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UNCITRAL and The Hamburg Rules—The Risk Allocation Problem in Maritime Transport of Goods

JOSEPH C. SWEENEY*

DEDICATION

It is a great honor to be asked to write for this Journal to pay homage to Professor Nicholas J. Healy. I feel that I have known him ever since I first opened the pages of Sprague and Healy's *Cases on Admiralty* when I was a law student in 1957. I did not meet him, however, until we were on opposite sides of a collision case in 1964, *The Ronda-Lucile Bloomfield*, which was wandering through the courts of New York, New Orleans, London and France. Thereafter, I could observe his voyage from the Presidency of our Maritime Law Association to his rightful place as wise counselor to the Comité Maritime International and generations of law students. I am most grateful to Jack McMahon for the opportunity to contribute to this *Festschrift* to commemorate the ten years of faithful stewardship of this Journal by Professor Healy and his long and distinguished career as an admiralty lawyer.

INTRODUCTION

The Hamburg Rules will come into force on November 1, 1992.

This article considers the allocation of risks—who pays for damage done to cargo during the movement of the goods by an industry which continues to be in trouble because of too many ships and not enough cargoes. No international organization can tell governments not to

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build new ships as long as shipyards and their workers are desperate for skilled employment; and, no international organization can tell governments to scrap old ships and replace them with more efficient vessels which will cost jobs (or produce "redundancies," in the euphemism of economists). The work of the U.N. Commission on International Trade Law ("UNCITRAL") on the risk allocation problem began at a time when IMCO¹ had no jurisdiction over the subject; IMCO having concentrated on the operational rather than the business aspects of the maritime industry.

At the heart of the risk allocation problem is the economic conflict between the cargo owning interests (seller/shipper, buyer/consignee and cargo insurers) and the ship owning interests (operators, charterers, the P&I Clubs and the Hull insurers). This has never been a North-South confrontation nor an East-West ideological skirmish. In fact, some nations are cargo owning, some nations are ship owning, but most nations are both.

HISTORICAL DEVELOPMENT

Legal recognition of this economic conflict between cargo owners and shipowners did not come until about the middle of the nineteenth century with the beginning of the age of steam propulsion and iron ships. What had disappeared together with wooden sailing ships were town and family based operations where the cargoes were owned at least in part by the shipowner himself and the ships were partly owned by the owners of cargoes. Theory and reality united in the description of a voyage as a common venture and the shipment of cargoes as a joint venture of cargo owners and shipowners.² In even earlier times, the common venture idea was illustrated by the presence on board the vessel of the "Super Cargo," representative of the cargo owners to look after the goods and arrange for their sale. Respecting the nature of the cargoes, it must be remembered that

¹IMCO, the Intergovernmental Maritime Consultative Organization, a specialized agency of the United Nations (UN Charter, Art. 57) was established by its own constitutive charter, 9 U.S.T. 621, TIAS No. 4044, 298 U.N.T.S. 48 (1948), which did not become effective until 1958. The original charter has been amended seven times, most importantly by the 1975 Amendments (TIAS No. 10374) effective May 22, 1982, under which the name of the organization became the International Maritime Organization (IMO).

²See A. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* 15 (1977), describing the "merchant" in the late 18th and early 19th centuries as the grand distributor of the economy, acting as exporter, wholesaler, importer, retailer, shipowner, banker and insurer. By the 1840s, however, specialized enterprises took over each function. See generally, R. Albion, *The Rise of New York Port, 1815-1860* (1939).

large manufacturing plants were yet to be built, and there was not yet demand for bulk cargoes except in wartime. Available legal treatises in the U.S. and U.K. barely mentioned the problem of cargo damage at all³ and the only available insurance was in the form of the all-purpose marine insurance policies originating with Lloyd's.⁴

A key distinction was becoming important at about this time, the distinction between common or public carriage and private carriage. Respecting private carriage, by which is meant some type of charter relationship, the private carrier owed a duty of care under the circumstances, but the parties were free to alter the allocation of risks by provisions negotiated in the charter party for use of the vessel.⁵

Respecting both common and private carriage, the shipowner warranted the seaworthiness of his vessel at all times and careful stowage and careful carriage of the cargo.⁶

Cargo insurers did not usually exercise their subrogation rights against shipowners or their insurers until after the mid-nineteenth century. The institution of cargo insurance developed gradually in the mid-nineteenth century using the same form of Lloyd's insurance policy as was already being used for the vessel's hull insurance.⁷

The recognition of the need for other insurance protection for shipowners appeared with the organization of the Shipowners' Mu-

³See A. Browne, *A Compendious View of the Civil Law and of the Law of Admiralty* (Dublin 1797; 2d ed., London 1802; American edition New York, 1840), and H. Flanders, *Treatise on Maritime Law* (Boston, 1852).

⁴Lloyd's Coffeeshop, first mentioned in the press in the 1680's became a meeting place for merchants (note 2 supra) where underwriting by "private and particular persons" (rather than the two corporations with official monopolies) could take place. Today, as in the eighteenth century, the corporation of Lloyd's does not write insurance policies but provides the location and support services for the underwriting members. See A. Parks, 1 *The Law and Practice of Marine Insurance and Average* 8-10 (1974).

⁵Charter parties are assumed to have been negotiated at arms' length by shipowners and charterers having equal bargaining power. See generally, *Work v. Leathers*, 97 U.S. 379 (1878); *The Caledonia*, 157 U.S. 124 (1895) and *The Southwark*, 191 U.S. 1 (1903).

Public or common carriage under bills of lading has been the subject of public policy at least since the mid-nineteenth century. Carrier liability for cargo damage (loss of a crate containing \$18,000 in silver and gold coins) resulting from a disastrous fire at sea was prominently advertised after *New Jersey Steam Nav. Co. v. Merchants' Bank (The Lexington)*, 47 U.S. 344 (1848). Arrest *in rem* for cargo damage was authorized in *Bulkeley v. Naumkeag Steam Cotton Co.*, 65 U.S. 386 (1860).

⁶See *The Edwin I. Morrison*, 153 U.S. 199 (1894) and *The Silvia*, 171 U.S. 462 (1898). Cf. *The Propeller Niagara v. Cordes*, 62 U.S. 7 (1858). See generally, Crutcher, *The Ocean Bill of Lading—A Study in Fossilization*, 45 *Tul. L. Rev.* 697 (1971).

⁷The single maritime risks policy was adopted by Lloyd's in 1779. See A. Parks, *supra* note 4, at 3.

tual Protection Society in England in 1855,⁸ but insurance coverage was not prevalent for cargo damage claims for another twenty years until the first modern P&I Club, the Steamship Owners' Mutual Protection and Indemnity Association, was formed in 1874.⁹

It is obvious that shipowners have always been very well organized. It is also obvious that shippers have not been well organized and it was not until 1984 that the danger of antitrust liability was partially removed from them in the United States.¹⁰ Beginning in 1874, another development protective of shipowners came into existence, the conference system for liner shipping services.¹¹ The essence of the conference system is no competition as to rates. Conference anti-competitive activities may come within an exemption to the antitrust laws where the Federal Maritime Commission has authorized the underlying agreement.¹²

One of the principal subjects of discussion in these early "conferences" was the bill of lading. Uniformity of bill of lading terms was desirable so that there would be no competitive differences between the duties owed to cargo owners by shipowners servicing the same routes. A notable effort in 1882 produced the Conference Form Model Bill of Lading at Liverpool.¹³ This bill of lading introduced the idea of unit limitation, that is, the maximum liability of shipowners per package, by which was meant boxes, barrels, bales, bags and drums, would be £ 100, a round figure suggested without reference to any empirical data. This model bill of lading modified shipowners' obligations by providing a long list of specific causes of loss (drawn from shipowners' bills of lading) for which the shipowner would not be liable.

⁸Birch-Reynardson, *The History and Development of P&I Insurance: The British Scene*, 43 *Tul. L. Rev.* 457 (1969), and Kipp, *The History and Development of P&I Insurance: The American Scene*, 43 *Tul. L. Rev.* 475 (1969).

⁹See Cabaud, *Cargo Insurance*, 45 *Tul. L. Rev.* 988 (1971).

¹⁰The 1984 Shipping Act, Pub. L. 98-595 § 3(a)(1), 98 Stat. 3132, codified in 46 U.S.C. 801-841.

¹¹D. Marx, *International Shipping Cartels* (1953), and B. Deakin, *Shipping Conferences* (1973).

¹²Despite the clear prohibition of anticompetitive agreements in the 1890 Sherman Act, 15 U.S.C. § 1 (1988), the 1916 Shipping Act provides an exemption for anti-competitive agreements filed with the Federal Maritime Commission and approved by it. 46 U.S.C. 814 (4th paragraph) (1988). See generally, Gardner, *Steamship Conferences and the Shipping Act, 1916*, 35 *Tul. L. Rev.* 129 (1960).

¹³Conference Form Model Bill of Lading, 1882. A. Knauth, *The American Law of Ocean Bills of Lading* 118-31 (4th ed. 1953). Before the birth of the Comité Maritime International in 1897, many discussions of maritime problems were conducted under the auspices of the International Law Association, organized in 1873, thus the "Conference" herein does not refer to shipowner cartels, but rather to a meeting of the International Law Association.

The Conference Model bill of lading was amended by the New York Produce Exchange, an organization where shipper viewpoints were prominent, and versions of it were endorsed in 1883, 1884 and 1889.¹⁴

The defense of negligent navigation arose in the period 1882-1889 from P&I Clubs which insisted that a clause relieving the shipowner from liability for any loss due to negligent navigation by his employees be inserted into the bills of lading issued by all shipowners whose vessels were entered in the same club.¹⁵ This concept of negligence as a defense was once prevalent with respect to other transportation modes, but has disappeared everywhere except in ocean shipping.¹⁶

THE HARTER ACT (1893)

The Harter Act¹⁷ was the first legislation anywhere to address the question of risk allocation for cargo damage. The U.S. Congress was not blind to the decline of the U.S. merchant marine, but the congressional response to the problem had traditionally been the subsidy where the opportunities for corruption were limitless.¹⁸

Legislation to protect the interests of the United States as a cargo owning, rather than a shipowning, nation was introduced in the fall of 1892 by Congressman Michael Harter of Ohio, being passed by the House of Representatives on December 15, 1892.¹⁹ It was heavily amended in the Senate where the famous "compromise" was add-

¹⁴A. Knauth, *supra* note 13, at 119.

¹⁵The broader and more general term "negligent navigation" gradually replaced earlier "accidents of navigation" and "errors of mariner's judgment." By 1893, Congress used the expression "*errors in navigation or in the management of said vessel*," 46 U.S.C. 192 (1988).

¹⁶The provisions of the 1929 Warsaw Convention for the negligent navigation defense in shippers' cargo damage claims against air carriers (Art. 20(2)) was removed by the Hague Protocol of 1956, 478 U.N.T.S. 371 (Article X).

There is no equivalent of the "negligent navigation" defense in either the 1956 international road convention (CMR), 399 U.N.T.S. 190, or the 1952 rail convention (CIM), 241 U.N.T.S. 336. There is a new rail convention (COTIF, 1980) which contains CIM as an appendix. The domestic statute applicable to road and rail, the Carmack Amendment, 49 U.S.C. § 11707 (1988), has no equivalent of the "negligent navigation" defense.

¹⁷46 U.S.C. 190-96 (1988). Despite ninety-eight years of litigation and interpretation it is still important to consider the initial understanding of the legislation as set out at 24 Cong. Rec. 1180 (1893) and in Green, *The Harter Act*, 16 Harv. L. Rev. 157 (1904), and in Wheeler, *The Harter Act: Recent Legislation in the United States Respecting Bills of Lading*, 33 Am. L. Rev. 801 (1899).

¹⁸M. McKee, *The Ship Subsidy Question in American Politics*, Smith College Studies in History VIII (1922-23).

¹⁹H.R. 9176, 52nd Cong. 1st Sess. (1892). See generally, J. Hutchins, *The American Maritime Industries and Public Policy 1789-1914: An Economic History* (1941).

ed.²⁰ Under the Harter Act compromise, found in Section 3 of the statute, if the shipowner used due diligence to make his vessel seaworthy—the time for this due diligence not being specified—the shipowner would not be liable for damages due to negligent navigation or management of the ship.²¹

Dangers of the sea, seizures under legal process, deviation to save life or property, and the traditional defenses of Act of God, Act of the Public Enemy, Inherent Vice of the Cargo and Faults of the Shipper were also preserved.²² Apparently, with “negligent navigation,” the drafters had in mind the idea of immunizing the owners only from liability for catastrophic losses in collisions or groundings, but they used language which could easily be expanded to include all acts of seamanship occurring on a vessel.

The “quid pro quo” in the compromise were two provisions: Section One outlawed bill of lading clauses which *relieved* the shipowner from liability for loss or damage due to negligent loading, stowage, custody, care or proper delivery;²³ Section Two outlawed clauses which *lessened* the shipowner’s duty to furnish a seaworthy vessel or carefully stow and deliver the cargo.²⁴

THE HAGUE RULES (1921), AND COGSA (1936)

The traditional maritime states of Europe, all shipowning nations, feared the spread of national legislative solutions like the Harter Act on the risk of loss problem.²⁵ Thus, after the successful conclusion of the new international rules on collision damages and salvage in 1910,²⁶ the Comité Maritime International prepared to take up the

²⁰See A. Knauth, *supra* note 13, at 120-3.

²¹46 U.S.C. 192 (1988). See *The Carib Prince*, 170 U.S. 655 (1898), which would seemingly permit the carrier to provide in the bill of lading that due diligence to make the vessel seaworthy in all respects was to be measured at the time “before and at the beginning of the voyage.”

²²46 U.S.C. 192. It has been assumed that due diligence to render the vessel seaworthy as a pre-condition did not apply to these general maritime law defenses, but there is no clear holding.

²³46 U.S.C. 190 (1988).

²⁴46 U.S.C. 191 (1988).

²⁵Legislation in exporting dominions of what was to become the British Commonwealth of Nations copied much of the policy and language of the Harter Act, as in New Zealand’s Shipping and Seamen Act of 1903, Australia’s Sea Carriage of Goods Act of 1904, and Canada’s Water Carriage of Goods Act of 1910. See A. Knauth, *supra* note 13, at 122-3.

²⁶International Convention for the Unification of Certain Rules of Law with Respect to Collisions Between Vessels, 6 Benedict on Admiralty, Doc. No. 3-2 (7th ed. 1990), and International Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, 37 Stat. 1658, T.S. No. 576. For a study tying the high seas collision problem

subject of the allocation of risk of loss between carrier and cargo by way of an international convention which would regulate the ocean bill of lading.

The CMI's work of international harmonization was suspended during the First World War (1914–1918) which had caused great losses to international shipping. After the war, rules based in part on the compromises contained in the United States Harter Act formed the basis for the ILA's Hague Conference of September, 1921, at which the Hague Rules were adopted for voluntary inclusion in bills of lading to be offered to cargo owners by shipowners; shippers would have no choice if all owners offered the same rules.²⁷

The "voluntary" Hague Rules system would not work without participation of all carriers and the full cooperation of shippers in a time of maritime industry depression, so the "mandatory" Hague Rules of 1924 were drafted after two further sessions in 1922 and 1923 and the conclusion of the Diplomatic Conference of August, 1924, in Brussels.²⁸ 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.

Forty-two states have now taken the formal steps to become contracting parties to the Hague Rules; 12 by ratification and 30 by accession;²⁹ uncertainty is caused by former colonial powers having ratified the Hague Rules on behalf of colonies, now independent.³⁰

to the development of the CMI, see, *Sweeney, Proportional Fault in Both to Blame Collisions*, in *Studi in Onore di Giorgio Berlingieri* 549 (Sp. ed. Il Diritto Marittimo 1964). See also, Note, *Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Conventions to Achieve International Agreement on Collision Liability, Liens and Mortgages*, 64 *Yale L.J.* 878 (1955), and Berlingieri, *The Work of the Comité Maritime International: Past, Present and Future*, 57 *Tul. L. Rev.* 1260 (1983).

²⁷See generally, R. Colinvaux, *The Carriage of Goods By Sea Act, 1924*, and A. Knauth, *supra* note 13, at 125–128.

²⁸International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155.

²⁹Comité Maritime International, *Yearbook* (1989–1990). The United States became the eighth state to adhere to the Hague Rules, but the deposit of ratification occurred in June, 1937 after Congress enacted the domestic statute, 46 U.S.C. §§ 1300–1315, in 1936.

³⁰In 1930 Great Britain deposited ratifications in the name of Antigua, Bahamas, Barbados, British Honduras (now Belize), Cyprus, Dominica, Fiji, Gambia, Grenada, British Cameroons (now Cameroun), British Guiana (now Guyana), Jamaica, Kenya, Solomon Islands (now Kiribati), Malaysia, Nigeria, Palestine, Borneo (now Sabah), Seychelles, Sierra Leone, Singapore, British Somaliland (now Somalia), Ceylon (now Sri Lanka), St. Kitts-Nevis, St. Lucia, St. Vincent and Grenadines, Trinidad and Tobago, The Ellice Islands (now Tuvalu),

While the Hague Rules have been successful in dealing with many problems, deterioration of essential legal uniformity began rapidly in the worldwide depression of 1929–1939 with respect to a key provision, the unit limitation of liability fixed at £100 in gold per package in the treaty,³¹ or \$500 per package in COGSA.³² Already under attack by inflation and devaluation, the situation became even more critical with the technological innovations of containerized transport.³³

Although the 1924 Convention (or Hague Rules) brought up to date a number of problems in maritime law left over from the days of sail and the wartime merchant fleets, the core of the 1924 Convention—the amount of limitation of liability per unit—£100 gold in the Hague Rules or \$500 U.S. in COGSA—has deteriorated to such an extent that it is impossible today for shipowners and their insurers to predict with any degree of accuracy what the total amount of exposure will be as a result of a disaster involving damage to ship and cargo. The insurers must first know where litigation is likely to take place and what currencies and methods of fixing the unit limit are to be used before being able to approximate a guess on liability exposures. Forum shopping by cargo interests and shipowner interests (through bill of lading clauses) has become an essential skill for the maritime industry.³⁴ It is not a fair criticism of the Hague Rules that they did not foresee worldwide inflation and the container revolution, but that does not mean that those problems can never be addressed and corrected.

Another problem of the Hague Rules was the very narrow documentary reach of the convention—only the bill of lading;³⁵ and the very narrow geographic scope of the convention—“tackle-to-tack-

Hong Kong, Falkland Islands, Cayman Islands and British Virgin Islands. Subsequently Portugal and Australia ratified for colonies. France specifically did not.

³¹See Art. IV(5) and X.

³²46 U.S.C. 1304(5).

³³See Bannister, *Containerization and Marine Insurance*, 5 J. Mar. L. & Com. 463 (1974), and Bissell, *The Operational Realities of Containerization and Their Effect on the Package Limitation and the On-Deck Prohibition: Review and Suggestions*, 45 Tul. L. Rev. 902 (1971).

³⁴See W. Tetley, *Marine Cargo Claims* 532-3 (2d. ed. 1978) for a table of per package limitations in 29 countries.

In *Petition of Bloomfield Steamship Co.*, 422 F.2d 728, 736, 1970 AMC 521 (2d Cir. 1970), Judge Palmieri commented, “The owners of ships moving in international trade and colliding in international waters may well expect to be involved in legal proceedings in more than one country. Forum Shopping in this context is not a term of opprobrium but a way of life and each party seeks what appears to be the best legal haven.”

³⁵46 U.S.C. § 1300 (1988), “Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea . . . shall have effect subject to the provisions of this chapter.” See note 105 *infra*.

le”³⁶—which leaves a legal vacuum in many countries before and after the tackle-to-tackle period, so that very often no responsible party can be held liable for damage to cargo during such periods although the carrier had “charge” of the cargo before and after the voyage.

THE VISBY AMENDMENTS (1967-8)

Dissatisfaction of the traditional maritime states with the Hague Rules led to proposed changes by the CMI, which came to be called the “Visby Amendments.”³⁷ The Belgian Government convened a diplomatic conference to consider these amendments in May, 1967, and an adjourned session in February, 1968. The Brussels Protocol of Amendments to the Hague Rules was finally signed on February 23, 1968. The Protocol came into force with the tenth instrument of ratification on June 23, 1977.³⁸ In the protocol the key issue, the amount and method of fixing the unit limitation of liability, was addressed.³⁹ The unit limitation amount was to be determined by reference to gold (Poincaré Francs). Gold, however, has not provided a mechanism to adjust to the effects of worldwide persistent inflation. The amount of unit limitation in the 1968 Protocol was 30 Francs Poincaré per kilogramme (U.S. \$.90 per pound) and 10,000 Francs Poincaré per package (U.S. \$662).⁴⁰ The issue today in a number of countries, both with respect to the Hague Rules and Visby Amendments and the other transportation law conventions, is whether the number of gold francs is convertible into national currency on the basis of the *market value* of gold. Thus, Courts in Australia and the United Kingdom (interpretation applicable to Kenya)⁴¹ have recently

³⁶46 U.S.C. § 1301(e) “the period from the time when the goods are loaded on to the time when they are discharged from the ship.” This is popularly known as the “tackle to tackle” rule. Cf. Hamburg Rules Art. 4, Carrier responsibility while the goods are in his charge.

³⁷Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 6 Benedict on Admiralty Doc. No. 1-2 (1990).

³⁸CMI Documentation, *supra* note 29.

³⁹See note 37, *supra*, Article 2, replacing Hague Rules Art. IV(5). Visby adds an alternative method of unit limitation by *weight* as well as package.

⁴⁰*Id.*

⁴¹The market value of gold cases are, *The Rosa S*, [1988] 2 Lloyd’s Rep. 574 (Adm. 1988), and *Brown Boveri (Australia) Pty. Ltd. v. Baltic Shipping Co.* (S.C.N.S.W. July 31, 1986), see 4 Lloyds Mar. L. Newsletter No. 4 at 1.

In the context of air law, the U.S. Supreme Court has rejected the market value of gold as the basis for converting the gold francs of the Warsaw Convention into dollars. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984).

ruled that £100 sterling in gold in the Hague Rules must be translated into local currency in terms of the market value of gold.

In 1979, the Belgian Government called another diplomatic conference to add a protocol to the 1968 Protocol—that is, to express the amount of unit limitation of carrier liability in terms of the artificial unit of the International Monetary Fund, the “Special Drawing Right” (“SDR”). The amounts chosen were 2 SDR’s (or \$2.62) per kilogramme, or 667 SDR’s (or \$873) per package, whichever is greater.⁴² This protocol came into force in 1984.⁴³

There is no conflict between the actual provisions of the Visby Amendments and the 1978 U.N. Convention on the Carriage of Goods by Sea (“Hamburg Rules”), since the provisions of Visby are incorporated in Hamburg. The conflict comes from the retention in the Visby Amendments of the negligent navigation and management defenses, the narrower period of carrier responsibility and the limitation to bills of lading.

THE HAMBURG RULES (1978)

The Hamburg Rules are a successful product of the science of comparative law and over eight years of research and study. Compromise and hard bargaining were also part of the process in UNCITRAL, the U.N. Conference on Trade and Development (UNCTAD) and the diplomatic conference. The Hamburg Rules illustrate the process of growth in international legislation on merchant shipping, providing a modern, sophisticated convention dealing in one document with most of the legal problems of cargo damage now encountered in the relations between cargo owning interests and their insurers and vessel owning interests and their insurers.

At about the time the CMI completed work on the Visby Amendments in 1968, the United Nations began to extend its activities into merchant shipping. In UNCTAD,⁴⁴ organized in 1964, there was considerable dissatisfaction with the traditional maritime law prevailing among the “colonialist” 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

⁴²The 1979 Protocol to the 1968 Visby Amendments usually called the “S.D.R. Protocol” is found in 6 *Benedict on Admiralty*, Doc. No. 1-2A.

⁴³CMI Yearbook, *supra* note 29.

⁴⁴UNCTAD was established under G.A. Res. 1995, 19 U.N. GAOR, Supp. (No. 15) at 1, U.N. Doc. A/5815.

to continued poverty and under-development in an industrial age. In the field of traditional maritime law, this dissatisfaction is clearly spelled out in the UNCTAD Secretariat Report on Bills of Lading of 14 December 1970.⁴⁵

At the First United Nations Conference on Trade and Development in Geneva, March 23 to June 16, 1964, Special Principle XII was agreed to, as follows:

All countries should cooperate in devising measures to help developing countries build up maritime and other means of transport for their economic development, to ensure the unhindered use of international transport facilities, the improvement of terms of freight and insurance for the developing countries, and to promote tourism in these countries in order to increase their earnings and reduce their expenditure on invisible trade.⁴⁶

The second UNCTAD Conference at New Delhi, February 1 to March 29, 1968, adopted ten resolutions relating to shipping, among which was a resolution for the creation of a Working Group on International Shipping Legislation.⁴⁷ Pursuant to these decisions, the UNCTAD Working Group was established in December, 1969, with first priority given to a study of bills of lading.⁴⁸

At its 1971 session, the UNCTAD Working Group had before it the lengthy study of problems in bills of lading and was preparing to go ahead with the work, however, with the emergence of UNCITRAL⁴⁹ capability in this vital area of international trade and the continued hostility of developed states to UNCTAD activity in maritime law, it was considered prudent to shift the legal questions arising out of bills of lading to the expertise of UNCITRAL⁵⁰ while UNCTAD's activities in the area of shipping would be concentrated on economic

⁴⁵UNCTAD Report, Doc. No. TD/B/C.4/ISL/6 of 14 Dec. 1970. See also UNCTAD, Committee on International Shipping Legislation, UN Doc. TD/B/289, and Hellowell, *Less Developed Countries and Developed Countries' Law: Problems From the Law of Admiralty*, 7 Col. J. Transnat. L. 203 (1968).

⁴⁶1964 U.N.Y.B. 195.

⁴⁷1968 U.N.Y.B. 375.

⁴⁸1969 U.N.Y.B. 336-8.

⁴⁹UNCITRAL, The United Nations Commission on International Trade Law, was established by G.A. Res. 2205, 21 U.N. GAOR Supp. (No. 16) at 99, U.N. Doc. A/63/6. The Commission is made up of 36 member states, elected by the General Assembly on the basis of legal systems and geographic regions.

⁵⁰Transfer of the politically sensitive issue was accomplished by General Assembly Resolution, U.N. GA Res. 2421 (XXIII). Merchant shipping became a priority item for UNCITRAL in 1969, and after further discussions the 21 member state Working Group was established. 1971 U.N.Y.B. 595.

issues such as the Code of Conduct for Liner Conferences, Combined (or Multi-modal) Transport of Goods,⁵¹ Merchant Marine Development, Port Development, and Freight Rates. In retrospect, the foresight of this decision has been proven in that UNCITRAL produced a draft convention free of the political and economic discords which sometimes burden the decision-making process of UNCTAD.

Looking back on the twelve years since the diplomatic conference, it is now possible to isolate the reasons for the hesitancy of maritime powers to adopt the Hamburg Rules, but at the time the work in UNCITRAL was widely approved as the dawn of a new era of cooperation in international trade. The debate in the United States and other developed states has rightly or wrongly centered on the issue of the retention of the negligent navigation defense. The position of the United States in UNCITRAL and at Hamburg for the diplomatic conference and earlier meetings of UNCITRAL on this issue is relevant. The instructions of the Department of State, prepared after lengthy consultations in the Secretary's Advisory Committee on Private International Law, stressed that the goal of the negotiations should not be new and unusual liabilities on carriers, but that the provisions of the Harter Act of 1893 and the Carriage of Goods by Sea Act of 1936 should not be made more onerous for shippers. This view of the State Department also noted how United States' courts had interpreted the negligent navigation defense to restrict its uses in single ship disasters⁵² and how United States' courts had used the rules on joint and several liability in collision cases to undermine the negligent navigation defense in collision cases.⁵³ Finally, United States' delegates were aware of the difficulty

⁵¹The 1980 multi-modal convention is not yet in force. It requires 30 ratifications to bring it into force. See U.N. Doc. TD/MT/CONF/16, and Driscoll and Larsen, *The Convention on the International Multimodal Transport of Goods*, 57 Tul. L. Rev. 193 (1982).

⁵²Limitations on the negligent navigation and management defenses because of an overriding duty to care for the cargo originated in *Knott v. Botany Mills*, 179 U.S. 69 (1900). Under the doctrine of that case, involving change of trim causing wet sugar to drain into a cargo of raw wool, the change of trim was merely *incidental* to navigation but was *essential* to care for the cargo. See generally, Greenwood, *Problems of Negligence in Loading, Stowage, Custody, Care and Delivery of Cargo: Errors in Management and Navigation; Due Diligence to Make Seaworthy*, 45 Tul. L. Rev. 790 (1971), and Villareal, *Carrier's Responsibility to Cargo and Cargo's to Carrier*, 45 Tul. L. Rev. 770 (1971).

⁵³Joint and several liability of both shipowners in a mutual fault collision descends from *The Alabama and The Gamecock*, 92 U.S. 695 (1875), and *The Atlas*, 93 U.S. 302 (1876). The principles were applied to produce the indirect liability of carriers to their own cargo by reason of joint and several liability and collision damage rules in *The Chattahoochee*, 173 U.S. 540 (1899). Attempts to circumvent this indirect liability through the "Both to Blame" Collision

which retention of the negligent navigation defense would create in multimodal shipping.

While the Hamburg negotiating process led to difficult compromises, it could never become a forum for commercial resolution of all the problems of risk allocation because of the rigid attitude of shipowning states, i.e., no changes in the Hague-Visby system were acceptable. Developing states, on the other hand, required that there be changes in international trade, although these same states were very pragmatic as to exactly what had to change. The Hamburg Rules were not the product of developing states, and could never have been achieved without the cooperation of the developed states: Australia, Canada, France, Norway and the United States.

At the second session of UNCITRAL in March 1969, the subject of international shipping legislation was added to UNCITRAL's priority items,⁵⁴ and in 1971, the objections of a great many interests were satisfied by the enlargement of the Working Group on International Legislation on Shipping to twenty-one members from the original seven in order to assure proper representation to commercial interests and legal systems as well as regional groupings. This working group thereafter held six substantive sessions from January 1972 to February 1975 during which time the UNCITRAL Draft Convention on Carriage of Goods by Sea was prepared. The story of the drafting will not be repeated as it has been described in detail in earlier articles in this Journal.⁵⁵

The order in which the substantive parts of the UNCITRAL Draft Text were developed is relevant to a consideration of the priorities assigned to problems of merchant shipping (the list cites the relevant articles of the Hamburg Rules):

- a. The before and after the voyage problem, Hamburg Rules Art. 4 (1972).

Clause were held to violate public policy in *United States v. Atlantic Mutual Ins. Co.*, 343 U.S. 236 (1952).

⁵⁴U.N. Doc. A/CN. 9/SER. A/1970, in 1 UNCITRAL Y.B. 110 (1968-70).

⁵⁵Sweeney, *The UNCITRAL Draft Convention on Carriage of Goods by Sea: Part 1*, 7 J. Mar. L. & Com. 69; Part 2, 7 J. Mar. L. & Com. 327; Part 3, 7 J. Mar. L. & Com. 487; Part 4, 7 J. Mar. L. & Com. 615 (1975-1976); and Part 5, 8 J. Mar. L. & Com. 167 (1977).

UNCITRAL Commission action on these draft articles can be found in the UNCITRAL Yearbooks, as follows: 1 UNCITRAL Y.B. paras. 114-133; 2 UNCITRAL Y.B. paras. 157-166; 3 UNCITRAL Y.B. paras. 44-51; 4 UNCITRAL Y.B. paras. 46-61; 5 UNCITRAL Y.B. paras. 38-53; 6 UNCITRAL Y.B. paras. 64-77.

See also, *The Hamburg Rules on the Carriage of Goods by Sea* (S. Mankabady ed. 1978) (hereinafter *The Hamburg Rules*).

- b. Deck Cargo and Live Animals, Hamburg Rules Arts. 1(5) and 9 (1972 and 1974).
- c. Jurisdiction—judicial and arbitral, Hamburg Rules Arts. 21 and 22 (1972, 1974 and 1975).
- d. Fault, Hamburg Rules Art. 5 (1972, 1974 and 1975).
- e. Unit Limitation of Liability, Hamburg Rules Art. 6 (1a) (1973).
- f. The Himalaya clause, Hamburg Rules Arts. 7(2) and 8(2) (1973).
- g. Transshipment, Hamburg Rules Arts. 10 and 11 (1973).
- h. Time Bar, Hamburg Rules Art. 20 (1973).
- i. Delay, Hamburg Rules Arts. 6(1b) and 5(2) (1974 and 1975).
- j. Documentary Scope, Hamburg Rules Art. 2 (1974).
- k. Definitions, Hamburg Rules Art. 1 (1974).
- l. Contents of the Bill of Lading, Hamburg Rules Arts. 15 and 16 (1974).
- m. Letters of Guarantee, Hamburg Rules Art. 17 (1974).
- n. Dangerous Goods, Hamburg Rules Art. 13 (1975).
- o. Notice of Loss, Hamburg Rules Art. 19 (1975).
- p. Derogations, Hamburg Rules Arts. 23–25 (1975).

A Second Reading of the complete text by the Working Group took place in February, 1975.⁵⁶ Of great importance was the question, "Should there be a new convention?" or "Should the work of UNCITRAL be cast in the form of a Protocol to the Hague Rules of 1924, with the Visby Amendments as partial correctives?" These discussions often mentioned the unsatisfactory situation of the Warsaw Convention⁵⁷ which, shortly before, had been revised in a most complex formula with four protocols to accommodate the signatories to the 1929 Convention without protocols and then to accommodate the signatories to the 1956 Hague Protocol and the 1971 Guatemala Protocol.⁵⁸ Not without misgivings, it was decided to adhere to the Working Group decision and initiate an entirely new Convention under United Nations auspices with the name, "United Nations Convention on the Carriage of Goods by Sea," rather than to add another protocol to the Hague Rules of 1924.

During this Second Reading a number of controversial issues were extensively reviewed. In light of the Hamburg Plenary of the CMI in April 1974⁵⁹ which had proposed the elimination of the defense of

⁵⁶The 1975 UNCITRAL Second Reading of the entire text is found in U.N. Doc. A/CN.9/105.

⁵⁷The Warsaw Convention, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 371.

⁵⁸The Montreal Protocols of Sept. 25, 1975 are found at III International Transport Treaties, 117–33.

⁵⁹C.M.I. Plenary, 1974, Hamburg (30th Conference), MLA Doc. No. 584, at 6269–6280.

negligent management of the ship but the retention of the defense of negligent navigation, the question was considered for the third time and again the decision went against both negligent navigation and management. Another review of the proposal to eliminate the package method of unit limitation in favor of the limitation amount to be fixed by weight alone did not change the outcome: the dual method of unit limitation would continue.

After the completion of the legislative drafting, the 1975 text of the Draft Convention was submitted to all governments and interested international organizations for comments. These comments, compiled and analyzed by the UNCITRAL Secretariat, provided a useful preparation for the four week diplomatic conference after the meeting of the entire Commission (Plenary Meeting) which took place in April-May, 1976.⁶⁰

Before the UNCITRAL Plenary, however, a bifurcated review of the UNCITRAL draft text by UNCTAD's Working Group on International Shipping Legislation began at Geneva in January, 1976.⁶¹ The economic implications of the new text were considered in principle and approved, although no economic research similar to that which the United States would employ in the Hamburg Conference had been done. The cumbersome "group" structure of UNCTAD perhaps hindered the exchange of policy arguments in that there were more serious disagreements *within* Group B (Western Europe and Others) than there were between the groups. A hasty textual review produced a list of proposals to change the draft text at the forthcoming UNCITRAL Plenary; UNCTAD having reserved the option to review the completed work of UNCITRAL before making a recommendation to the General Assembly.

Final approval by UNCTAD of the UNCITRAL Plenary's draft convention was obtained in July, 1976.⁶² The draft convention was

⁶⁰See The Final Act of the United Nations Conference on the Carriage of Goods by Sea, March 31, 1978, 17 I.L.M. 608 (1978), and United Nations Conference on the Carriage of Goods by Sea, Official Records (1981), UN Doc. No. A/Conf. 89/14 (hereinafter Official Records). The 1976 UNCITRAL Plenary Report to the General Assembly is in U.N. Doc. A/31/17 at 57-160. The draft text can be found in the Official Records, at 4-10. The analysis of governmental comments can be found in Official Records, at 38-70.

⁶¹UNCTAD Working Group on International Shipping Legislation, U.N. Doc. TD/B/C.4/ISL/21 (Jan. 16, 1976). See also UNCTAD Secretariat Report on the UNCITRAL Draft in TD/B/C.4/ISL/19.

⁶²UNCTAD Working Group on International Shipping Legislation, U.N. Doc. TD/B/C.4/ISL/25 (July 30, 1976). After the Diplomatic Conference the end product was approved by the Asian-African Legal Consultative Committee at its meeting in Doha, Qatar in 1979, holding that the new convention was a suitable contribution to the New International Economic Order.

considered and debated in the Sixth (Legal) Committee of the General Assembly in November 1976 and endorsed by the General Assembly when, by its resolution of 16 December 1976, the General Assembly convened the Conference of Plenipotentiaries to consider it.⁶³

The fact that there was an extensive text, prepared over a long period at great expense and already riddled with delicate compromises meant that it would be very difficult to introduce substantive changes in the text at the Hamburg Conference, while purely drafting changes were readily accomplished, although very often some of the alleged drafting improvements were substantive in nature. Thus, during the deliberations in Committee One, there were 263 amendments proposed to the various substantive articles; 39 of 263 were adopted, therefore roughly 85% of the proposed amendments were rejected in favor of the established text.⁶⁴

During the preparation for the diplomatic conference a number of studies were undertaken: the Department of Transportation made a factual and legal study of shipping since the advent of containers;⁶⁵ the Bill of Lading Committee of the Maritime Law Association of the United States divided the draft Convention among five sub-committees, each of 5 or more members, to study and report on the text;⁶⁶ and the Department of Commerce produced a study to determine actual values per kilogram, per pound and per package in United States export trade (through the export declarations) and import trades (through the Customs receipts) with the use of the computers of the Census Bureau.⁶⁷

⁶³G.A. Res. A/31/100.

⁶⁴See Official Records, *supra* note 60.

⁶⁵Dept. of Transportation, *Cargo Liability Study*, June, 1975 (Report No. YS-32004; Office of Facilitation of the Office of Assistant Secretary for Environment, Safety and Consumer Affairs).

⁶⁶Special Report of the Bill of Lading Committee on the UNCITRAL Draft of New Rules for the Carriage of Goods by Sea, March 11, 1977, submitted to the Annual Meeting, May 4, 1977; summary in MLA Doc. No. 604, at 6630-6636. In view of the subsequent hostility of MLA to the Hamburg Rules, it should be noted that the sub-committee was divided on the question of retention of the negligent navigation defense and no position was taken thereon.

⁶⁷The Dept. of Commerce Study of United States Export and Import Values in Ocean Transport 1974-1976 was submitted as Conference Documents U.N. Doc. A/CONF. 89/C.1/L47 and L131. (Note: At the time of the preparations for the Hamburg Rules the Maritime Administration was still within the Department of Commerce. The Department of Transportation did not acquire responsibilities in ocean shipping legislation until a 1981 reorganization.)

THE "PACKAGE DEAL" OF THE HAMBURG CONFERENCE

The United States suggested at an early stage the necessity of a "Package Deal" involving Articles 5, 6 and 8 of the UNCITRAL Draft, stressing the trade-offs which would be necessary to achieve a logically consistent yet economically feasible compromise.⁶⁸ Thereafter, a number of delegations spoke in favor of the package deal concept, accordingly, the core articles would be negotiated together instead of independently of one another as had initially occurred when the first four substantive articles of the draft Convention consumed the first week. The Chairman of Committee One, Professor Mohsen Chafik of Egypt, proposed to appoint a special "Package Deal" Committee of fourteen of the seventy-eight attending nations to negotiate articles 5, 6 and 8 and report back to Committee One.⁶⁹

After several days of negotiation by the Group of Fourteen, there had still been little movement except to restate previous positions. Consequently, Chairman Chafik requested a smaller group of five, the Netherlands, U.S.S.R., Mexico, Norway, and the U.S., to advise the chairman of the structure of an eventual compromise.⁷⁰ The Netherlands and U.S.S.R. proposed retention of nautical fault, an amended but weaker fire defense, and unbreakable limits. Mexico proposed no nautical fault, a vastly weaker fire defense, and a new vague compromise on unbreakability. Norway proposed that since the strongest views had been expressed respecting only two parts of the package, nautical fault and unbreakability, those could be traded off so that nautical fault would be removed as a defense but with a formula for unbreakable limits.⁷¹ The U.S. followed through on the Norwegian proposal with a suggestion of 3 SDR per kilo if the nautical fault and

⁶⁸Official Records, at 166.

The author has described the package deal negotiations in cable reports to the Department of State and the Delegation Report to the Secretary of State, dated February 5, 1979 (recommending signature), and in lectures in New York, Washington, D.C., Atlanta, New Orleans, San Francisco, Halifax and Vancouver. He has also described the process in: Sweeney, *Article 6 of the Hamburg Rules*, in *The Hamburg Rules*, supra note 55, at 151, and Sweeney, *Les Regles de Hambourg: Point de Vue d'un Juriste Anglo-Saxon*, 31 *Droit Maritime Français* 323 (June, 1979), and Sweeney, *La Política de distribución de Riesgos en el Transporte Marítimo de Mercancias*, Univ. Nac. Autonomia de Mexico, Estudios Jurídicos en Memoria de Roberto L. Mantilla Molina 769 (1984).

⁶⁹See Official Records at 82, paragraph 49.

⁷⁰See Official Records at 173, paragraph 82.

⁷¹The unbreakable limit formula (Art. 8) was adopted from the earlier work of CMI and IMCO in the Athens Passenger Convention of 1974, 14 I.L.M. 945 (1975); 6 Benedict on Admiralty, Doc. No. 2-2 (7th ed. 1990), and the London Limitation of Shipowners' Liability Convention of 1976, 6 Benedict on Admiralty, Doc. No. 5-4 (7th ed. 1990). The United States is not a party to these conventions.

fire defenses were removed, but the limits were to be unbreakable. The U.S.S.R. refused to discuss the 3 SDRs and the U.S.S.R. and the Netherlands proposed a 1.5 SDR limit, but insisted that the fire defense remain unchanged. Eventually, the U.S. proposed 2.75 SDRs with no nautical fault or special fire defense. A counter proposal of 2.6 SDR limit with no nautical fault, but with the existing UNCI-TRAL fire defense followed.

Finally, agreement was reached on 2.5 SDRs with a complex fire defense, (Article 5(4)), no nautical fault defense, and unbreakable limits (Article 8).⁷² Respecting the subsidiary issue of the unit limit for delay damage, the debate returned to the Committee of fourteen where many diverse proposals concentrating on connecting the delay damages to some part of the freight were raised. The U.K. and the U.S.S.R. proposed that the limit of liability be the freight on the goods delayed. The U.S. and Norway proposed the entire contract freight. Mexico proposed three times the freight on the goods delayed. Poland proposed twice the freight on the goods delayed, but not to exceed the total contract freight. There were other variations, but, as with the principal unit limit proposals, both the economic justification and the consequences of the proposals were uncertain. After further inconclusive debate, Chairman Chafik resolved the impasse with a proposal utilizing the 2.5 SDR per kilo compromise of the Group of Five so that the new limit for delay damages would be two and one half times the freight on the goods delayed, but not more than the total contract freight.⁷³

From the point of view of the United States delegation, the instructions of the Department of State had been achieved; most importantly in the amount of unit limitation of liability, since 98.5% of United States maritime exports by weight and 99.4% of United States maritime imports would have been fully covered by the 2.5 SDR per kilo amount.⁷⁴

At the last substantive session of the conference, the United States made an interpretation, not challenged, to the effect that the Article 6 special delay rule does not apply to physical deterioration of the goods because of delay but only to consequential economic losses.⁷⁵ The Article 6(1) figure applies to physical deterioration.

⁷²Official Records at 173, paragraph 82; and at 349-352, paragraphs 21-62.

⁷³See Official Records, at 350. There is, of course, no logical connection between 2.5 SDR per kilo and two and one half times the freight. The explanation is not logic but exhaustion.

⁷⁴See note 67, *supra*. The Percentages of coverage by *value* would be less, 70.4% of exports and 81.9% of imports.

⁷⁵See Official Records, at 174, paragraph 101.

The final vote on the entire text of the new convention came at midnight on March 30, 1978. Under the Rules of Procedure for this Conference, customarily adopted for all United Nations Conferences, an affirmative vote of two thirds of the states present is necessary for the adoption of a text.⁷⁶ The Hamburg Rules were adopted by sixty-eight states in favor, none opposed and three abstentions of the seventy-eight states present at the Conference.⁷⁷ The text of the Final Act was signed on Friday, March 31, 1978. The text was to be open for signature until April 30, 1979.⁷⁸ No time limit for entry into force was adopted and the number of mandatory ratifications was twenty without reference to tonnage of merchant fleet or volume of international trade, thus the Hamburg Rules will come into force one year after the deposit of the twentieth ratification.⁷⁹

The positive reasons for the adoption of the Hamburg Rules are the versatility of its concept of contract of carriage by sea instead of the bill of lading;⁸⁰ the equity in carrier responsibility while the goods are in the charge of the carrier instead of the artificial exclusion of periods other than the ocean voyage;⁸¹ the rationality of the liability regime, free of the policy based defenses of negligent navigation and management and the impossible burdens of proof imposed on parties without primary access to information;⁸² and the certainty of the financial limits of liability regardless of the situs of the proceedings.⁸³

I wish I could say that after all the time and money spent on the Hamburg Rules that they are perfect. They are not, but I believe that whenever conflicting economic interests must be compromised, the

⁷⁶See Official Records, at XVIII-XXIII; Rule 33.

⁷⁷See Official Records, at 189.

⁷⁸Hamburg Rules, Art. 28(1).

The statements in Maher and Maher, *Marine Transport, Cargo Risks and The Hamburg Rules—Rationalization or Imagery*, 84 Dickinson L. Rev. 183 (1979), to the effect that U.S. signature was "peculiar," "most curious," and "tainted" are not correct. A Committee of Legal Adviser's Office lawyers recommended signature. The Legal Adviser disagreed on policy grounds, but Warren Christopher, Deputy Secretary of State, acting in the absence of the Secretary, disagreed with Legal Adviser Hansell and ordered the Hamburg Rules to be signed before expiration of the period for signature.

The signatory states as of April 30, 1979, the last day for signature in accordance with Art. 28(1) were: Austria, Brazil, Chile, Czechoslovakia, Denmark, Ecuador, Egypt, Finland, France, Germany, Ghana, Holy See, Hungary, Madagascar, Mexico, Norway, Pakistan, Panama, Philippines, Portugal, Senegal, Sierra Leone, Singapore, Sweden, United States of America, Venezuela and Zaire. See U.N. Doc. A/CN.9/325.

⁷⁹Hamburg Rules, Article 30(1).

⁸⁰Id. Article 2(1). See notes 35 supra and 105 infra.

⁸¹Id. Article 4.

⁸²Id. Article 5.

⁸³Id. Article 6.

resulting structure must be inelegant and shaky. I do not see how the results could be noticeably improved in the foreseeable future by another conference. Sometime after the Hamburg Rules shall have come into force, it may be possible to revise some of the more infelicitous provisions in a new spirit of compromise.

The Hamburg Rules were built on all the sound work of the past, especially the Hague Rules of 1924 and the Visby Amendments of 1968. The Hamburg Rules are not concerned with multimodal transportation, yet they made the negotiation of the multimodal treaty⁸⁴ and the terminal operators' liability treaty⁸⁵ much easier than would have been the case if the Hague Rules with their privileged position of carriers had continued to be the glaring exception in international transport law.

The Hamburg Rules finally accommodated the container revolution of the post war period, but the delegates at Hamburg (or their governments) were not ready to accommodate the rapid changes in financing and documenting international sales which are being felt right now.⁸⁶

STRUGGLE TO RATIFY HAMBURG

The failure of ratification of the Hamburg Rules since 1978 to this date does not mean that there was paralysis in the effort. There has been much activity and at least seven aspects in the struggle can be identified.

A. Search for Hard Data on Economic Questions.

The shot-gun attack on Hamburg had asserted as economic certainty that adoption of the new Rules would necessarily lead to higher costs, beyond inflation, both in the short term and in the long run.⁸⁷

⁸⁴See note 51 supra.

⁸⁵The UNCITRAL Plenary approved the Draft Convention on the Liability of Terminal Operators in International Trade in June, 1989. See U.N. Doc. A/Conf. 152/5. By UN G.A. Res. 44/33 of Dec. 4, 1989 the General Assembly approved the draft and called a diplomatic conference to consider the draft convention for April, 1991. The conference adopted a modified text, which is now open for signature. U.N. Doc. A/CONF. 152/13 of 18 April 1991.

⁸⁶"Writing" is defined to include telegrams and telex (Article I(8)). No provision for the replacement of physical documents by equivalent electronic data interchange messages (EDI) is made. Cf. OTT Convention, note 85 supra, Art. 4(3).

⁸⁷Moore, *The Hamburg Rules*, 10 *J. Mar. L. & Com.* 1 (1978); Chandler, *A Comparison of COGSA, the Hague-Visby Rules and the Hamburg Rules*, 15 *J. Mar. L. & Com.* 233, 237 (1984).

Contrary arguments were made, less assuredly, that Hamburg *must* result in lower costs for shippers since double insurance on the same risk would be eliminated.⁸⁸ After five years of futile searches for reliable data the effort to resolve the economic argument had to be abandoned. Neither economic proposition is provable to its opposition, and the economic situations of both the maritime industry and marine insurers are sufficiently troubled and unique so that past changes in law do not provide useful analogies.

Furthermore, vessel liability insurance is dominated by mutual associations of shipowners, the P&I Clubs, for which rate structures can be highly individualized, and also dependent on fierce competition, fleet size and claims experience.⁸⁹

B. Carrier Opposition

As at the Hamburg Conference itself, carrier opposition to any changes from the Hague-Visby regime has not diminished. Ship operations are always risky and profits may suddenly be devoured by unexpected emergencies so that the carriers can see no reason to change from a *familiar* legal system, where risks can be easily classified, to a new one, even though that new system is already well known to air, road and rail transport.⁹⁰ Thus, carriers predict that all cases dealing with the cause and effect of cargo damage over the past 50 years will be relitigated under the new reversed burden of proof.⁹¹ Given the volume of decided cases under COGSA and the other modes of transportation, it is problematic that courts in the United

Almost all the economic arguments made *after* the Hamburg Conference were made and answered in a lively session of the Conference itself, reported in Official Records at 233-239.

⁸⁸Hellawell, Allocation of Risk Between Cargo Owner and Carrier, 27 Am. J. Comp. L. 357, 363 *et seq.* (1979) discussing elimination of "friction" costs. See also O'Hare, Allocating Shipment Risks and the UNCITRAL Convention, 4 Monash Univ. L. Rev. 117 (1978).

⁸⁹An UNCTAD study regards increases in carriers' costs (and thus, directly, shippers' costs) as probably negligible, The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention, UNCTAD Secretariat, U.N. Doc. TD/B/C.4/315 (1987), following the reasoning of Professor Selvig of Oslo University in Selvig, The Hamburg Rules, the Hague Rules and Marine Insurance Practice, 12 J. Mar. L. & Com. 299 (1981). See also Katz, Uniformity of International Trade Law and Economic Interest: The Case of the Hamburg Rules, 1989 *Diritto del Commercio Internazionale* 103.

⁹⁰Comité Maritime International, Colloquium on the Hamburg Rules, Vienna, January 8-10, 1979. (Chairman, Lord Diplock)

⁹¹See generally, Diamond, The Hague-Visby Rules, (1978) *Lloyd's Mar. & Com. L.Q.* 225; Moore, The Hamburg Rules, 10 J. Mar. L. & Com. 1 (1978); Yancey, The Carriage of Goods; Hague, COGSA, Visby and Hamburg, 57 *Tul. L. Rev.* 1238 (1983).

States, armed with the new powers of Rule 11 sanctions,⁹² will permit carriers and their insurers to reinvent the wheel.

Carriers seek to justify the negligent navigation defense as essential to risk allocation because cargo damage risks are not concentrated on one source of funds, but are spread about the entire society. While the spreading of risks is the rationale behind insurance at Lloyd's by many syndicates, it may be inefficient in the maritime industry at large, where insurance is simply a cost of doing business.

It should be noted that P&I Clubs have not been vocal supporters of the Hamburg Rules even though the addition of risks the carrier must bear would seem to benefit such insurers by the transfer of risks (and premiums) from the cargo insurer. The reason lies in the nature of the Clubs as non-profit mutual societies made up of shipowners whose views are shared by the administrators of the Clubs.

C. Opposition of Cargo Insurers

Given the nature of the combatants in the usual cargo damage dispute: P&I Clubs representing the carrier, and traditional insurance companies insuring the cargo from warehouse to warehouse, it might be assumed that cargo insurers might favor the Hamburg Rules because the subrogated rights of shippers would eventually produce greater returns for them. This is not the case. Apparently individual claims are seldom set off by cargo insurers and P&I and Hull insurers, but groups of claims may be used to wash out other groups of claims in reconciliation negotiations. Cargo insurers have been consistent opponents of any change from the familiar Hague-Visby regime.⁹³ This anomaly may be explained as coming from fear that transfer of operational risks from shipper to carrier would be the beginning of an avalanche of rejection of cargo insurance—the fear of cargo insurers that customers will ask, “Why do I need cargo insurance? Why not self-insurance?” The answer, of course, is that cargo insurance protects shippers against unit limitation of liability,⁹⁴ global limitation

⁹²Fed. R. Civ. P. 11. See Louis, *Intercepting and Discouraging Doubtful Litigation*, 67 N.C.L. Rev. 1023 (1989); Note, *Rule 11 of the Federal Rules of Civil Procedure and the Duty to withdraw a baseless pleading*, 56 Fordham L. Rev. 697 (1988), and Vairo, *Rule 11: A critical Analysis*, 118 F.R.D. 189 (1988).

⁹³See generally, Donovan, *The Hamburg Rules: Why a New Convention on Carriage of Goods by Sea*, 4 Mar. Law. 1 (1979), and Chandler, *A Comparison of COGSA, the Hague/Visby Rules and The Hamburg Rules*, 15 J. Mar. L. & Com. 233 (1984).

⁹⁴Hamburg Rules, Art. 6; Hague Rules Art. IV(5); COGSA, 46 U.S.C. § 1304(5).

of liability,⁹⁵ general average and salvage claims and other unexpected charges. Such insurers feel that these instances of carrier non-liability will not fully sustain the existing premium structure of cargo insurance. They are probably correct to the extent that coverages are reduced.

D. The Trigger Controversy and the ABA

Since the Lloyd's of London Press Conference in November, 1978, suggestions have been made for a compromise between Hague-Visby and Hamburg.⁹⁶ Since the United States was not a signatory to the Visby Amendments and since it appeared as though it might be several years before the Hamburg Rules would enter into force, it seemed logical for there to be a compromise whereby the United States would ratify the Visby Amendments immediately and simultaneously ratify the Hamburg Rules, such ratification to become effective at some time after the Hamburg Rules shall have come into force. As with many compromises, mistrust of each protagonist by the other made the provisions extraordinarily complex. Thus, proposals were made for ratification to follow after the greater number of our trading partners shall have ratified; or ratification to follow within a definite number of years after the treaty would be in force, regardless of the number of trading partners. Only the first of these alternatives—called the "Trigger"—was acceptable to proponents of Hague-Visby and Hamburg. Further provisions were drafted to ensure that preselected criteria would be used which would eliminate controversy as to the percentages of United States foreign trade, by volume, being carried by Visby nations and Hamburg nations.

With the cooperation of the Departments of State and Transportation and hard bargaining with shippers, cargo insurers, carriers and P&I Clubs and their trade associations, it was possible to put together a proposal for the simultaneous ratification of both Visby and Hamburg, although the Treaty Section of the State Department had substantial reservations about such conditional advice and consent by the Senate. The negotiations required almost two years to complete and the proposal was eventually approved unanimously by the Carriage of Goods Committee of the Maritime Law Association of the

⁹⁵Note 71 *supra*. The 1851 United States' limitation of shipowners' liability act is codified at 46 U.S.C. § 180–89 (1988).

⁹⁶Lloyd's of London Press, *The Speakers' Papers for the Bill of Lading Convention Conference*, November 29–30, 1978.

United States for presentation to the Association at its May 6, 1983 meeting.⁹⁷ The proposal, however, was rejected by the entire association, chiefly due to the opposition of cargo insurers and there has been little interest in it since then.

No serious negotiations between the opposing groups can occur until the Hamburg Rules are in force. Supporters of Hague-Visby now know that efforts in support of Visby will be vigorously challenged by shippers while supporters of Hamburg know that the opposition is powerful and united.

Because of the 1983 rejection of the "Trigger," attention turned briefly away from the Maritime Law Association of the United States to the American Bar Association in 1986 and 1987. This proved to be just as frustrating to carriers and shippers as the "Trigger" controversy and has not led anywhere due to the unwillingness of the government to submit any proposal to the Senate which is not fully supported by the private sector. The Section of International Law and Practice of the ABA produced a compromise that satisfied no one, in that the ABA endorsed⁹⁸ immediate ratification of the Visby Amendments *with conditions*: a) use of the liability limits of the 1980 Multimodal Convention: \$920 per package or \$2.75 per kilo; b) elimination of the negligent navigation defense; c) imposition of liability on multimodal carriers when identification of the precise source of the damage cannot be made; and d) ensuring that stevedores are entitled to the same limited liability as carriers. (The last provision seems to be acceptable to shippers and carriers and their insurers and is no longer controversial.) The ABA conditions would be achieved contemporaneously either by unilateral action of the United States or multilateral treaty. The problem with these conditions is that for unilateral action the United States would have to denounce the Hague Rules while ratifying Visby, a step not conducive to international uniformity. The other multilateral alternative would be for the United States to sponsor and convene an international conference to attempt to meld Hague-Visby with Hamburg and the 1980 Multimodal Convention. The problem with such a "solution" is that it is approximately what the seventy-eight nations attempted to do at Hamburg in 1978, with the resulting inelegant and shaky compromises. It does not seem to this observer (who favors the Hamburg Rules) that as long as governments must be involved in treaty negotiations the result of a new conference could be any different from the Hamburg Rules.

⁹⁷MLA Doc. No. 647, at 7686-7700.

⁹⁸ABA House of Delegates Resolution, Aug. 12, 1987.

It is also unlikely that the United States will attempt to meld Hague-Visby with Hamburg after an unsuccessful effort to achieve a compromise at a Department of Transportation Symposium in Washington D.C. on October 20, 1988.⁹⁹ The sad truth is that carriers, their insurers and the cargo insurers will not yield an inch on the Hague-Visby system and shippers are adamantly opposed to Visby *unless* it surely leads to Hamburg—a classic stalemate which has produced governmental inaction until the maritime industry can solve its own problems.

Without the United States effort proposed by the ABA, the only possibility of achieving a reconciliation through negotiation remained with the CMI, but that avenue appears to have been closed at the June, 1990 Paris Plenary.¹⁰⁰

E. The Shippers' Alliance and the United Nations

It took several years to persuade shippers that mere approbation of the Hamburg Rules would not bring about ratification. The shippers would have to organize and use strategy and tactics to obtain change similar to that which carriers had been using to maintain the status quo. It was also necessary to change the same attitude of detachment in UNCTAD¹⁰¹ and UNCITRAL.¹⁰²

With the evidence of effective lobbying against Hamburg by shipowners, P&I Clubs and cargo insurers, shippers who were organized under the Shippers National Freight Claim Council and the National Industrial Traffic League began a campaign to procure United States ratification of the Hamburg Rules and, eventually, the 1980 UNCTAD Multimodal Transport Convention.

Beginning in mid-1986 an alliance developed among the American shippers' organizations and the British Shippers' Council, the European Shippers' Council—consisting of shipper organizations in Belgium, Denmark, Netherlands, Spain and Switzerland—the Canadian

⁹⁹Department of Transportation Symposium, Washington D.C., October 20, 1988. (The report of this conference has never been published.)

¹⁰⁰See note 108 *infra*.

¹⁰¹Study of the Economic and Commercial Implications of the Entry into Force of the Hamburg Rules, UNCTAD Secretariat, UN Doc. No. TD/B/C.4/315. See also, Measures Towards the Implementation of Conventions, UNCTAD Secretariat, TD/B/C.4/302.

¹⁰²See United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), UNCITRAL Secretariat, U.N. Doc. A/CN.9/306 of 19 Feb. 1988. An UNCTAD document prepared by Prof. Rolf Herber of the University of Hamburg makes the historical, legal and equitable arguments in favor of the Hamburg Rules. See UN Doc. TD/B/C.4/315 Part I (Dec. 31, 1987). Prof. Herber was the President of the Hamburg Rules Conference.

Shippers' Council, Australian Shippers' Council, Japanese Shippers' Council, Hong Kong Shippers' Council and Korean Shippers' Council. These groups organized the World Shipper Councils for Hamburg Alliance in mid-1987.

On June 1, 1987 in Geneva, an informal meeting of invited groups from the shipping industry 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). With such a combination of shippers and carriers there could never be immediate agreement. Technological change in the industry—especially the movement to eliminate the paper bill of lading—was prominent in the Geneva discussion. Furthermore, it seemed that in the future the united opposition of shippers might prevent any further accessions to the Hague-Visby Rules.¹⁰³ The uncertain element in the discussions was how long it would be before the Hamburg Rules were in force.

The stalemate of shipper-carrier blocs cannot lead to the goal of uniformity of maritime law without the lobbying of UNCTAD and UNCITRAL, at least until the minimum number of ratifications, twenty, is assured. Thereafter, the presence of Hamburg as the third regime of risk allocation will have to be taken account of in industry-wide planning, thus, in the fierce competition between carriers, shippers and charterers may demand the Hamburg alternative, and it is likely that those states which have indicated that they will ratify the Hamburg Rules once they are in force will promptly do so.¹⁰⁴

F. Elimination of the Paper Bill of Lading

In the late 1980's, shippers, carriers, and the CMI became concerned about technical developments with regard to paperless trans-

¹⁰³See Katz, *New Momentum towards Entry into Force of the Hamburg Rules*, 24 *European Transport Law* 297 (1989).

¹⁰⁴The following states have ratified as of October 7, 1991: Barbados, Botswana, Burkina Faso (formerly Upper Volta), Chile, Egypt, Guinea, Hungary, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, Senegal, Sierra Leone, Tunisia, Uganda, U. Rep. Tanzania, and Zambia. In accordance with Article 30 (1), the treaty will enter into force on November 1, 1992.

actions by electronic data processing. The truth is that industry demands multi-modal carriage from warehouse to warehouse under modern methods and the failure of carriers, government and the legal profession to accommodate this need is a source of great frustration to shippers of all kinds. The recurrent problem, however, is the requirement of the Hague Rules that there must be a bill of lading for the international convention to be applicable.¹⁰⁵ This stumbling block of Hague is overcome in the Hamburg Rules which apply to all contracts of carriage by sea¹⁰⁶ and not merely to bills of lading. Concern over the necessity for bills of lading would seem to push the CMI towards a third protocol to the Hague Rules to eliminate the requirement, an effort which the CMI would not contemplate without support of U.N. organs such as IMO, UNCTAD and UNCITRAL, since the Belgian Government indicated in 1979 that it would no longer call diplomatic conferences for the CMI.

The Hague draftsmen had intentionally designed the rules to govern only the international ocean voyage, and one can speculate that confining the documentary scope to bills of lading followed naturally as the *letter of credit* (in which the on-board bill of lading played a crucial role) had been developed as the most convenient method of financing international trade. Regardless of the origin of the bill of lading requirement, Hague-Visby is confined to the paper bill of lading without a way to arrive at the paperless exchange of electronic data demanded by modern commerce.

G. *Comité Maritime International and the Conflict of Laws*

An important factor in CMI thinking is the conflict of laws problems which will emerge when the Hamburg Rules shall have come into force. It would be devastating to all CMI efforts since 1897 on behalf of uniformity of maritime law to see carriers competing in an over-crowded marketplace on the basis of whether the shipment was subject to Hague Rules alone, Hague-Visby, Hague-Visby plus the SDR Protocol, or the Hamburg Rules.

¹⁰⁵See note 35 supra. The structure of the Hague Rules imposes duties, rights, responsibilities, liabilities and immunities on *Carriers*, defined in Art. I(a) as, "the owner or the charterer who enters into a *contract of carriage* with a shipper," but by Art. I (b) contract of carriage, "applies only to contracts of carriage covered by a *bill of lading* or any similar document of title. . . ." (The French original reads, "*connaissance ou tout document similaire formant titre.*") Cf. Art. VI and the proviso imposed in 46 U.S.C. § 1306 (1988).

¹⁰⁶Hamburg Rules, Articles 1(6) and 2.

In planning for the 1990 Plenary Meeting of the CMI in Paris, a preliminary review of the risk allocation problem in Hague-Visby and Hamburg was made in a meeting at Knokke-Le-Zout in Belgium. One proposal was the drafting of a "Composite Text" which would incorporate desirable provisions of the Hamburg Rules—by which was meant non-controversial updating changes—into the existing Hague-Visby-SDR Protocol text. (A study commissioned by the CMI President¹⁰⁷ had looked into a number of problems unresolved by the existing CMI texts and had found that the Hamburg solutions were worthy of further study for the composite text.) Nevertheless, the composite text was not to be, and the Paris Plenary failed to resolve the emerging conflict of laws problems.¹⁰⁸

CONCLUSION

For the past thirteen years debate has centered on comparing the regimes of the Hague-Visby Rules and the proposed regime of the Hamburg Rules, and my lecture delivered in Vienna in 1989, upon which this article is based, was supposed to be part of that debate. But the fact is that the maritime industry is moving away from paper bills of lading, the cornerstone on which the Hague-Visby treaties are built. Accordingly, the ship operators may resolve the debate, which maritime lawyers have been unable to do, in favor of the Hamburg Rules as the Hamburg Rules apply to all contracts of carriage by sea, regardless of whether a bill of lading has been issued.

All of the bargaining and all of the debate has but one goal—to make the law better and more responsive to the needs of international commerce. I hope the Hamburg Rules have done that, and it is for that reason that I recommend them for earnest study and eventual support.

¹⁰⁷CMI Documentation, UNIP-17, III-90 (1990). Eight topics were selected for this study: Identity of the carrier; Contracts and Documents; Deck Cargo; Period of Application; Exemptions from Liability; Limits of Liability; Deviation; and Damages.

¹⁰⁸Retention of the negligent management defense (abandoned in 1974) was recommended by vote of sixteen delegations to twelve delegations (of the forty-eight member national associations). Retention of the negligent navigation defense was recommended by vote of twenty to nine with four abstentions. See MLA Document No. 686, at 9712-3.