubs, their implications for liability insurance are limited. An increase of cargo claims by 20 to 30 per cent would cause an increase of the total claims reimbursed to shipowner by 6 to 9 per cent[85]. Such an increase again will influence liner freight rates from 0.2 to 0.4 per cent of the total freight rate[86]. In this connection it must also borne in mind that P&I Clubs are in general more cost effective, being mutual and non-profit-making than cargo insurance companies. From a purely economic point of view, it would seem that P&I Clubs are the more efficient type of organisation. Risks may consequently be covered relatively more cheaply under P&I insurance than under cargo insurance and the limited shift in liability may result in either no change or a reduction in total insurance costs.
This argument finds support in the fact, that the introduction of the Hamburg Rules has more influence on smaller than on "major" cases. "Major" claims are unavoidable no matter which legal rules apply. Smaller cases, however, have much less effect on the overall cost of cargo claims.

In an attempt to avoid costs an interesting proposal has been made that cargo insurers and ship owner's liability insurers should agree to formulae in advance for the allocation of loss in specified categories of claims, and there would be no-recourse agreements backing up those formulae so that the cargo insurer would not attempt to

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[83] Mercer Management Consulting Report " Legal Liability in Maritime Transport with Particular Reference to Short Sea Shipping and the Hamburg Rules" prepared in 1994 for Commission of the European Communities DG VII, P. 2
[84] IUMI, supra 33, P. 9
[85] Pineus, supra 5, P. 16
[86] UNCTAD Report, P. 54

recover from the liability insurer amounts in excess of what would be provided in the formulae[87].

To sum up, it is doubtful whether the alteration of the Hague Rules system will result in any increase of the total insurance and transport costs. The Mercer Report's final statement is that because the cost of liability insurance is only a small part of a carrier's cost structure, and because of carriers' effort to reduce loss and damage, this should have no effect, or a negligible effect, on freight rates overall. Carriers, they interviewed, expect limited impact on freight rates as a result of a possible changeover to the Hamburg Rules.

5.3. Liability period

The extension of the carrier's period of responsibility to the duration while the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge according to Article 4(1) of the Hamburg Rules entails the advantage of having the same approach as that for the international conventions for carriage by road, rail, and air[88]. This is a valuable amendment towards establishing uniform international rules on carriers' responsibility.

The "tackle to tackle" principle of the Hague Rules reflects early patterns in which the shipper brought goods to the dock as the ship was ready to load and the consignee received the goods as they were unloaded[89]. The period in which neither the shipper was in possess of the goods nor the carrier responsible was minimal. Nowadays, at busy ports, a delivery of goods to the dock is not feasible anymore. By applying the Hague Rules it means that the shipper has to give up his possession sometime long before the goods are loaded without anybody else being responsible when they are damaged or lost. To exclude the periods while the carrier is in charge of the goods generates a risk for the shipper which is not bearable and not even necessary. Cargo losses from weather and theft are more common in the freight-yards than while cargo is in the ship[90]. The carrier can even in compliance with the Hamburg Rules enter into an agreement that a third party be responsible for the custody before loading and after carriage. But once he is in possession of the goods it is a principles of equity that he is responsible for the damage or loss. The obligation to take care of goods in one's possession reaches such an importance in some jurisdictions that courts are inclined to refuse the validity of an exoneration clause concerning responsibility of possession even without an application of the Hamburg Rules[91]. The necessity of the Hamburg Rules seems to be self- evident and compelling.

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[87] Goldie, supra 78, P. 116
[88] Honnold, supra 13, P. 82
[89] Honnold, supra 13, P. 81
[90] Honnold, supra 13, P. 82
[91] Prüßmann/Rabe, supra 11, § 559 Anm. E 2.

5.4. Application of the liability regime even without the issue of a bill of lading

Hague Rules apply accordingly to 1(b) only to contracts of carriage covered by a bill of lading or any similar document of title. The reason for this limitation is to restrict coverage to carriage under a document that must be surrendered in exchange for the goods, this being a useful way for sellers (and banks) to keep control of the goods until the price has been paid[92]. The increased speed of ocean transport and current payment and financing arrangements have led to shipment under contracts (often called "waybills") that do not require the contract to be surrendered before the goods can be unloaded and delivered, this a development that avoids difficulties in delivery that may result from delayed arrival or loss of a "document of title"[93]. Nevertheless the shipper needs protection when goods are damaged or lost. While there is an uncertainty about whether Hague or the various domestic laws are applicable to modern contracts of carriage, this problem is avoided by Hamburg since it applies to any contract of carriage without regard to whether a document of title must be issued, according to Article 1.6. The demand for clarity and certainty necessitates this.

5.5. Deck cargo

The extension of the liability on deck cargo flows from an economic requirement[94]. In recent times the exclusion of deck cargo was justified because of the enhanced danger the cargo was exposed to on deck. In modern times - with containerism - this danger is minimised. Besides that , there is no danger of heavy duty of care for the carrier since the liability is based on fault which again depends on the specific circumstances of the deck cargo, which includes a consideration of what care is appropriate and the usual customs.

5.6. Liability of the "Actual Carrier"

The modernisation of the rules governing transhipment between ocean carriers has been one of many measures in the Hamburg Rules to lessen the disparity between the responsibility of ocean carriers and other modes of transport. Hence, Hamburg provides uniform international rules. The solution responds to the fact that, although most shipper cannot cope with claims against unknown remote parties, carriers can effectively handle this problem as part of their on-going relationships with each other.

5.7. Liability for nautic fault of the servants

One of the major complaints about the Hamburg Rules is that the list of defences has been eliminated except for fire. The most vocal complaint has been over the

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[92] Honnold, supra 13, P. 83
[93] Herber 92, supra 27, P. 386
[94] Herber 92, supra 27, P. 386

elimination of the nautical faults defence. This defence was originally included in the Hague Rules because the so-called "maritime adventure" of ocean transport in the past was indeed an uncertain affair fraught with danger. However, there is a vast difference between the perils of trading under sail without modern navigational aids and today's methods using highly sophisticated vessels and satellite navigation[95]. The vessel can communicate with the carrier at any time[96]. Modern satellite communication, telex and telephone places owners in daily contact with their vessels, whose masters would not take any important decision without first having consulted their head office[97]. This, of course, doesn't mean that the idea of presumed fault is that the master first calls his head office when the vessel is in a severe storm or hurricane or in a difficult navigational or collision situation[98]. In this situation the master is on his own, but this is rather an exceptional occasion. But for most of his decisions the master can get confirmation and is rather executing by instruction. The increased influence by the carrier justify making him responsible.

That safety has increased dramatically can be seen, for example, in the shipowner requiring fewer and fewer crewmembers per vessel[99].

Consequently, the Hague Rules' "errors in navigation" defence is no longer reasonable[100].

If not the law itself would provide the exoneration, like the Hague rules, the German courts would hold such an agreement anyhow void as a violation of cardinal obligations[101], and this despite the freedom of contract. No doubt exist under German Law that the guarantee of proper nautical carrying out of carriage on sea is a cardinal obligation and that the carrier therefore is responsible for fault of his master and servants.

The liability isn't a strict one but depends on fault. So there always remains possibilities to defend the behaviour of the servants which caused the damage as reasonable apart from negligence .

No doubt exists that the carriage by sea is exposed to specific perils and that it carries a high risk because of the immense value of the goods. But to justify the defences of the Hague Rules with these circumstances does have persuasive force, since this fact is already considered in the limitation of liability based on a very low amount. This amount is approximately just one fourth of the sum in the CMR Convention (Carriage by road) and one eighths of the sum in the CIM Convention(Carriage of rail)[102].

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[95] UNCTAD Report, supra 18, P. 19
[96] Herber 92, supra 27, P. 387
[97] UNCTAD Report, supra 18, P. 19
[98] Lüddeke, supra 20, P. 25
[99] UNCTAD Report, supra 18, P. 19
[100] Herber 92, supra 27, P. 386
[101] Bundesgerichtshof (German Federal High Court of Justice) Neue Juristische Wochenzeitschrift 56,1056
[102] Herber 92, supra 27, P. 387

In this context it should be mentioned that the Hamburg Rules introduced the burden of proof under Article 5(1) in reaction of Hague's silence on this matter which led to conflicting case-law and international disharmony[103]

The opponents of the presumed faults provision refer to the possibility of transport insurance and one has to agree that the insurability of a risk has to be taken into account by the legislator. However, this fact cannot justify a unbalanced rule. The legal rule has to lead to an acceptable result even without insurance[104]. This requires at the same time a determination, who has to carry the costs for the insurance.

A further argument against the extensive defence possibilities under the Hague Rules is that it results in diminished standards of care and uneconomic results since the carrier need not care about other things since no danger exists for which he has to pay. There is no incentive for the carrier to make outlays that are needed for the safe carriage. Carrier answer that adequate incentives are provided by their interest in protecting the investment in the ship[105]. This interest may provide incentive to have radar, sonar, and other navigational aids to avoid collision and stranding. This however doesn't include care to prevent seepage or "bleeding" of sea-water into cargo holds, care in adequate stowage to prevent shifting of cargo in heavy weather, or care in adequate securing of on-deck containers. A current report observes that large claims have recently resulted from a lowering of standards in officers and crews as well as their inadequate training[106].

The responsibility for nautical fault and the abolishment of the majority of the defence possibilities could, however, induce the carriers' companies to improve loss prevention measures and standards of cargo care.

5.8. Inbound shipments and "conflict" vagaries

A further contribution to clarity and uniformity is provided by Article 2 of Hamburg by making the Convention applicable, when either "the port of loading or the port of discharge" is in a Contracting State. This avoids the uncertainties resulted from judicial attempts to invoke conflict rules when the shipment came from a non-Contracting State to a Contracting State of Hague and the forum is a third State.

5.9. Jurisdiction clause

Most standard bills of lading restrict the place where the cargo-owners may bring suit for cargo loss. The most common provision limits actions to the country "where the carrier has his principal place of business"[107]. The Hague Rules do not address the

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[103] Honnold , supra 13, P. 99
[104] Herber 92, supra 27, P. 387
[105] Honnold, supra 13, P. 107
[106] Honnold, supra 13, P. 107
[107] Honnold, supra 13, P. 88

difficult problems of validity presented by these clause. The clause is in favour of the convenience of the carrier and to reduce cost of litigation "at home".

Cargo loss or damage usually is not discovered until the cargo is unloaded at destination, which may be thousands of miles from the carrier's principal place of business. Thus, the standard bill of lading clauses often place on the claimant the burden and expense of transporting the evidence and of instituting its claim before a distant, foreign tribunal. Because of the heavy costs of litigating in a distant forum many courts with reference to Article 3(8) of the Hague Rules have invalidated these forum clauses[108].

The uncertainty and unfair situation for the shipper have been solved by the Hamburg rules insofar as the shipper also can sue the carrier, for instance, according to Art 21 (3) at "the port of loading or the port of discharge". Consequently, neither party may institute a proceeding that is unconnected with the contract or its performance. These provisions are designed to bring fairness and also clarity to an unpredictable area of international commercial law. It also generates uniformity since the other international transport conventions have the same rules. The rule also doesn't limit the freedom of contract beyond the necessary extent, since the Hamburg Rules give full effect to agreement at the place of proceedings made after a claim under the contract for carriage by sea has arisen according to 21(5) with regard to legal actions and according to 22(6) with regard to arbitration.

5.10. Monetary Ceilings on Liability

Cargos vary widely in their value per package or pound. The Hague Rules ceilings were set for recovery for cargo losses to minimise costs for insuring cargo and carrier liability and to create some certainty in commercial relations. The carrier knows what the limit of his exposure are, and can insure himself accordingly, and the cargo owner knows what his maximum recovery will be, and he can purchase insurance if he wants protection against losses in excess of the limitation figure. The ceiling consist of a cargo unit and a monetary limit.

One of the major sources of the lack of uniformity in the carriage of goods by sea under bills of lading arises from different package and kilo limitations. There are at least nine package and kilo limitation regimes in the world today[109], which is also a consequence of paragraph II of the sign protocol, whereby the parties of the Hague Rules were free either to adopt them word-to-word or by giving the gist of them[110].

Hague omitted to define "package" or "unit". This has created a number of problems[111]. With the container revolution" a new dimension to the problem was created. The Visby Protocol has already faced this problem which is solved by the Hamburg Rules by Article 6 which recognise two cargo units for setting liability limits.

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[108] Honnold, supra 13, P. 88
[109] see a list at Tetley 95, supra 55, P. 134
[110] Necker, supra 36, P. 90
[111] Honnold, supra 13, P. 90

The monetary limit for each cargo as "100 pounds sterling" according to Hague 4(5), caused uncertainty and has been replaced according to Art. 6 of Hamburg which employs a widely-recognised international standard-unit of account defined as Special drawing Rights(SDRs) administered by the International Monetary Fund(IMF), the same as the SDR Protocol apply. This led to certainty and accountability of the financial limit regardless of the sites of the proceeding[112].

The rules of Hamburg to the monetary ceiling of liability was the result of a package deal[113]. Against the abolishing of the defence of nautical fault a very low amount of 2.5 SDRs was agreed. Considering the inflation of 10 years one has to admit that this amount is lower than the amount agreed in the Visby Protocol with 2 SDR. Already this agreement should calm those concerned with an increase in indemnity costs for the carrier. It even shows that the Hamburg Rules do not overly favour cargo owners[114].

5.11. Efficiency and Fairness

The different issues dealing with certainty and clarity as mentioned above also touch upon the question of fairness: especially for clauses in the Hague Rules which require shippers to bring their claims in the carriers' jurisdiction; clauses in the Hague Rules that in cases of transhipment shippers are required to pursue their claims against a second or third carrier, not identified in the bill of lading; rules require shippers to bear the burden of proving facts that are only in the carrier's possession.

Besides that, it couldn't be described as fair that the carriers are able to cling to the Hague Rules with its multitude of immunities and defences, with their related ambiguity and elasticity providing immunity and negligence.

If at all, the fact that uncertainty is generated raises the question of fairness, since this gives the possibility to delay or defeat cargo claims through tenuous legal technicalities. Carriers' companies are rather able to afford legal advisers and legal actions than the smaller shipper companies, so that sometimes only a threat to bring a matter to court is deterrence enough for the shipper to drop any complains.

One cannot reproach Hague's founders for these failures. It is the fact, that seventy years ago many of the problems had not arisen or had not yet reached crisis proportions as seen in containerisation and combined transport, custody at intermediate transfer-points, persistent world-wide inflation, and widespread use of non-negotiable contracts of carriage. The less a convention is abstract the bigger its chance to become outdated[115].

Legal uncertainties, as shown above, create waste; elements of increased costs include delays in settlement, expensive legal services, overlapping insurance and unnecessary

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[112] Sweeney, supra 7, P. 529
[113] Sweeney, supra 7, P. 527
[114] A.J. Waldron "The Hamburg Rules-A Boondoggle for Lawyers?" in Journal of Business Law, P. 305(318) (herein "Waldron")
[115] Honnold, supra 13, P. 100

casualty losses, while immunity is given to the only party who could guard against losses[116].

Besides the fact of some unclear phrases caused by the necessity to compose different views of a liability regime and the low monetary ceiling as a consequence of the package deal[117], the Hamburg Rules seem to improve the performance of maritime trade operations and to facilitate the settlement of international contracts compared with the Hague Rules. This is reached by rules which at least persuade in content through clarity and certainty, considering modern developments and contributing to uniform international rules. In many respect the Hamburg Rules are necessary to meet modern requirements and there is no other legal regime which unites so many positive aspects. Nevertheless the number of ratifications is low especially amongst the important maritime countries and question remains what further development will be whether a uniform regime is necessary at all, what kind of problems arise because of the existence of different liability regimes, and how to achieve uniform law.

6. Further development

The ratification of the Hamburg Rules appears slow. Just 25 States have ratified them[118]. The majority of these countries are developing countries. Member States as Botswana, Cameroon, Hungary, Kenya, Malawi, and Zambia haven't yet incorporated the Rules into their national legislation[119].

At present, the impact of the Hamburg Rules on world trade seems to be negligible. The Hague-Visby States control about 35% world's fleet by dead weight tonnage and about 65% of world trade. Hamburg Rules States control respectively only about 1,5% of the world fleet and only 3,2% of world trade[120].

A report of the 1995 Transport Committee of the OECD indicates that it is unrealistic to believe that the major trading countries will ratify the Hamburg Rules in the near future[121].

Nevertheless, it is true that Canada, by enactment of the Carriage of Goods by Water Act, which came into force on 6 May 1993, has adopted the Hague-Visby Rules. But the same act adopted the Hamburg Rules, which will come into force when the minister of Transport of Canada, on or before, 31 December 1999, has considered their adoption under inclusion of the parliament[122].

In Australia the Hamburg Rules could even come into force at midnight on 19 October 1997 unless both Houses of the Commonwealth Parliament resolve before then that

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[116] Honnold, supra 13, P. 107
[117] see above under heading 5.10.
[118] see above supra 3
[119] according an investigation by one of the British P&I Clubs in 1994, cited at IUMI, supra 33, P. 4
[120] IUMI, supra 33, P. 5
[121] IUMI, supra 33, P. 5
[122] William Tetley "Canadian maritime legislation and decisions 1993-1994" in Lloyd's Maritime & Commercial Law Quarterly 1995, P.88 (herein "Tetley 93-94")

they should be repealed or that consideration of their repeal should be postponed a further three years, until the year 2000[123].

France has adopted the Hague-Visby Rules, but under the declaration, that it would be only for transition[124]. Its tight connection to African Countries, especially Morocco, who have adopted the Hamburg Rules, could be significant[125].

Anyhow, it is common view, that hesitation in adoption can at least partly be explained in light of a general belief towards international conventions affect the economy, and that the states wait to see whether the convention will come into force at all or even how other states with similar conditions react[126]. One must also consider the long time an adoption takes within a democracy[127].

But despite that fact, the number of ratifications after 19 years is truly very small. This may be explained by the strong resistance which some institution with enormous influence have against the Rules. In a bulletin issued by the Baltic and International Maritime Counsel (BIMCO), members of the organisation have advised that the pro-Hamburg campaign by shippers must be resisted[128].

The opposition by the P&I Clubs is expressed by their refusal to give cover for voluntarily inclusions of the Hamburg Rules[129].

The Association of Marine Underwriters in South Africa (AMUSA) have expressed their opposition through a paper by its chairman[130].

Support from shipper organisations, like the European Shippers' Counsel (ESC)[131], is relatively low, since the small reduction of premiums being expected keeps their interest low. Besides that, it is the bad state of the organisation of cargo interests which is up against the well organised carriers.

Even the International Union of Marine Insurance (IUMI) rejects the introduction of Hamburg Rules and urges the United Nations to use all its efforts to promote a wider adherence to the Hague Visby Rules[132]. It maintains, due to the small number of ratifications, the Hamburg Rules have proven that they have failed commercially[133].

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[123] Martin Davies "Australian maritime law decisions 1994" in Lloyd's Maritime & Commercial Law Quarterly 1995, 385 (herein "Davies")

[124] Herber 92, supra 27, P. 389 Fn 43,44; Rolf Herber "Haftung nach Haager Regeln, Haag/Visby-Regeln und Hamburg-Regeln" in Transportrecht 1995, P. 261(herein "Herber 95")

[125] even in Italy already exists a parliamentary approval, see Werth, supra 48, P. 77 Fn 106

[126] Herber 92, supra 27, P. 389

[127] Booysen, supra 2, P. 49

[128] quoted at Waldron, supra 114, P. 318

[129] Lloyd's List of 22.9.1992

[130] Association of Marine Underwriters in South Africa (AMUSA) "The Hamburg Rules A Marine Underwriter's Viewpoint 1991, P. 9 (herein AMUSA)

[131] quoted at Lüddeke, supra 20, P. 13

[132] IUMI, supra 33, P. 2

[133] IUMI, supra 33, P. 1

CMI was never a promoter of Hamburg but yet only a couple of years after the adoption it recommended their ratification because of reasons of uniformity. Meanwhile they have switched to an opposite position.

But it is questionable whether the long period before the convention came into effect and the small number of ratifications already obtained, indicates its eventual failure. It took also seven years until the Hague Rules came into effect with just a small number of ratifications, and 9 years for the Visby Protocol after just 10 ratifications came into effect[134].

Even the fact that countries adopt the Visby-Protocol long after the acceptance of the Hamburg Rules doesn't mean an absolute rejection of Hamburg[135]; France serves as example[136]. Other countries who in the meantime have introduced the Hague Rules are South Africa (04.07.1986), and Italy(01.11.86); Germany has on 05.06.1986 written the Hague-Visby regime into their commercial law. Just Japan declared by ratification of the Visby-Protocol that it refuses each increase of the carrier's liability.

It is general view that the prevailing Hague Rules even with the amendments by the Visby Protocol needs further amendments[137]. The opinions are not agreed about what path should be followed. Should there be an adoption of the Hamburg Rules or a second protocol comparable to the Visby one, or a autonomous developing on State basis, or a new convention at all? Some recent developments in single States now follows.

6.1. United States

The United States does not belong to the traditional big maritime nations in terms of fleets, but it has some huge harbours (Long Beach with 74, Philadelphia with 68, and Los Angeles with 67 millions tonnes goods[138]). It plays a major role in international trade as one of the biggest import as well as export countries. The United States is influenced rather by shipper than by carrier organisations, and hence it isn't surprising that it gave the international impulse for improving the situation of the shippers by introduction of the Harter Act[139]. Besides that it was the United States, amongst other industrial states, who promoted the drafting of the Hamburg Rules[140]. So, it wasn't a surprise, when the United States was deemed as one of the first nations to adopt the Hamburg Rules[141]. Nevertheless, the ratification is still pending. Yet it is important to keep in mind that in 1936 the United States adopted the Carriage of Goods by Sea Act

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[134] Waldron, supra 114, P. 318 says, that if Hague Rules had used the same machinery governing their entry into force, it would have taken over 30 years before they became effective
[135] Herber 92, supra 27, P.389
[136] see above heading 6.
[137] Herber 92, supra 27, P.388
[138] Bertelsmann Universallexikon "Die wichtigsten Häfen der Welt"
[139] see above 2.3.
[140] Sweeney, supra 7, P. 523
[141] Lüddeke, supra 20, P. 11

(COGSA), which is the domestic enactment of the Hague Rules, but has not yet adopted the Visby Protocol.

The struggle in the United States to ratify Hamburg seems to be exemplary for the occurrences in other countries: rigid opposition by the carrier and weak support by the shipper organisations. The first stage was characterised by the search for reliable data on whether the adoption really led to higher costs as the opponents of Hamburg had asserted. The search remained without success[142]. It is interesting to know that carriers seek to justify the negligent navigation defence as essential to risk allocation with that being the rational behind insurance of Lloyd's. The distribution of the cargo damage risks on many syndicates would mean a spread within the entire society instead of concentrating on one source of funds[143] as it would mean when the P&I Clubs had to cover the loss or damage.

While not surprised by opposition of the carrier organisations and the liability insurer, the big surprise-as in other countries- is the opposition by the cargo insurer. While one could have assumed that they might favour the Hamburg Rules because of the subrogated rights of shippers which eventually could produce greater returns for them, the fear predominated that the transfer of risks from shipper to carrier would be the beginning of rejection of cargo insurance and a diminishing in premiums and business[144].

Another phenomena with regard to the adoption of Hamburg which occurred with conventions in the United States, was what has been called the "Trigger-effect". This described an agreement among protagonists, that the ratification shall follow after a great number of ratifications by trading partners of the United States[145]. The consequence of having no ratification so far can not surprise, since many countries thought in the same way.

Furthermore, the special situation in the United States of not having adopted the Visby Protocol gave the opponents to Hamburg a tool of being progressive by demanding its ratification. This, however, was blocked by the proponents of Hamburg with their demand of a simultaneous ratification of both Visby and Hamburg with the consequence that Hamburg would come into effect automatically after a period of time. The contrary proposals led to a stalemate which has produced governmental inaction and prompted government to let the maritime industry solve its own problems[146].

Also the alliance among shipper organisations in and beyond the United States with UNCTAD and UNCITRAL[147], which eventually lead to a conference in Geneva in 1987, remained without result[148].

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[142] Sweeney, supra 7, P. 533
[143] Sweeney , supra 7, P. 533
[144] Sweeney, supra 7, P. 532
[145] Sweeney, supra 7, P. 533
[146] Sweeney, supra 7, P. 535
[147] Sweeney, supra 7, P. 535
[148] concerning the conference see below under heading 6.4.

Because of the widespread view hat COGSA and the Hague Rules were outdated, The Maritime Law Association of the United States sought to break this long-standing deadlock and proposed a solution aimed as a compromise to find the acceptance to all affected interests in the maritime industry[149]. Interestingly the members of the Study Group in charge of drafting the act were not representatives of particular organisations involved in maritime matters, although they tried to approach the project from the points of view of the participants in the relevant commercial transactions[150]. The work was completed in 1995 and submitted to the members of the Maritime Law Association for comment. In 1995 and 1996 meetings were sponsored throughout the country to introduce and discuss the proposals. It is now intended to represent it to the US congress.

The Maritime Law Association itself describes in the Final Report of the proposed bill, that the framework is that already established by the Hague Rules and continued in the Hague-Visby Rules[151]. It would be better suited to the modern needs of the commercial world. The main characteristics are the incorporation of the Hague-Visby package on kilo limitation and the abolition of error in navigation and management exceptions. Besides that, there exists some terms not found in any other national or international legislation.

Its similarities to the Hamburg Rules are: the elimination of the tackle-to-tackle limitation concerning the time period where the carrier is responsible for the safety of the goods according to subsection 1(e), the extension of the application of the proposed act to all contracts for the carriage of goods by sea except charterparties according to subsection 1(b), and the inclusion of deck carriage within the scope of the proposed act.

Entirely new within a liability regime is the fact, that the bill provides that it shall govern the rights and responsibilities of the relevant parties regardless of the form of the action or the court in which suit is brought. This should avoid the attempt to evade the carrier's limitations and defences by filing suit under headings not in the proposed act, for instance actions in bailment or in tort for having damaged the goods.

The usage of service contracts is not even known in current liability regimes. Its idea is to compose the principle of the freedom of contract with the protection of third parties. The agreement to increase or even decrease the carrier's liability is binding only the immediate parties to that agreement and not third parties.

Especially because of the elimination of the navigational fault exception it hardly needs to be mentioned that both the International Group of the P&I Clubs and the International Chamber of Shipping has criticised the draft[152]. Additionally, in both statements, the opinion was made that the timing of submitting the draft would be inconvenient since on the international level efforts were being made to create one uniform regime.

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[149] Maritime Law Association of the United States " Revising The Carriage Of Goods By Sea Act: Final Report of the Ad Hoc Liability Rules Study Group, Febr.1996, (herein "Final Report")
[150] Final Report, supra 149, P. 3
[151] Final Report, supra 149, P. 4
[152] William Tetley "The tangled garden" in Fairplay 11th July 1996, P. 22 (herein "Tetley 96")

Independently from the success of the bill, it is worthwhile to note that an important national player in international trade is attempting to go its own way.

6.2. China

China has not only the biggest population in the world with over 1,2 billion people, the globe's third largest economy, and one of the largest growing economies with 10% annually since 18 years[153], but is also a major maritime state with a national fleet of over 13 million BRT[154]. 85-90% of China's foreign trade- China ranks already 11th in export in the world[155]- is carried by sea[156]. Because of the size of the fleet a maritime Chinese code is of great interest to many world-wide. For a long time China hasn't had any particular maritime code nor has she signed one of the more known regimes. Because of this gap, principles of civil law were applicable to maritime commerce[157]. Although China began to draft a maritime code in 1952[158], it took until the 1. July 1993 when the first code, the Maritime Code of the People's Republic of China, came into force.

The Maritime Code isn't an enactment of one of the current liability regimes, although the authors had considered them. Whereas the Hague Rules had too many shortfalls, it was the extensive liability of the carrier in the Hamburg Rules which deterred the authors from ratifying those Rules[159]. Also the low number of states, which had ratified the Hamburg Rules influenced the draftsmen. The product is unique, like the draft of the Maritime Law Association of the United States, following mainly the Hamburg Rules with some Hague Visby provisions and some original provisions. In addition, the case law and commentaries of the Anglo-American legal circles was invoked[160], and will influence the interpretation and application of the Code in the future[161]. The terminology is rather local than international[162]. It is noteworthy that the code contains no propaganda of the socialist regime, unlike previous legislation[163]. The main goal of the authors was to rather reach a parallel in the provisions in line with the international law on the carriage of goods[164].

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[153] TIME Magazine March 3, 1997 "The Next China" P. 14(19)
[154] L. Li "The Maritime Code of the People's Republic of China" in Lloyd's Maritime and Commercial Law Quarterly 1993, P. 204 (herein "Li")

[155] TIME Magazine March 3, 1997 "The Next China" P. 19
[156] Li, supra 154, P. 212
[157] Li, supra 154, P. 204
[158] Li, supra 154, Fn 5
[159] Jens-Peter Fante "Die Haftung des Verfrachters im Seehandelsgestz der Volksrepublik China" in Transportrecht 1995, P. 99 (herein "Fante")
[160] Fante, supra 159, P. 104
[161] Li, supra 154, P. 217
[162] Tetley 96, supra 152, P. 22
[163] Li, supra 154, P. 206; Fante, supra 159, P. 104
[164] Fante, supra 159, P. 104

The Maritime Code consists of 15 Chapters with 278 Articles[165]. The carriage of goods is regulated in Chapter 4. The Hamburg Rules have mainly influenced the rules about the person as carrier and actual carrier (Art 61), delivery of goods (Art 50), deck cargo (Art. 53), rules about the limitation of liability(but not the amount), and burden of proof (Art 51,2). The provision concerning the period of the carrier's responsibility is also incorporated following the Hamburg Rules but only to cover container transport. With the non-container transport the provisions conform to the Hague-Visby Rules, just as the amount of the limits of liability. On the other hand the Maritime Code has adopted all the exceptions and immunities laid down in Art. IV, r.2 of the Hague Rules, including thus the defence of nautical fault[166]. But one may speculate that China moved by a pragmatic point of view will change this principle and adopt Hamburg's presumed fault rule when the majority of the other countries have adopted Hamburg[167].

The Maritime Code also provides some special provisions unknown to the other conventions, the Hague Rules or the Hamburg Rules. These are the provisions concerning voyage charterparties, whereas the Hamburg Rules expressly in Art 2.3 and the Hague-Visby Rules through interpretation of Article 1(b) exclude the application of the rules to charterparties[168].

Besides that, the Maritime Code has special provisions on combined transport (Art 102). Therefore, the Maritime Code may be applicable when within a combined transport there is one stage of sea transport. With regard to loss or damage the liability provisions of the Maritime Code according to the Rules are applicable either when it can be ascertained that the loss or damage occurred in the stage of the carriage on the sea or when it cannot be ascertained where it occurred. Only when it can be ascertained that the damage or loss occurred during a stage other than that of the carriage on sea, the law applicable for such stage will apply[169].

The enactment of the Maritime Code by China confirms a movement in terms of liability regimes by countries towards an autonomous development on national levels.

6.3. Scandinavian countries

Even the Nordic countries, Denmark, Finland, Norway, and Sweden, have recently adopted a carriage of goods law of their own. The Nordic code came into force on October 1, 1994.

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[165] the English version of the Maritime Code is to find with Wang Guijun "Maritime Law" in China &Law, 25 February 1993; the German version can be find with Frank Münzel "Seehandelsgesetz der VR China" in Chinas Recht 7.11.92/1 Fn 1

[166] Li, supra 154, P. 210

[167] Fante, supra 159, P. 104

[168] these applies in general; however, municipal law in some countries, e.g. Japan, applies the Hague Rules to charterparties, see Martineau, supra 22, P. 13

[169] China has been a contracting state to the Warsaw Convention, so that with regard to carriage by air the Warsaw Convention is applicable

The Nordic countries have a long tradition of co-operation on their maritime legislation and therefore have almost identical codes[170]. Although the Nordic countries economically have not the same power as the United States or China, it is the union of their countries, the size of their fleet and their traditional significant influence on international maritime matters which accounts for their influence.

The Nordic Code is a partial implementation of the Hamburg Rules[171]. This isn't a major alteration of their old code, the Maritime Code, because the Hamburg Rules were taken into consideration when the Hague-Visby Rules were ratified in the 1970s and the case law has also tended towards the Hamburg Rules in certain areas[172]. From the Hague-Visby Rules they retained the package and kilo limitations, the one year delay for suit, the error in navigation, and the management and fire exception. The Hamburg Rules jurisdiction and arbitration provisions only apply between Nordic countries[173]. In terms of terminology it is worthwhile to mention that the Nordic code often uses neither Hamburg nor Hague-Visby ones[174].

6.4. Efforts on international level

Recent developments show that the deadlock in finding a uniform law caused by the indecision of many countries leads to autonomous behaviour which results, in national laws moving further apart from any uniform liability regime. The state justifies the description of this problem as being a "tangled garden"[175].

Also the attempts by meetings of the shipping industry or private organisations to rescue a way towards standardisation has been without success.

On June 1, 1987 in Geneva, an informal meeting of invited groups from the shipping industry met, convened under the auspices of the International Chamber of Commerce and UNCTAD. The groups involved were the U.S. Shippers' National Freight Claim Council, the Australian Shippers' Council, the International Shipowners' Association (INSA), the International Union of Marine Insurers (IUMI), the International Chamber of Shipping (ICS), the CMI, the Baltic and International Maritime Committee (BIMCO) and the Council of European and Japanese Shipowners' Associations (CENSA). Technological change in the industry-especially the movement to eliminate the paper bill of lading- was prominent in the Geneva discussion[176]. The meeting ended without any result.

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[170] Trond Eilertson "The Nordic Maritime Codes" in The International Journal of Shipping Law 1996 P. 175(176) (herein "Eilertson")
[171] Hugo Tiberg "Swedish maritime law 1989-1995" in Lloyd's Maritime And Commercial Law Quarterly 1996, P. 519 (herein "Tiberg")
[172] Eilertsen, supra 170, P. 176
[173] Tetley 96, supra 152
[174] Tetley 96, supra 152
[175] Tetley 96, supra 152
[176] Sweeney, supra 7, P. 536

In 1990 the CMI held a meeting in Paris, especially to address the conflict of law problems[177]. It even considered the drafting of a "Composite Text" which would incorporate desirable provisions of the Hamburg Rules into the existing Hague-Visby-SDR Protocol text. Nevertheless, the composite text was not to be, and the Paris Plenary failed to resolve the emerging conflict of laws problems[178]. The only result was the "Paris Declaration on Uniformity of the Law of Carriage of Goods by Sea". It contains the proposal to accept a couple of Hamburg's provisions as to the liability period, deck cargo, and the liability of the actual carrier. The only point where a majority voted for the retention of the current liability regime was the provision relating to the defence because nautical fault[179].

The CMI set up a International Sub-Committee on the Regime of Carriage of Goods by Sea[180]. It is the opinion of the CMI that the Hague-Visby Rules need modification and additions. This International Sub-Committee met for the fourth time in London on the 27th and 28th of February 1997; as chairman acts Professor Berlingieri, Hon. President of the CMI. The Sub-Committee involved the national Maritime Law Associations. It considers the main issues covered by the Hague-Visby Rules. The main goal is to obtain international uniformity of the law of the Carriage of Goods by Sea. At the end a study shall have been created which than will be submitted to the competent UN organisations, since it is common view that the goal of uniformity cannot being safeguarded by UNCTAD and/or UNCITRAL[181].

UNCITRAL in its twenty-eighth session has expressed its concern about the problems that arose as a result of different liability regimes[182]. The secretary-general of the United Nations had recommended in 1995 to the Governments of the Member States of the United Nations to consider an early adherence to the Hamburg Rules. UNCITRAL recognises the effort by the CMI to produce uniformity of law and the interest in working together. The aim by CMI to accept a new convention is upheld by the introduction of a "Jettison of Conventions Clause"[183]. It contains the commitment by all Member States of the UN then adopting of a new convention, to jettison immediately any other Convention or national law concerning the carriage of goods by sea.

Another question is whether uncontroversial parts of Hamburg can be accepted by voluntary agreements in the form of model clauses[184]. The CMI seems to be the appropriated organisation to introduce a draft in this direction. It wouldn't be a surprise if the CMI increase their endeavours to present a result in celebration of its 100th anniversary in 1997.

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[177] Sweeney, supra 7, P. 538
[178] Sweeney, supra 7, P. 538
[179] Herber 92, supra 27, P. 385
[180] Gerfried E. Brunn "IUMI Conference Oslo 1996-Jettison of Conventions Clause or the "Super Hamburg Rules" January 1997 (herein "Brunn")
[181] Herber 92,supra 27, P.383; IUMI, supra 33, p. 10
[182] Brunn, supra 180
[183] Brunn, supra 180
[184] Herber 92, supra 27, P. 388

It is difficult to estimate the future of the Hamburg Rules. A certain degree of scepticism is probably reasonable. But it is interesting to remember that the policy of Uncitral, the organisation without its approval nowadays no international liability regime will have any success, itself remains committed to work towards the adoption of Hamburg[185].

7. Necessity of a uniform convention

Despite current efforts towards a uniform convention, the discussion at the Sub-Committee[186] of the CMI again indicates how different and apparently irreconcilable the opinions are to some issues. Also the recent developments in some countries as the United States, China and the Scandinavian Countries must also introduce the question whether a uniform convention is necessary at all.

Firstly, it must be mentioned that the twentieth century is characterised by a re-emergence of the international lex mercatoria, consisting of international rules governing international transactions[187], which have come after a period of predominate national legal codification's in the eighteenth and nineteenth centuries. It centres principally around an autonomous international commercial law[188]. The international lex mercatoria doesn't mean the development of one single global code of international trade acceptable to all countries of the world. This is rejected as being a straitjacket which slow down the growth of commercial practices and usage's[189]. It rather means a pattern of law which is multiform and complex. It will consist - among others - of international conventions[190]. International conventions are sources of the international lex mercatoria besides customs, general principles of law, and judicial decision and judicial commentaries[191].

International conventions are sometimes described as legislation on the international level[192]. As an important characteristic they are binding on states and not individuals. To be applicable to individuals they often need incorporation by legislation. During this process they often loose their uniformity[193], which is perceived as a disadvantage of international conventions. The Hague Rules can serve as a good example for a convention which isn't applied uniformly[194], especially because the Rules itself gives the possibility to individual adoption on a national level. The Hamburg Rules try to be effective against this misdevelopment by introducing the duty to adopt the rules as a

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[185] so Dr Gerold Herrmann, Secretary of UNCITRAL at a seminar "UNCITRAL Instruments in South Africa" on March 11,1997 at the University of Stellenbosch

[186] Report of the Third Session of the 'International Sub-Committee on Uniformity of the Law Carriage of goods by Sea' of the CMI from 27th and 28th September 1996 by Frank L. Wiswall

[187] Booysen, supra 2, P. xiv

[188] Booysen, supra 2, P. 47

[189] Clive M. Schmitthoff "The Unification of the Law of International Trade" in Journal of Business Law 1968, P. 105(112) (herein "Schmitthoff")

[190] Schmitthoff, supra 189, P. 111

[191] Booysen, supra 2, P. 47 ff

[192] Clive Schmitthof "International Business Law: A New Law Merchant" P. 33 ff

[193] Booysen, supra 2, P. 49

[194] Goldie, supra 78, P. 111

whole and by the inclusion of Article 3 of the Rules. (Latter provision reminds of an interpretation and application with regard to promote uniformity) This and the international exchange of national decisions- all which is a success of the Vienna Convention of 1980- could mitigate the disadvantage of international convention. The problem of creating uniform regimes to carriage of goods seems to be even less a general one.

The movement towards international conventions indicates that there is a necessity for them, when one regards some conventions, for instance the Vienna Convention, one can see how well they work. This is particular necessary for international transport, since by its nature the transport crosses international borders and involves different national legal systems. The absence of an international legal regime to govern the transport, would mean that each national leg would be governed by a different legal system. Every time an international border is crossed, a new contract would have to be concluded and new documents would have to be issued. Also the specific hazard to ships, moving from port to port and being subject to arrest, cries out for international unification of maritime law[195]. In international transport it is inherent that it links two countries together insofar as one part of the performance subject to the contract is executed in one country and an other part in an another country.

International facts get a proper treatment with a sufficient degree of legal certainty only in an uniform law[196]. It is a common opinion that ocean carriers need uniform international rules[197]. Even the International Group of P&I Clubs represent the opinion that no nation should act independently but rather should move towards a uniform law[198]. The package or kilo limitations[199], where at the moment at least nine different regimes exist, and the application of the "unit of account"[200] should be sufficient to prove the difficulties carriers and shippers experience when they have to manage their businesses. This uncertainty limits the possibilities to calculate the risk a transport carries.

The international feature of transport and the requirement of forseeability for the parties of international transport are the main reasons for an uniformity of law. As understandable the development is towards national solos because of the slow ratification of Hamburg Rules, as detrimental it is for the international trade.

The statement that a lack of effort to promote wider adherence to the Hamburg Rules indicates that the proliferation of differing legal regimes does not create serious enough legal problems[201], and misunderstand the real reason. It is the strong opposition by certain groups and the fear of something new which caused the deadlock.

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[195] Honnold, supra 13, P. 77
[196] Necker, supra 36, P. 89
[197] Honnold, supra 13, P. 81
[198] Tetley 95, supra 55
[199] Tetley 95, supra 55
[200] Stephen A. Silard "Carriage of the SDR by sea: the Unit of Account of the Hamburg Rules" in Journal of Maritime Law and Commerce 1978, P. 13 (herein "Silard")
[201] IUMI, supra 33, P. 3

8. Problems because of different liability regimes

The discussion above should not distract from the fact, that presently and for some time in the future there will be different applicable liability regimes, at least three regimes, Hague Rules, Hague-Visby Rules, and Hamburg Rules, and besides that all having their own national orientation. Even the fact that very often the Hague-Visby Rules are incorporated by a Paramount Clause, which may spread its application beyond the contracting states of the Hague and Hague-Visby Rules, doesn't make it superfluous to deal with the problem of the existence of different regimes as the parties are nevertheless free to decide against the incorporation of a Paramount Clause in favour of Hague-Visby Rules while the Hamburg Rules itself seems to declare them null and void and vest the shipper with a damage claim according to Article 23.1.

There is no doubt that a number of different regimes raises several problems of overlapping regimes. One has only to imagine the case that in one and the same transport by a vessel, different regimes might be applicable to different goods.

The liability of a carrier is determined by the law applicable to a certain forum. That is the reason why the carrier by contractual agreement frequently tries to choose a convenient forum. This is called the "forum shopping". After the Hamburg Rules came into effect carriers are trying to avoid their application because of the increase of its liability through the introduction of the presumed fault principle[202].

Additionally, by application of Hamburg, a new risk for carriers arises, in Art 23 III, namely that the omission of referring to the Hamburg Rules in the contract could cause a claim for compensation.

In the following chapter several questions surrounding this problem will be discussed. How can the practise dealing with the draft of contractional provisions affect the situation? Is there a possibility of avoiding litigation in courts of member states of Hamburg? What impact does the coming into effect of Hamburg have on the formulation of Paramount Clauses? What possibilities exist to avoid judgements based on Hamburg but violating forum agreements?

To answer these questions it is necessary to begin with an precise examination of the application system of Hamburg and to see what kind of cases exist where the regimes can overlap.

8.1. Application of the Hamburg Rules

8.1.1. International scope of the Hamburg Rules (Art 2 I)

The Hamburg Rules are only applicable to the international carriage of goods. This means that carriage between two states plus the fulfilment of one of the conditions in

[202] see above under heading 4.(2)

Art. 2 I lit. a-e is required for the Hamburg Rules to apply. The substantive scope also encompasses besides bill of lading sea way bills and data freight receipts[203] as a consequence of the increasing paperless transactions in modern carriage of the goods.

The Hamburg Rules follows, in terms of its application provisions other international transport conventions. Art 1 II of the Warsaw Convention (air), Art 1 I of the CMR Convention (road), Art 1 §1 of the CIM Convention (rail), and Art 2 I Athena Convention (passenger) refer in particular to the agreed contract, that the departure and/or arriving points lie in the member states. The further conditions in Art. 2 I a-e of the Hamburg Rules stand side by side. Even when just one of these conditions is met the application of the Hamburg Rules is compulsory. A contracting-out isn't possible. Contractual agreements that derogate from the obligations under the Hamburg provisions are null and void according to Art. 23 I 1. The parties cannot avoid the application of the Hamburg Rules by choosing the law of a non-member state or the application of the Hague Rules or the Hague-Visby Rules. A corresponding Paramount Clause would be null and void[204]. These rigid and strict rules not known under the Hague-Visby Rules are designed to enforce a rapid spreading of the Rules[205].

As said above the international carriage of goods need not occur between two Contracting States. It is sufficient that one of the States involved is a Contracting State. The following situations are covered:

(a) Either the port of loading or the port of discharge mentioned in the contract is situated in a contracting State; or,

(b) An optional port of discharge mentioned in the contract of carriage which becomes the actual port of discharge is situated in a Contracting State; or,

(c) The bill of lading or other documents evidencing the contract is issued in a Contracting State; or,

(d) The bill of lading or other document evidencing the contract of carriage provides for application of the Hamburg Rules or any national legislation giving effect to the provision of the Hamburg Rules.

According to the Rules at Art 23 III in connection with Art 15 lit. 1, contract to which the Rules apply must include a clause stating that the Hamburg Rules are applicable. If this clause is missing, compensation is payable to a claimant who incurs loss as a result of omission of the clause. The loss may be caused by the claimant's having been mislead by the incorrect insertion in the bill of lading or by the failure of a court in a non-Contracting State to apply the Hamburg Rules when it would have done so if the statement had been inserted. The scope of the claim isn't easy to determine. The minimum should be the difference between the higher indemnity according the Hamburg Rules and a lower one held in a non-contracting state.

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[203] see above under heading 4.(4)

[204] Peter Mankowski "Jurisdiction Clauses und Paramount Clauses nach dem Inkrafttreten der Hamburg Rules" in Transportrecht 1992, P. 301(308) (herein "Mankowski")

[205] Necker, supra 36, P. 98

The application system of the Hamburg Rules also contains provisions on jurisdiction according to Art 21. It sets out a list of places where juridical proceedings, at the option of the plaintiff, may be instituted:

(a) the principal place of business or residence of the defendant; or
(b) the place where the contract was made, provided the defendant has a representative in that location; or
(c) the port of loading or discharge; or
(d) any additional place designated for that purpose in the contract.

In addition to the jurisdictions mentioned above an action may be brought in the court of a contracting State where the carrying vessel or another vessel owned by the carrier is arrested.

In terms of arbitration Art 22 of the Hamburg Rules provides that the parties may agree to submit their disputes under the Hamburg Rules to arbitration. An agreement must be in writing. The places of arbitration corresponds with the places where juridical proceedings may be instituted. In this circumstances it is important to mention that Hamburg requires the arbitrator or arbitration tribunal to apply the Hamburg Rules.

8.1.2. Cases where the application of different regimes overlaps

The existence of different regimes entails cases where the application of a regime depends on the forum where the case will be brought. The following examples may demonstrate this.

1) Transport from England (where the Hague-Visby are applicable) to Chile (Hamburg Rules). The contract contains a London jurisdiction clause. The goods arrive damaged because of the fault of a drunk master.

a) A court in England would have jurisdiction because of the jurisdiction clause. It would apply the Hague-Visby Rules with the consequence that the carrier could rely on the defence of nautical fault according to Art. IV NR. 2(a).
b) However, when the carrier sues in Chile, the court would have jurisdiction according to Art 21 of the Hamburg Rules. The application bases on Art. 2, since there is transport to a contracting state. The jurisdiction clause is null and void according Art. 23 I 1 of the Hamburg Rules. The carrier would be held liable for the behaviour of its master according to Art. 5 of the Hamburg Rules.

2) Transport from Chile to England. The contract contains a London jurisdiction-clause. Any liability for damage caused by loading and discharge is excluded by contract.

a) A court in England wouldn't apply the Hague-Visby Rules since no starting point exists. A decision would be based on common law with the result that the exclusion clause would be upheld.
b) A court in Chile would apply the Hamburg Rules with the consequence that the carrier would has to pay.

In both cases the liability of the carrier would depend on the forum.

3) An interesting case which illustrates that a carrier may be faced with application of the Hamburg Rules unexceptionally is the following one:

A shipper in Hamburg agrees with a carrier to carry goods to Valparaiso, Chile, which has ratified the Hamburg Rules. The carriage goes via New York. The contractual carrier includes in the transport a further carrier for the leg between Hamburg and New York. This carrier might have no information about the final destiny of the goods and also that the Hamburg Rules might apply in a liability case brought in Chile. Since according to the Hamburg Rules not only the contractual carrier but even the actual carrier is liable for loss or damage, the possibility exists that the carrier executing the carriage from Hamburg to New York is liable under the Hamburg Rules[206] when the forum is in Chile.

These collision-cases demanding the application of conflict of law rules are suppose to exercise pressure on the states to ratify the Hamburg Rules[207].

8.2. Elimination of the Hamburg Rules by suitable Jurisdiction clauses

To avoid the higher liability risk the carrier is going to ask now, whether he can avoid being sued in a court in a contract-state of the Hamburg Rules by urging the shipper to an agree on an exclusive jurisdiction clause in a non-contracting state of Hamburg. The answer must be found in the view of a court in a contracting-state of Hamburg.

8.2.1. No derogation by Jurisdiction clause in a contract of carriage by sea

Jurisdiction clauses agreed in advance of the damage case in a bill of lading or any other document would be null and void when it contains an exclusive character. Art. 21 I lit. d of the Hamburg Rules "additional place" unequivocal determines that such jurisdiction clauses cannot derogate the jurisdictions of Art. 21 I lit. a-c Hamburg Rules. Such jurisdictions agreements can only open additional jurisdictions. They have no exclusive character. The clause has the effect of prorogation but not of derogation.

8.2.2. Derogation by jurisdiction agreement after claim has arisen

Agreements closed after the claim has arisen are effective according to Art. 21 V of the Hamburg Rules. This means that the parties after the event are free to derogate in terms of jurisdiction places with the consequence that just at this place a suit can be brought[208].

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[206] examples given by Herber 95, supra 124, P. 263
[207] Necker, supra 36, P. 98
[208] Mankowski, supra 204, P. 308

The parties are even free to agree to submit their disputes to arbitration after the claim has arisen. In contrast to agreements in terms of arbitration in advance of the event, the arbitrator of an agreement after the damage or loss is not obliged to employ the Hamburg Rules when finding a decision according to Art. 22 VI of the Rules.

The underlying idea of these rules is that the claimant, mostly the shipper, shouldn't be bound to other rules other than Hamburg. After the event which give rise to a claim for indemnity he is free to choose one of the places mentioned in the rules or to agree with the potential debtor to a different place with a different law. Reasons for such a decision by the claimant could be the convenience and security of trial conduct in a country with a reliable and sophisticated legal system or the chances of execution from a title in a country where the debtor owns properties[209].

It is important to mention that the shipper cannot be compelled in a contract of carriage by sea to agree to such an jurisdiction or arbitration place apart from contracting countries after the claim has arisen. Such a possibility would evade the character of the provisions of the Hamburg Rules and therefore be void.

8.3. Protection by an appropriate clause

It is usual that carriers in avoiding certain inconveniences of the law incorporate standard clauses in bills of lading or carriage of goods by sea contracts. The usage of a Paramount clauses incorporating the Hague-Visby rules is wide spread. The coming into effect of Hamburg will even cause the legal adviser of the carriers to find a formulation of a Paramount Clauses to secure the rights of the carrier in a best possible way.

By drafting such a clause one has to consider the obligation according to Art. 23 III of the Hamburg Rules to include in the contract the statement that the carriage is subject to Hamburg. With regard to this obligation it is however sufficient to limit the application of the Hamburg Rules to the cases in which they are compulsory. Hence, the following clause is recommended[210]:

> "This Contract of Carriage shall have effect subject to the provisions of the UN Convention on the Carriage of Goods by Sea, signed at Hamburg on March 31, 1978 (Hamburg Rules) whenever they are to be applied compulsorily by the court seized to this contract pursuant to Art. 2 par. 1 lit. a or d of the said Convention".

In non-contracting countries such a clause had the function of a partly-choice of law-clause, which is subject to the will of the parties and could be interpreted that in courts out of contracting states the Hamburg Rules are not to apply[211].

Even the P&I Clubs, which at the moment deny any cover when carriers voluntarily agree to the Hamburg Rules[212], cannot have any complains with this clause.

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[209] Mankowski, supra 204, P. 310
[210] Mankowski, supra 204, P. 310
[211] Mankowski, supra 204, P. 310
[212] Herber 95, supra 124, P. 264

The clause mentioned above protects the carrier in a best possible way of being sued on the basis of Hamburg Rules. This is especially likely in courts situated in contracting states of Hamburg. It is still a question under which circumstances outside of a contracting states to Hamburg, the chance exists that the court would apply the Hamburg Rules.

In cases where a bill of lading is issued in a Hague-Visby contracting state or where the shipment is from a Hague Visby contracting state it is likely the case that courts situated in Hague-Visby countries apply Hague-Visby law even where local law in the receiving state would apply the Hamburg Rules. This is a matter of statute and hardly controversial.

This case differs from another case where the port of loading or discharge is in a Hamburg Rules state and local law would apply those Rules. It is said, that even in this case the courts will still follow a contractual incorporation of the Hague-Visby Rules[213]. An explanation for this is, that it is the will of the party which is more important than the facts which refer to the application of the law in a different country[214].

It is concluded that the only case where courts outside of contracting states will apply the Hamburg Rules is where those Rules are incorporated by contract. A conflict with the statutory application of the Hague-Visby Rules is very unlikely, since the Hamburg Rules are increasing the liability of the carrier in relation to the Hague-Visby Rules through the introduction of the principle of presumed fault[215]; an increase of the liability however is allowed according to Art. III 8[216]. Hence, litigation outside of Hamburg's contracting states seems to be sufficient to avoid Hamburg in favour of the application of the Hague Rules when they are incorporated in the contract[217].

8.4. Legal Protection for the Carrier due to the violation of forum agreements

An interesting question arises in connection with forum agreements containing the application of the Hague-Visby Rules where the shipper ignores this agreement and

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[213] Rupert Steer "The Hamburg Rules-a storm in a teacup", in Lloyd's list ; he gives the point of view of English courts, whose meaning is of great importance since plenty of bill of ladings refer disputes to English courts

[214] Steer, supra 213, refers to different cases *as In Re Missouri Steamship Company (1889) 42 Ch D 321* and *Jones v Oceanic Steam Navigation Co LTD (1924) 2 KB 730*

[215] see above under heading 4.(2)

[216] the House of Lords, in *The Morviken, sub nom. The Hollandia (1983) 1 AC 565; (1983) 1 Lloyd's Rep.1*, held that according to the English law forum agreements and choice of law clauses are null and void when their application leads to a less strict liability regime; the American courts are suppose to apply the same principle even without applying the Hague-Visby Rules so that a paramount clause in favour of Visby are preferred in relation to the US Carriage of Goods by Sea Act according to *Insurance Company of North America v. M/V "Atlantic Corona" 704 F.Supp. 528,529f. = 1989 AMC 875,877 f.(S.D.N.Y. 1989);* and *Associated Metals & Minerals Corp. v M/V "Arletis Sky" 1991 AMC 1499, 1506 (S.D.N.Y. 1991)*

[217] Steer, supra 213

files a suit in a contracting state of the Hamburg Rules concerning a case where the Hamburg Rules are applicable because of the lex fori and according to Art. 2 lit a-e of the Rules. The court has to ignore the forum agreement favouring of the Hague-Visby Rules since the application of Hamburg in such a case is compelling and the agreement null and void according to Art. 23 I of the Rules. It would be of interest now for the carrier whether judgements in such cases would be accepted and executed in other countries and whether the carrier may protect himself against the violation of contractual agreements.

The answer to these questions depends on the legal systems of every single state so that a general answer applicable to all legal systems cannot be given. Since most bills of lading have incorporated the Hague Rules with a forum agreement or arbitration clause referring to London it shall be examined how the English legal system would respond to this problem. The remarks are added with some mention at the German legal system. The examination is based on the case where transport takes place from London to Chile and the contract of carriage on sea contains a jurisdiction clause referring to London[218].

8.4.1. The Recognition and Enforcement of decisions

A judgement obtained in Chile in favour of the shipper would be sought to be enforced in England presuming the carrier has its properties mainly in England. The recognition and enforcement of decisions in England is regulated in the Civil Jurisdiction and Judgement Act 1982 (CJJA 1982). According to section 32 (1)(a) CJJA 1982 a judgement experiences no recognition when it occurred "contrary to an agreement under which the dispute in question was to be settled ...". By way of exception the decision would be recognised when the defendant had submitted to the jurisdiction of that court. According to section 33 CJJA no submission would be made where the contest of the jurisdiction or the "ask to dismiss or stay the proceedings on the ground that the dispute in question should have been submitted to arbitration or the determination of the courts of another country" occures. Hence, the carrier need not to fear the enforcement of the judgement in England. Nevertheless, the possibility exists that the vessel or a sister vessel may be arrested in Chile or elsewhere. Vessels are used for transport around the world and are especially exposed to arrests.

In Germany recognition of such an judgement would be very likely since only judgements violating the ordre public are rejected; the requirements to fulfil such an violation are strict and hardly conceivable in a case where the judgement offends against a own provision, here the priority of a jurisdiction agreement[219].

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[218] concerning the case see above under heading 8.1.2. case 1)
[219] Herber 95, supra 124, P. 265

8.4.2. Compensatory Damage

It is a common view that according to English law the carrier is entitled to claim damages when the shipper has violated the jurisdiction - or arbitration agreement[220]. The problem is that the claimant, here the carrier, has to prove substantial loss which just exists when the original judgement is already executed.

The contractual clause may even exclude the introduction of provisional legal protections with the consequence that their introduction justifies a damage claim. It is however rather doubtful whether a jurisdiction clause already includes remedies in terms of provisional legal protections[221]. Reasons for the use of provisional legal protection suddenly arise which calls for immediately response where the problem arises; this must not be at the location of the agreed jurisdiction but may even elsewhere.

In this connection it is worthwhile to mention the possibility in the English law to secure a later judgement by issuing a mareva injunction which freezes the assets of the defendant[222]. This could be of interest for the carrier claiming damages to secure his claim before the issuing of the judgement.

Even under the German law it would be possible to claim damages due to the violation of a contractual agreement[223].

However, it must be said that even the damages claim cannot eliminate uncertainties insofar as the shipper will still be able to enforce a judgement based on the Hamburg Rules.

8.4.3. Declaration of non-liability

The remedy of a declaration of non-liability, which is generally available, has the same weakness as the compensatory damage suit as it does not prevents the enforcement of an judgement based on the Hamburg Rules.

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[220] Mustill and Boyd "The law and Practice of Commercial Arbitration in England" (2nd. ed., London 1989) 409,461, 524; *Mantovani v. Caraplli Spa (1980) 1 Lloyd's Rep. 375*

[221] Regina Asoriotis "Urteile nach den Hamburg-Regeln unter Verletzung vertraglicher Gerichtsstands- und Schiedsgerichtsklauseln" in Transportrecht 1995, 266 (270) (herein "Asoriotis") Fn 24 with referring to *Mike Trading and Transport Ltd. V. R. Pagnan and fratelli(Lisboa) (1980) 2 lloyd's Rep. 546*

[222] Ough and Flenley, The Mareva Injunction and Anton Pillar Order (2nd ed., London 1993)

[223] Herber 95, supra 124, P.265

8.4.4. Restraining order/ antisuit injunction

By issuing a restraining order or an antisuit injunction the defendant is prohibited from filing or proceeding with a suit in a foreign country[224]. The remedies are derived from judge-made law and section 37 of the Supreme Court Act 1981. The decision by the court is based on equity; the claimant is not legally entitled to the issue of an restraining order since the decision is in the discretion of the court. The success depends on the existence of vexatious or oppressive[225]. Contempt of the court can result in prison, fine or sequestration according to section 14(1) of the Contempt of Court Act (1981).

These remedies are extremely effective since they interfere with litigation abroad[226]. That's the reason why strict conditions are required for the approval of vexatious and oppressive[227]. The courts recognise the existence of vexatious and oppressive when a violation of an exclusive jurisdiction clause exist[228]. A further crucial point promoting the existence of vexations and oppressions means the ineffectiveness of a claim of damage as a remedy against a breach of contract[229].

8.5. Summary

The measures and remedies practice employs either to evade the application of a certain regime, here the Hamburg Rules, or to mitigate their impact, cannot derogate from the fact that the existence of several regimes is an unsatisfied state to be in.

9. Way to the creation of uniform law - Conclusion

The international rules concerning shipping law do not consist of a complete system of material provisions, as mentioned above, but rather constitute a "multicoloured manufactured patch-carpet" with many imperfections. Though standardisation is advanced in some areas of shipping, many of these conventions partly overlap. This latter statement is especially applicable to the area of liability regimes where three different international regimes may apply in addition to a host of different national ones. The Hamburg Rules are only a patch on the carpet. But one thing is uncontroversial, the fact that the shipping law is still far away from complete standardisation.

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[224] Dicey and Morris, The Conflict of Laws (12th ed. London 1993),408-411
[225] *Castanbo v. Brown & Root (U.K.) Ltd. (1980) 2 Lloyd's rep. 423*
[226] it is doubtful whether the German legal system would apply such a remedy
[227] *Castanbo v. Brown & Root (U.K.) Ltd. (1980) 2 Lloyd's rep. 423*

[228] *Sohio Supply Co. v. Gatoil (USA) Inc. (1989) Lloyd's Rep. 588; Continental Bank N.A. v. Aeakos Compania Naviera S.A.*
[229] *Continental Bank N.A. v. Aeakos Compania Naviera S.A. 512*

Once it is accepted that standardisation is a goal which should be achieved (there seems to be few objections to this point) one has to contemplate on how this is to be done.

Legal standardisation is not an act of scientific knowledge but an act of legislation[230]. The problem is, that international legislation does not exist[231], so that one has to go the stony route via national legislation.

Uniformity is impeded by different legal systems in countries, different economic systems as well as differences in cultural backgrounds. Even misunderstandings concerning the language and terms of international conventions exists not least because of formal compromises and uncertainties of the translations of the Rules into different languages which hampers the process of clear standards. A further factor causing problems are the court decisions on a national level.

Standardisation can only be achieved in a two step process. Firstly the adoption of conventions at international conferences and secondly their ratification by the national parliaments.

A successful conference is decided by its attractiveness and thorough preparation. The attractiveness of a convention is determined by its object, its circle of participants, and its content. In the run-up to the conference all the major groups must work together, the scientists, the administrators, the legislators and the economists. Different maxims must be taken into account[232], as

- creating conventions only for objects which are of practical legislative interests only
- allowing preparation and participation by only those states with an material interest in the topic
- solutions acceptable by a large number of states
- the relationship to former and future conventions
- a preparation assisted by a secretary and the consulting of the science

The ratification of the convention through the national parliaments is still necessary. Economic and political neutrality cannot be assumed nor the fact that the national legislator will submit to a decision by a majority of member states at a conference. The transfer of sovereign rights would provide a uniform political will[233], which does not exists.

The fact that at the moment only a small number of states have ratified the Hamburg Rules does not indicate its weakness or failure. Both the advance preparation and result at the Hamburg conference, that is the Hamburg Rules, indicate that several of the important conditions mentioned above were met. The preparation period covered a long time, seven years in fact. The scientists and the economists were involved as well as the representatives from large number of countries. The relation to former

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[230] Herber FS, supra 23, P. 67
[231] the EU builds insofar an exception, but just for the members of the EU
[232] Herber FS, supra 23, P. 70
[233] Herber FS, supra 23, P. 69

conventions was taken into account and the preparation had been assisted by a secretary. Nevertheless, reservations remained.

Besides the existence of rational reasons for resisting Hamburg, especially the nautical fault and the jurisdiction provisions, there are also some irrational and psychological reasons responsible for this resistance. It is always difficult to find support for something new, especially if it affects the economy. Besides that, it seems to be a problem of paternity insofar as the economy blocks a regime which it hasn't created[234].

Hamburg's contribution to standardisation cannot be overlooked. The Hamburg Rules constitute an important approximation to the other transport conventions and its adoption prepared the way to the UN Convention on Multimodal Transport. Finally, this development will lead to an international lex mercatoria which facilitates international trade.

There is hardly any doubt that after Hague and Hague-Visby a new convention was necessary. Most of Hamburg's provisions are widely accepted. Taking this into account one has to wonder why Hamburg hasn't been ratified by more states so far. Better alternatives are not in sight. A further protocol to Hague-Visby or a new convention does not seem advisable. This latter way requires a lot of effort and would be a waste of all the work put into Hamburg. A further protocol, however, would be half-hearted. While the Hamburg Rules in content could be successful and while its final success depends on ratification, one could seek the way via an international conference at which states share a common commitment to ratify the Rules simultaneously.

Whether Hamburg fails or succeeds depends on adequate ratification and there is at least a good chance that further ratifications will follow so that success is possible. This would eventually be for the benefit of the maritime industry.

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