THE CARRIAGE OF GOODS BY SEA ACT 1972 AND THE HAMBURG RULES

In recent years, the international community has concerned itself with the bringing forth of a fresh and acceptable legal regime for contracts of carriage of goods by sea. That such a regime is necessary, in view of wide-spread dissatisfaction with the Hague Rules[1] and the Brussels Protocol of 1968, which amended the Hague Rules, is beyond doubt since carriage of goods by sea will remain an indispensable part of international trade despite improvements in air and land transportation. These efforts resulted in the United Nations Convention on the Carriage of Goods by Sea of 1978 (known as the Hamburg Rules) which now has the unenviable task of bringing about meaningful international uniformity.

As far as Singapore is concerned, the Hague Rules were incorporated into the Carriage of Goods by Sea Act (Cap. 184 of 1970 Rev. Ed.) which remained in force until 16 January 1978 when the Brussels Protocol was given effect by the Carriage of Goods by Sea Act 1972.[2] Within three months after the later Act came into force, Singapore became a signatory to the Hamburg Rules which, in due course, may necessitate the introduction of yet another Act. This article will examine some of the changes introduced by the present Act and highlight some of the differences between the present Act and the Hamburg Rules.

To understand the *raison d'etre* for the 1972 Act and the Hamburg Rules, a few pages of history have to be unravelled. The Hague Rules were formulated in colonial times and marked the first concerted international effort at curbing the excesses of carriers who conducted their affairs as if sailing ships were still in vogue and the Jolly Roger, not Britannia, ruled the waves.[3] Even so, they took exceedingly good care of carriers. To begin with, they abolished the absolute duty imposed by common law on carriers to provide a seaworthy ship at the commencement of the voyage and substituted for it the duty to exercise due diligence in providing a seaworthy ship. Secondly, they listed a long array of carrier exemptions which may be pleaded in order to avoid liability. Apart from the specific exemptions which included default in navigation and management of the ship, fire, restraint of princes, perils of the sea and quarantine restrictions, there was a clause to the effect that the carrier was not to be liable for any loss or damage resulting from any cause arising without

[1] These Rules date to August 1924.

[2] The Hague Rules applied to the Straits Settlements, of which Singapore was once a part. For an article on the coming into force of the 1972 Act, see *"The Hague Rules and the Carriage of Goods by Sea Act 1972: A Caveat"*, Ying C.A., (1975) 17 Mal. L.R. 86.

[3] There were national efforts prior to the Hague Rules. See the United States Harter Act of 1893.

the actual fault or privity of the carrier or without the fault or neglect of his agents or servants. Thirdly, the carrier's maximum liability was limited to a mere £100 per package or unit unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading. Finally, the cargo owner is made to race against time for if a suit is not brought within one year after delivery of the goods or the date when the goods should have been delivered, the carrier and the ship were discharged from all liability. Needless to say, the race was often lost.

Such a pro-carrier regime could, by no stretch of imagination, satisfy cargo owners and non-carrier nations. With the passage of time and the emergence of innumerable newly independent countries, cargo owners and developing countries became more assertive of their rights, Challenges, unthinkable in colonial days, were mounted against many a traditional aspect of the shipping scene, including the conference system adopted by shipping lines and the international legal regime on carriage of goods by sea. Flags of convenience fluttered conspiciously in many ports, to the chagrin of many who feared that economic chaos was over the horizon. Far too often, issues became, regrettably, politicised. It was only in 1968 that the Brussels Protocol was introduced to bring the Hague Rules a little more in line with the needs of the fast changing world. By then, it was being increasingly asked whether the Hague Rules could survive with some amendments or whether they should be abandoned in favour of a fresh and more acceptable legal regime. The result of international deliberations after 1968 was the Hamburg Rules.

THE CARRIAGE OF GOODS BY SEA ACT 1972

The present Act does not meet the demand, in some quarters, for a totally new regime on carriage of goods by sea. It preserves the basic fabric of the Hague Rules and retains in its entirety the whole list of carrier exemptions. As such, the present Act is not that markedly different from the old Act although there have been some changes.

To begin with, the scope of application of the present Act is wider than that of its predecessor. As a general rule, like the old Act, the present Act applies to contracts of carriage of goods by sea in ships carrying goods from any port in Singapore. However, the new Act also applies in regard to every bill of lading relating to carriage of goods between ports in two different countries if the bill of lading is issued in a contracting state, if the carriage is from a port in a contracting state or if the contract contained in or evidenced by the bill of lading provides that the said Rules or legislation of any country giving effect to them are to govern the contract.

The next change introduced by the present Act is in relation to limitation of liability.[4] There was no doubt then that the limitation amount of £100 per package or unit found in the old Act was unrealistic as almost half a century of inflation had gravely reduced the value of the sum. The pound was abandoned as the basis of limitation and gold was substituted in its place. Also, for the first time,

[4] Art. IV Rule 5.

a shipper could have the carrier's liability assessed either on the weight shipped or quantity shipped. Unless the nature or value of the goods shipped had been declared by the shipper before shipment and inserted in the bill of lading, liability is limited to the equivalent of 10,000 francs per package or 30 francs per kilo of gross weight. A franc is defined to mean a unit consisting 65.5 milligrammes of gold of millesimal fineness 900 and the date of conversion of the sum awarded into national currencies is to be governed by the law of the court seised of the case.[5] Unlike the previous Act, the present Act takes into account the rise of containerisation by providing that where a container, pallet or other similar article of transport is used to consolidate goods, the number of packages or units listed in the bill of lading as packed in the article of transport shall be deemed to be the number of packages or units for the purposes of computing limitation of liability.[6] Finally, it is provided in Article IV Rule 5(e) that neither the carrier nor the ship can take advantage of the provisions on limitation of liability if the damage in question was the result of an act or omission of the carrier which was done or omitted with the intention to cause damage or which was done or omitted recklessly or which was done or omitted with the knowledge that damage would probably result.

The present Act also alters the law on a master's statements in a bill of lading in regard to quantity of goods shipped and the leading marks necessary for identification of goods. Under the common law and the previous Act, such statements were usually not conclusive as against the carrier. The bill of lading is only *prima jade* evidence and the carrier could prove, as against both shipper and transferee of the bill of lading, that there had been an error. In *Grant* v. *Norway,*[7] a bill of lading was issued for twelve bales of silk which, in fact, had not been shipped. Although the transferee of the bill of lading had paid for the goods in reliance on the statement as to quantity in the bill of lading, it was held that the carrier could prove that none of the goods had been shipped, Jervis C.J. observed:

> "It is not contended that the captain had any real authority to sign bills of lading unless the goods had been shipped.... If then, from the usage of the trade and the general practice of shipmasters, it is generally known that the master derives no such authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of express limitation of the authority, and in that case, undoubtedly, he could not claim to bind the owner by a bill of lading signed when the goods therein were never shipped."[8]

This approach is highly unsatisfactory. A master of a ship has actual as well as ostensible authority to state the apparent order and condition of goods, their number and leading marks. The carrier should be responsible to third parties who have, in good faith, relied on the representations of the master. Such an approach would avoid having the transferee of a bill of lading contend with two parties, the carrier and the shipper or transferor of the bill of lading, in order to have his claim satisfied.

6 Art. IV Rule 5(d).
6 Art. IV Rule 5(c).
7 (1851) 20 L.J.C.P. 93.
8 *Ibid*., p. 98.

The present Act resolves the matter in the transferee's favour by providing that while a bill of lading is usually a *prima facie* receipt, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.[9] The carrier is therefore obliged to settle the transferee's claim and look towards the shipper for damages if the shipper had, at the time of shipment, made inaccurate statements relating to marks, number, quantity or weight.[10] The present Act therefore envelopes bills of lading with a long overdue cloak of creditability and makes them more welcome as securities in the world of banking and finance.

Two other new provisions, namely Article III Rule 6 *BIS* and Article IV *BIS,* merit attention. The former provides that an action for indemnity against a third person may be brought after the expiration of the one year limitation period so long as it is brought within the time allowed by the law of the court seized of the case. It further adds that such time allowed shall not be less than three months from the day when the person initiating the action has settled the claim or has been served with process in the action against himself.

Under Article IV *BIS* Rule 1, the carrier may plead the defences and limits of liability provided for in the Act whether the action against him for loss or damage to goods is founded in contract or in tort. This article also gives the servant or agent of the carrier the right to plead the defences and limits of liability which the carrier is entitled to invoke in his favour so long as such servant or agent is not an independent contractor and the loss or damage has not been the result of an act or omission of the servant or agent done with intent to cause damage. An act or omission done recklessly or with the knowledge that damage would probably result would also deprive such servant or agent of such right to plead the said defences and limits of liability. Article IV *BIS* thus alters the common law position under which a servant cannot rely on an exemption clause found in his master's contract with a third party because of the doctrine of privity of contract. Of course there are exceptions and the question of privity does not arise in situations of agency or where there has been an implied contract between the servant and the third party. The readiness of courts to find the presence of such exceptional circumstances in regard to the loading and unloading aspects of carriage of goods by sea reveals how artificial the doctrine of privity can be. The decisions of the House of Lords in *Elder Dempster & Co.* v. *Paterson, Zochonis & Co.*[11] and of the Privy Council in *The Eurymedon*[12] may have preserved the facade of privity of contract but they have done nothing to develop a coherent doctrine. Article IV *BIS* comes to terms with commercial reality and thus spares lawyers and judges from the ardous task of fathoming the circumstances under which a servant or agent of the carrier may rely on the exemptions and limits of liability primarily intended for the benefit of the carrier.

[9] Art. III Rule 4.

[10] The shipper is deemed to have guaranteed to the carrier the accuracy, at the time of shipment, of the marks, number, quantity and weight, as furnished by him and he has to indemnify the carrier against loss, damages or expenses arising or resulting from such inaccuracy. See Art. III Rule 5. The position is similar under the Hamburg Rules. See Art. 17.

[11] [1924] A.C. 522.

[12] [1974] 1 All E.R. 1015.

THE HAMBURG RULES

As a vehicle of international uniformity, the Brussels Protocol never left the launching pad. In the years that followed, few countries adopted the Protocol. Most countries preferred to await the completion of the draft convention on carriage of goods by sea which was being prepared by the United Nations Commission on International Trade Law (UNCITRAL) before committing themselves one way or another. As for developing countries, they could take satisfaction in the fact that one of the terms of reference for UNCITRAL in regard to its studies on the subject included the review of economic and commercial aspects of international legislation and practices in the field of bills of lading from the standpoint of their conformity with the needs of economic development, in particular, of developing countries.

UNCITRAL's draft convention was adopted, with some amendments, at a Diplomatic Conference in Hamburg in March 1978. Amidst fears that any alteration of the *status quo* could lead to uncertainties and possible increases in freight charges which would be detrimental to developing countries, the Hamburg Rules ushered in a new regime. Some of the more salient features of these Rules are discussed below.

Period of carrier's responsibility

The Hamburg Rules extend the duration of the carrier's responsibility for goods shipped on board his vessel. Under the present Act, the carrier's responsibility begins when goods are loaded onto the ship and ends when the goods are discharged from the ship.[13] As such, as a general rule, the carrier is only liable from tackle to tackle. The Rules, of course, apply during loading and discharge. *Goodwin, Ferreira* v. *Lamport and Holt*[14] and *Pyrene* v. *Scindia Navigation Co*.[15] make this fairly clear.

The Hamburg Rules, on the other hand, provide that the carrier's responsibility 'covers the period when the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge'.[16] The carrier is deemed to have taken charge of the goods at the port of loading when he or his servants or agents have taken over the goods from the shipper or a person acting on the shipper's behalf or from an authority or third party to whom, pursuant to law or regulations applicable at the port of loading, the goods have to be handed over for shipment. As for the termination of responsibility, the carrier is deemed to be no longer in charge of the goods when he has delivered the goods by one of three methods. The first is where the goods are handed over to the consignee or his servants or agents. The second is by having the goods placed at the disposal of the consignee or his servants or agents in accordance with the contract of carriage or with the law or usage of the particular trade applicable at the port of discharge when the consignee or his servants or agents do not receive the goods from the carrier. The

13 Art. 1(e).
14 [1929] 45 T.L.R. 521.
15 [1954] 2 Q.B. 402.
16 Art. 4.

third is by handing the goods over to an authority or other third party to whom, pursuant to the law or regulations applicable at the port of discharge, the goods must be handed over.

Basis of liability

The Hamburg Rules adopt an entirely different approach to the question of basis of liability. They omit the entire list of exemptions found in Article IV Rule 2 of the present Act. Instead, a single rule of liability is provided for in Article 5 Rule 1 which states as follows:

> "The carrier is liable for loss resulting from loss of or damage to the goods as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences".

Although no reference is made to seaworthiness, by implication, the duty to exercise due diligence in providing a seaworthy ship remains for otherwise, the carrier cannot plead that he has taken all reasonable measures to avoid loss or damage to the goods or delay in delivery if these had been caused by unseaworthiness. As for the omission of the once sanctified list of exemptions, carriers and Protection and Indemnity Clubs are understandably uncomfortable. The difference in state of affairs becomes especially clear if two exemptions found in the present Act, namely navigation or management of the ship and fire are looked at.

Under the present Act, neither the carrier nor the ship is liable for any loss or damage arising or resulting from any act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or management of the ship.[17] Under the Hamburg Rules, the carrier, his servants and agents must take reasonable measures to avoid mistakes in navigation or management of the ship. As for fire, under the present Act, neither the carrier nor the ship is responsible for loss by fire unless the fire had been caused by the actual fault or privity of the carrier.[18] This is a most effective exemption clause for it is not easy to establish that there has been actual fault or privity. Where, as is often the case, the carrier is a company, the directing mind or alter ego of the company must have been actually at fault.[19] In the usual course of events, fault or privity of the carrier's servants does not prevent the exemption clause from applying. However, the Hamburg Rules, which deal specifically with the question of fire, provide that the carrier is liable for loss of or damage to the goods or delay in delivery of the goods if the claimant is able to establish that the fire arose from the fault or *neglect* on the part of the carrier, his servants or agents.[20] In addition, should there be a fire; the carrier is liable for any loss, damage or delay in delivery which is proven by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents in not having taken reasonable measures to put out the fire or to mitigate its con-

[17] Art. IV Rule 2(a).
[18] Art. IV Rule 2(b).
[19] *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.* [1915] A.C. 705.
[20] Art. 5 Rule 4.

sequences. The Rules further provide that at the request of either carrier or claimant, a survey in accordance with shipping practices must be held in order to determine the cause and circumstances of the fire and the survey report shall be given, on demand, to the carrier and the claimant.

Delay in delivery of goods

Another new feature in the Hamburg Rules concerns the carrier's liability for delay in delivery of goods, a matter not dealt with by the present Act. The carrier is made responsible for loss resulting from delay in delivery of goods unless he can establish that he took all measures which could reasonably have been taken to avoid the delay and its consequences.[21] However, to take advantage of these provisions, the cargo owner has to give written notice to the carrier within sixty consecutive days after the day when the goods were handed over to him.[22] If this has not been done, no compensation is payable. This requirement of written notice within sixty days is not advantageous to cargo owners and it is regrettable that such a position has been adopted, especially when the limitation period for other matters has been extended by the new Rules.

The Rules further provide that in certain circumstances, delayed goods may be abandoned to the carrier and treated as lost.[23] This right arises when goods have not been delivered within sixty consecutive days following the expiry of the time provided for in the contract as the delivery date or, in the absence of such an agreed date, within sixty consecutive days after the period within which a diligent carrier would have, in the circumstances of the case, delivered the goods. This regime should encourage a shipowner to be more diligent as a shipowner who delays for more than sixty days could well have a cargo of unwanted goods on his hands if the cargo owners have elected to abandon the goods. It must be noted that the right of abandonment does not arise where there has been a justifiable deviation for in such an event, the carrier is not liable for anything other than general average.[24]

The Hamburg Rules do not deal with the question of remoteness of damage. This will still have to be determined in accordance with the rule in *Hadley* v. *Baxendale*,[25] and in particular with the second branch of the rule which provides that the damage should be such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach. If there were any doubts that this rule applied to contracts of carriage of goods by sea, they were put to the rest by the House of Lords in *Koufos* v. *Czarnikow (C) Ltd*.[26] In that case, Lord Morris had occasion to observe:

> 'In principle, it seems to me that the rule in *Hadley* v. *Baxendale* must in these days be applied to cases of carriage of goods by sea. If the parties for some particular reason have contracted on the basis that

[21] Art. 5 Rule 1.
[22] Art. 19 Rule 5.
[23] Art. 5 Rule 3.
[24] Art. 5 Rule 6.
[25] (1854) 9 Exch. 341.
[26] [1969] 1 A.C. 350.

> there is no obligation to proceed normally to a destination, then delay would not constitute a breach. If however, there is a delay which amounts to a breach of contract I see no reason for adopting some special formula in the assessment of damages (such as giving interest on the capital value of the goods carried) or for any artificial divergence from the principles that govern the assessment of damages'.[27]

Carriers and insurers have voiced fears over these provisions in the Hamburg Rules and have raised the spectre of increased freight rates to fund additional insurance cover as the usual insurance policy does not cover losses due to delay. However, grouses by carriers are not altogether well founded. Too few carriers remember that under the present law, carriers are liable for loss through delay in delivery because exemption clause have been used, with far too much success, to avoid such liability. The Hamburg Rules, by providing for the question of loss through delayed delivery and ensuring that carriers who try to exempt themselves will run afoul of Article 23 of the Rules,[28] restore a sense of balance to the law.

Bills of lading

The Hamburg Rules provide a good measure of protection for third parties who have relied, in good faith, on descriptions contained in bills of lading. Under the Rules, the bill of lading is *prima facie* evidence of the taking over of the goods by the carrier while a shipped bill of lading is *prima facie* evidence of loading of the goods.[29] Where the bill of lading has been transferred to a third party who has, in good faith, acted in reliance on the descriptions contained therein, the carrier is estopped from denying the accuracy of statements in the bill in regard to the general nature, leading marks, number of packages or pieces, weight or quantity of the goods.[30] The carrier who has suffered a loss as a result of any inaccuracy of such particulars is, of course allowed to recover damages from the shipper if the inaccurate statements were furnished by the shipper.[31] Furthermore, if the bill of lading does not specify the amount of freight due or indicate that freight is payable by the consignee or does not set forth demurrage incurred at the port of loading and state that such demurrage is payable by the consignee, the carrier is not allowed to prove, as against a third party who has, in good faith, acted in reliance on the bill of lading, that freight or demurrage charges are due.[32]

As far as the filling in of particulars in the bill of lading is concerned, the Hamburg Rules do create some difficulties. To begin with, there is a fairly long list of particulars which must be included in every bill of lading.[33] These relate to the following:

27 *Ibid*., 402.
28 Art. 23 of the Hamburg Rules provides that any stipulation in a contract of carriage by sea, in a bill of lading or any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly from the provisions of the convention.
29 Art. 16 Rule 3(a),
30 Art. 16 Rule 3(b).
31 Art. 17.
32 Art. 16 Rule 4.
33 Art. 15. However, Art. 15 Rule 3 provides that the absence in the bill of lading of one or more of such particulars does not affect the legal character of the document as a bill of lading.

(a) the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces and the weight of the goods or their quantity otherwise expressed;

(b) the apparent condition of the goods;

(c) the name and principal place of business of the carrier;

(d) the name of the shipper;

(e) the consignee if named by the shipper;

(f) the port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading;

(g) the port of discharge under the contract of carriage of goods by sea;

(h) the number of originals of the bill of lading if more than one such bill has been issued;

(i) the place of issuance of the bill of lading;

(j) the signature of the carrier or a person acting on his behalf;

(k) the freight payable by the consignee or some other indication that freight is payable by him;

(1) a statement that the carriage is subject to the provisions of the Rules which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee;

(m) a statement, if applicable, that the goods shall or may be carried on deck;

(n) the date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties and

(o) any increased limit or limits of liability agreed upon between the parties.

A point worth noting is that the number of packages or pieces *and* the weight of the goods must be recorded. This appears logical since the Rules provide that the carrier's liability is to be measured in terms of weight or number of packages or other shipping unit.

What may be a source of problems in regard to contents of bills of lading are the rules on reservations which may be entered by carriers onto such bills. Under Article 16, the carrier may make reservations in the following circumstances:—

(a) if he knows that the particulars furnished are inaccurate;

(b) if he has reasonable grounds to suspect that the particulars furnished are inaccurate or

(c) if he has no reasonable means of checking the accuracy of the particulars furnished.

A carrier can be expected to make reservations where necessary. In regard to apparent condition of the goods, extra care must be taken for the Rules provide that if the carrier fails to note on the bill the apparent condition of the goods, he is deemed to have noted on the bill that the goods were in apparent good condition. Conflicts can be expected between shippers and masters as to whether the right to make reservations had been exercised correctly or fairly. There could well be some delays at the port of loading before matters are sorted out.

Of particular difficulty are the rules on 'reasonable grounds' of suspicion and 'reasonable means' of checking. Questions may well be asked as to what constitute 'reasonable grounds', whether the grounds should be stated and most important of all, the manner in which reservations should be worded. The truth should, no doubt, be told but an unwarranted harsh wording of a reservation could affect the value of the bill of lading as an instrument of international trade. In similar vein, questions may well be asked in regard to lack of reasonable means of checking. Shippers can legitimately argue that where the carrier lacks reliable men or equipment to conduct the necessary checks, they ought not be prejudiced by reservations. One can only hope that when the Rules come into force, the courts will have an early opportunity to provide some useful guide-lines to carriers and shippers.

Deviation

If the carrier appears to be overly protected by the regime established by the Hague Rules and Brussels Protocol, the rules in regard to deviation by the carrier must be his Achilles' heel. Under the present position, an unjustified deviation is a fundamental breach which entitles the injured party to repudiate the contract of carriage, in which case, the carrier is regarded as a common carrier and entitled only to the exemptions of inherent vice, act of God and the King's enemies.

A deviation in order to save lives is understandably regarded as a justifiable deviation under common law as well as statute. However, where the saving of property is concerned, common law and statute part company and it is only under the statute that attempts to save property are justifiable.[34] Furthermore, under the present Act, in addition to saving life and property, a 'reasonable deviation' shall not be deemed to be an infringement or breach of the Rules contained therein or of the contract of carriage. What constitutes a reasonable deviation is a question of fact. In *Stag Line* v. *Foscolo Mango*[35] Lord Atkin formulated the following working rule:

> "The true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the interests of anyone as conclusive."[36]

The Hamburg Rules preserve the position in regard to saving of lives.[37] As for the saving of property, they introduce a requirement of reasonableness. A carrier who deviates to save property will, under these Rules, do so at his peril if his efforts are adjudged unreasonable in the circumstances of the case. The Rules also make no reference to the category of 'reasonable deviation' found in the present Act.

The reforms in regard to deviation will be welcomed by cargo owners. After all, there is no reason why they should have their

34 Art. IV Rule 4.
35 [1932] A.C. 328.
36 *Ibid.*, *p.* 343.
37 Art. 5 Rule 6.

cargo exposed to the danger of loss or damage or suffer any delay in delivery of cargo merely because the carrier wishes to deviate for his own profit.

Maximum liability of the carrier

The Hamburg Rules adopt a fresh approach to the question of limitation of liability.[38] As a general rule, liability is linked to the artificial unit of account of the International Monetary Fund which is known as the 'Special Drawing Right' or SDR. However, for countries which are not members of the International Money Fund and whose laws do not permit application of the new regime based on the SDR, the Brussels Protocol system based on gold is followed but the limitation amounts have been increased.[39]

Liability depends on whether the claim is for loss of or damage to goods or for delay in delivery. Where the claim is for loss of or damage to goods, the maximum liability of the carrier is limited to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher. For countries which cannot adopt the unit of account formula, the corresponding figures are 12,500 monetary units per package or other shipping unit or 37.5 monetary units per kilogramme of gross weight. As is under the present Act, each monetary unit amounts to sixty-five and a half miligrammes of gold of millesimal fineness nine hundred. As has been done under the present Act, the Rules provide that where a container, pallet or other similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued or otherwise in any other document evidencing the contract of carriage, as packed in such article of transport are deemed packages or shipping units. A new feature in the Rules is that they state that where the article of transport itself has been lost or damaged, that article of transport is regarded as a separate shipping unit if it is not owned by or otherwise supplied by the carrier.[40]

Where the claim is in regard to delay in delivery, the carrier's maximum liability is limited to two and a half times the freight payable for the delayed goods.[41] However, such sum is not to exceed the total freight payable under the contract of carriage of good by sea. Finally, the Rules provide that under no circumstances is the aggregate liability of the carrier for loss of or damage to goods and for delay in delivery to exceed the maximum amount which may be claimed under the Rules for loss of or damage to goods.[42]

Limitation period

The period of limitation of action for contracts of carriage of goods by sea has, under the previous and present Acts, been unduly favourable to the carrier. Under the present Act, in the absence of an agreement to the contrary, the carrier and ship are discharged

38 Arts. 6 and 26.
39 Art. 26.
40 Art. 6 Rule 2(b).
41 Art. 6 Rule 1(b).
42 Art. 6 Rule 1(c).

from all liability unless a suit is brought within one year of their delivery or of the date when they should have been delivered.[43] This applies even though the carrier may have been negligent or reckless. Furthermore, for the purposes of the one year rule, a suit brought in another jurisdiction is irrelevant.[44]

The Hamburg Rules improve the cargo owner's position by extending the limitation period to two years.[45] Admittedly, several countries had misgivings about the extension. Greece and Japan both proposed that the one year rule be adhered to while the United Kingdom proposed an interesting alternative, namely that the one year rule be adhered to but it would be extended to two years if within the one year period, the claimant gives written notice of his intention to bring a claim as well as sufficient particulars to identify the claim. The two year rule adopted at Hamburg is preferable. After all, the case against extension of the limitation period rests primarily on fears that there could be more claims as a result of the extension since, in the usual course of things, many claims lapse by default under the present system. Surely a better sense of fairplay ought to be the order of the day. As for the interesting proposal of the United Kingdom, one could legitimately argue that if the courts had to decide whether sufficient particulars had been given to identify the claim, they might as well proceed to adjudicate on the merits of the claim.

There are also some other new features in regard to the limitation period in the new Rules. To begin with, to make matters clear, they state that the period of limitation begins on the day on which the goods or part thereof have been delivered or in situations where there has been no delivery, on the last day on which the goods ought to have been delivered. Secondly, the Rules provide that judicial as well as arbitral proceedings will halt the running of time. Under the present Act, arbitration proceedings are not mentioned. However, it has been held in '*The Merak*'[46] that the term 'suit' in the Hague Rules includes arbitration. Thirdly, the Rules merely state that the action is time-barred whereas the relevant terminology under the present Act is 'discharged from all liability'. The difference is fundamental for under the present Act, a discharge from all liability results not only in the barring of the remedy but also the total obliteration of the claim. Lord Wilberforce explains the position in the following terms in *The* '*Aries*[47]:

> "The contract... expressly provides by incorporation of the Hague Rules that the carrier and the ship *shall be discharged* unless suit is brought within one year after the date of delivery or the date when delivery should have been made. This amounts to a time bar created by contract. But, and I do not think that sufficient recognition to this has been given in the courts below, it is a time bar of a special kind viz., one which extinguishes the claim (cf. art. 29 of the Warsaw Convention, 1929) not one which, as most English statutes of limitation (e.g. the Limitation Act 1939 and the Maritime Conventions Act 1911) and some

[43] Art. III Rule 6.
[44] *Compania Colombiana de Seguros* v. *Pacific S.N. Co.* [1965] 1 Q.B. 101,
[45] Art. 20.
[46] [1965] P. 223.
[47] [1977] 1 Lloyd's Rep. 334.

> international conventions (e.g. the Brussels Convention on Collisions 1919 art. 7) do, bars the remedy while leaving the claim itself in existence."[48]

Cargo owners have every reason to be pleased that the present rule that a time barred claim cannot be utilised as a defence or set-off against any claim by the carrier will be abolished when the Hamburg Rules come into effect.

Conclusion

The Hamburg Rules are controversial. They must be so as they are essentially a compromise between conflicting political and economic interests. There will be some difficulties ahead. When implemented by statute, courts will have to interpret the grey areas. There may be some increases in freight charges to reflect increased insurance costs for carriers. However, on balance, the Hamburg Rules are to be welcomed if only because they distribute, in a more equitable manner, the risks inherent in a contract of carriage of goods by sea.

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[48] *Ibid.*, p. 336.

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