

**APPORTIONING LIABILITY IN A CARRIAGE OF GOODS BY SEA
CONTRACT: TOWARDS A UNIVERSAL CODE**

BY BENSON MUSAU KISILU

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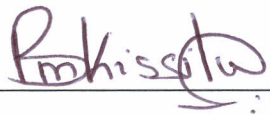
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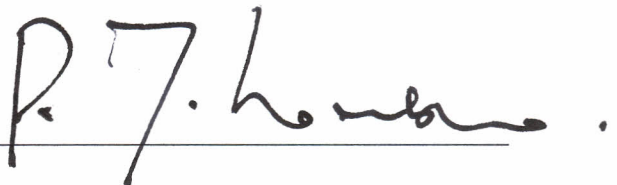
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Supervisor:

Signed  _____

Paul Musili Wambua

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I would like to thank all those who assisted me in the preparation of this thesis. I am especially indebted to my supervisor Mr. P. Musili Wambua, without whose guidance and support this work would not have been finalized. I am equally grateful to all the staff at the Faculty of Law Library and specifically to Mr Njuguna for assisting me to access the requisite materials. To them all I say a big thank you!

DEDICATION

To my wife Ngina and my daughters - Joyce, Caroline, Maureen and Diana.

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ABSTRACT

This paper will give a brief history of the common law that governed the carrier's liability in a carriage of goods by sea contract before the enactment of the 1924 Hague Rules. It will briefly point out the shortcomings of The Hague rules .The paper will demonstrate how these shortcomings led to the adoption of the Hague-Visby Rules that tend to favour the ship owning nations. It will be shown that although the Hague-Visby Rules were enacted to mitigate the weaknesses and shortcomings of The Hague Rules they have miserably failed to achieve their desired objectives. The paper will demonstrate that the Cargo owning nations rightly felt that the Hague-Visby Rules were too harsh to them thus justifying their eagerness to have another code/rules. It will be shown that the Hamburg Code came into being because of the agitation of the cargo owning nations (mostly third world countries). It will be clearly shown that the Hamburg Code is skewed towards the cargo owning nations and how this reality has made ship owning nations shun it. The paper will also demonstrate how the Hague Rules, Hague-Visby Rules and the Hamburg Code have divided the world in the field of the lucrative and important maritime trade. The paper will put a strong case for the enactment of a compromise code that will ease the stand-off between the ship owning nations and the cargo owning nations. The paper will analyse the UNICTRAL Draft pointing out its strengths and weaknesses; proposals of enacting a compromise code will be made to ensure that there is a balance of interests of both the ship owning nations and the cargo owning nations.

TABLE OF ABBREVIATIONS

AC	-	Appeal Cases
All ER	-	All England Law Reports
CMI	-	Comite' Maritime International
COGSA	-	Carriage of Goods by Sea Act
ICLQ	-	International and Comparative Law Quarterly
INCOTERMS	-	International Chamber of Commerce Official Rules for the Interpretation of Trade Terms
JBL	-	Journal of Business Law
J. MAR. L & COM	-	Journal of Maritime Law and Commerce
KB	-	Kings Bench Law Reports
LMCLQ	-	Lloyds Maritime and Commercial Law Quarterly
LQR	-	Law Quarterly Review
PC	-	Privy Council
QB	-	Queens Bench Division
Transp. LJ	-	Transport law Journal
Tul LR	-	Tulane Law Review
UK	-	United Kingdom
UN	-	United Nations
UNCITRAL	-	United Nations Commission on International Trade Law
UNCHE	-	United Nations Conference on Human Environment
UNCTAD	-	United Nations Conference on Trade and Development
US	-	United States of America

VUWLR - Victoria University of Wellington Law Review
Wm. & Mry L. Rev - William and Mary Law Review
YALE L.J - Yale Law Journal

TABLE OF CASES

1. *Adler v. Dickson (The Himalaya)* [1955] 1 Q.B. 158, [1954] 2 Lloyd's Rep. 267
(C.A.)
2. *Baxter's Leather Co. v. royal Mail* [1908] 2 K.B. 626.
3. *Coggs v Bernard* (1703) 2 Ld.Raym. 909
4. *Eisenerz G.m.b.H. v. Federal Commerce & Navigation Co. (The Oak Hill)* [1974]
S.C.R. 1225, [1975] 1 Lloyd's Rep. 105 (Supr. Ct. of Can.)
5. *Encyclopedia Britannica, Inc. v. S.S Hong Kong Producer*, 422 F.2d 7, 12, 1969
A.M.C. 1741 (2d Cir. 1969).
6. *Grant v Norway* (1851) 10 CB 665
7. *Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha* [1962] 2 QB 26
8. *Houghton v. Gilbert*, 7 C. & P. 701
9. *Levi v. Berk*, 2 T.L.R. 898.
10. *Luke v. Lyde* (1759) 2 Burr 882.
11. *Maxine Footwear Co., Ltd. v. Canadian Government Merchant Marine* [1959] A.C.
589 (P.C.)
12. *Morse v. Slue* 1 Vent. 190, 238
13. *Pyrene v. Scindia Navigation* (1954) 2 QB 402
14. *Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. (The Muncaster Castle)*
[1961] A.C. 807, [1961] 1 Lloyd's Rep. 57, 1961 AMC 1357 (H.L.)
15. *Smith & Co. v Bedouin Steam Navigation Co., Ltd* [1896] A.C.70
16. *Stag Line Ltd v Foscolo Mango & Co. Ltd* [1931] All ER.666

17. *The Ardennes (Owner of cargo) v The Ardennes* [1950] 2 All E.R.517
18. *Vimar Seguros y Reaseguros, SA v M/V Sky Reefer* (1995) 515 US 528, 537; 115 S Ct 2322, 2328 ["Sky Reefer"].
19. *Union of India v. N.V. Reederij Amsterdam (The Amstelslot)* [1963] 2 Lloyd's Rep. 223 (H.L.)

TABLE OF STATUTES

1. Carriage of Goods by Sea Act (Cap 392 of the Laws of Kenya)
2. Carriage of Goods by Sea Act 1936 (US)
3. Carriage of Goods by Sea Act, 1924 (UK)
4. Carriage of Goods by Sea Act, 1971(UK)
5. The Marine Insurance Act (Cap 390 of the Laws of Kenya)
6. The Merchant Shipping Act (Cap 389 of The Laws of Kenya)
7. Harter Act, 1893(US)
8. The Judicature Act (Cap 8 of the Laws of Kenya)

CHAPTER ONE

1.0 INTRODUCTION

1.1 BACKGROUND TO THE STUDY

Under the English law, prior to the enactment of the 1924 Hague Rules¹, liability under a carriage of goods by sea contract was governed by the common law. Under this regime, the courts through judicial decisions, developed rules regarding the liability of all the parties to a contract of carriage of goods by sea. The liability of the carrier was made dependent relative to the degree of responsibility the carrier impliedly undertook under the contract of carriage. This liability, however, could be limited by an express contract entered into by the parties and expressly modifying the obligations of the parties, *inter se*. As long as the parties involved in a contract of carriage of goods by sea were British subjects or hailed from the larger British Commonwealth, the common law liability regime worked well. However, with increased trade between various nations, the homogeneity of the parties involved became increasingly rare, with the result that applying common law rules regarding liability of parties to the contract of carriage became increasingly controversial. A party, foreign to the common law jurisdiction, would feel discriminated against and disaffected leading to the situation where other countries developed and insisted on the application of their domestic rules.²

¹ The long title of which is the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Signed in Brussels, August 25, 1924.

² A Glass & C Cashmore Introduction To The Law of Carriage o f Goods (Sweet & Maxwell London 1989) 173.

An additional difficulty that came in to play on the wholesale application of the English common law rules of liability to contracts of carriage of goods by sea where parties of different nationalities and jurisdictions were involved, lay in determining which national law was to apply in the absence of an express choice of law by the parties involved.³ Apart from this dilemma on conflict of laws, another assault on the common law liability regime came from its latent weaknesses. The doctrine of privity in a contract and the linking of contractual rights with the ownership rather than with the property combined to discredit the common law regime as an appropriate legal system to govern international commercial transactions.⁴

Partly as a result of the above drawbacks and partly as a result of a practice prevailing then in which many carriers by sea would limit their liability even under the common law by putting all embracing exclusion clauses in Bills of Lading, a situation ruled by chaos emerged. Some countries, which felt that the common law system of liability was tipped in favour of carriers as against the other parties to a contract of carriage, enacted national legislations that were directed at remedying this situation. For example, the United States came up with the “Harter Act” of 1893. The stage for a conflict between the various legislations was set.⁵

The authority of English common law rules regarding carriage of goods by sea that had become pervasive by the end of nineteenth century, especially as a result of the virtual monopoly of much of the world’s shipping that the English carriers enjoyed at the time, was

³ See generally Charles Debattista, ‘Transferring Property In International Sales: Conflicts and Substantive Rules Under English Law’, 26 J. Mar. L. & Com. 273 (1995) The Author seems to agree With Chesire and North Private International Law (12 th edn 1992) p 807 That “no one law can be made the exclusive arbiter of disputes arising out of a transfer of goods in transit”.

⁴ R Bradgate and N Savage Commercial Law 509 (1991).

⁵ Glass and Cashmore (n 2) 173.

now threatened. English common law was seen as epitomising the interests of the ship owning countries as against those of the cargo owning nations. Moves towards the reform and unification of the law thus began to concentrate on the creation on of an international model bill of lading that would establish certain worldwide minimum standards with respect to the shipowner's liability.⁶ International conferences were held, mainly under the auspices of the International Law Association and Comite' Maritime International.⁷The work of these conferences, interrupted by the First World War was resumed when the British government, under the pressure of the Dominions, insisted that the ship owners reach an agreement.⁸After considerable discussion among representatives of leading ship owners, underwriters, shippers and bankers of the big maritime nations, a set of rules was finally drafted by the Maritime Law Committee of the International Law Association at a meeting held at The Hague in 1921 and came to be known as the Hague Rules.⁹ The Hague Rules were enacted in England as the Carriage of Goods by Sea Act (COGSA) 1924 and also forms the substance of the Kenyan COGSA.¹⁰

Although, the Hague Rules were meant to correct the patent drawbacks of the English common law and the attendant confusion in the world stage regarding the regulation of the carriage of goods by sea it would seem that it did not successfully deal with this issues. The failure of these rules can be traced to the fact they were from the beginning destined to

⁶ UNCTAD 'Report on Bills of Lading' (UN New York 1971) 14.

⁷ *ibid.*

⁸ S Dor Bills of Lading Clauses and the International Conventions of the Brussels, 1924 (Hague Rules) (2 nd edn Witherby & Co., Ltd.1960 Northumberland press London) 19.

⁹ *ibid.*

¹⁰ Cap 392 of the Laws of Kenya.

become a compromise document and hence were not a comprehensive code.¹¹ The result was that the rules were silent on some matters such as freight, in relation to which English common law was still to apply and were also defective particularly in relation to the position of the carrier's servants and agents, containerisation and limits of liability¹².

The Hague rules had various shortcomings that needed to be addressed urgently. For instance 'carrier' was defined to include the owner or the charterer who enters into a contract of carriage with the shipper. Two issues arose from this definition:

- Can any person other than the owner or charterer be a carrier? e.g. a forwarding agent where he receives the goods on the behalf of the carrier.
- Who is liable as 'carrier' when vessels are chartered? Demise clauses inserted in bills of lading lead to evasion of liability by both the ship owner and the charterer since courts consider neither to be 'carriers'.

The meaning of 'Goods' in The Hague Rules does not cover goods placed on the deck and live animals. This means that carriers could contract out of liability for such cargoes. It is also not clear if the definition given to 'ship' includes barges and lighters when used for loading and discharging vessels.

The shortcomings of the Hague Rules, some of which are enumerated above, led to the Brussels Protocol, better known as the Hague-Visby Rules. The Visby Rules (the Brussels Protocol of 1968 amending the Brussels convention of 1924) were the outcome of the successful deliberations of the Comité Maritime International (CMI) conference in Stockholm in 1963, where changes to the Brussels convention of 1924 were adopted. The

¹¹ Glass and Cashmore (n 2) 173.

¹² *ibid*

CMI met in the historic city of Visby after the conference and therefore gave the Visby their name. Most cargo owning nations have refused to adopt these rules, being convinced that they are heavily tilted in favour of ship owning nations such as England. For example, the Hague-Visby Rules have been implemented in England as Carriage of Goods by Sea Act of 1971, while in the United States, which has traditionally fought against the carrier exculpatory clauses in the bills of lading; these rules have not been enacted¹³.

The Hague-Visby Rules do not reflect consensus arrived after a full debate of all the relevant issues but rather it is a compromise convention. Consequently, the Rules have not dealt with the major defects of the Hague Rules, such as the exception relating to negligent management of the ship. The result is that a shipowner should not be entitled to contract out of liability to exercise due diligence to make the ship seaworthy but that, once the voyage had begun, he should be entitled to rely on certain exceptions including those of negligent navigation and management of the ship. Like the Hague Rules, the Hague-Visby Rules only apply to contract of carriage covered by a bill of lading or any similar document of title and only in so far as such documents relates to the carriage of goods by sea. Just like the Hague Rules, these Rules do not apply to carriage of live animals and cargo which by the contract is stated as being carried on the deck and is so carried.¹⁴

¹³ The US adopted the Hague Rules, which were mainly influenced by and indeed embraced, the spirit of the Harter Act of 1893, by enacting the COGSA in 1936. It did not ratify the convention that enacted the Hague-Visby Rules. For a full detailed discussion see Gilmore and Black *The Law Of Admiralty* (2nd edn Mineola New York 1975) 142-149.

¹⁴ A Diamond ‘The Hague-Visby Rules’ [1978] LMCLQ 264.

As is evident from the foregoing, the Hague-Visby Rules suffer from a credibility problem and hence the search for a more acceptable and comprehensive regime of rules to govern the carriage of goods by sea was far from being over.

The Hamburg Rules¹⁵ that were adopted in 1978 under an initiative of the United Nations Conference on Trade and Development (UNCTAD) were said to be the first truly comprehensive attempt at codifying the allocation of risks between carrier interests and cargo interests.¹⁶This as it may be, it would seem again, not all countries have been happy with these new rules as a casual glance at the countries that have ratified them reveals. The states that have ratified the Hamburg Rules are mostly third world countries¹⁷.

Current efforts to unite the world of maritime trade are now focused on the UNCITRAL (United Nations Convention on International Trade Law) Draft. The draft outline has been discussed at the Comité' Maritime International conference held in February 2001 but nothing final has been agreed upon. Suffice it to say that the negotiations are still going on. Considering the current state of affairs, it is clear that the contract of carriage of goods by sea continues to be ruled by a multifarious regime of rights and liabilities. This situation is not tenable and if allowed to persist could easily put into permanent disarray the lucrative and vital world maritime trade.

¹⁵ Also known as the United Nations Convention on the Carriage of Goods by Sea, Mar. 1978, 17 I.L.M. 608.

¹⁶ RG Bauer 'Conflicting Liability Regimes: Hague-Visby v. Hamburg Rules --A Case Analysis' 24 J. MAR. L. & COM 53

¹⁷ *ibid* 53.

It is in view of the serious threat posed by the apparent inability of the world nations to coalesce around any of the various rules governing contracts of carriage of goods by sea that have been promulgated at diverse periods in our common history that this study draws inspiration.

1.2 STATEMENT OF THE PROBLEM

Maritime trade has over the years come to allocate the bill of lading a special place and role within its scheme of things. The bill of lading has moved from being a bailment receipt for goods to a receipt containing the contract of carriage and finally to a negotiable document of title.¹⁸ The importance of the bill of lading and the need to have uniformity in the maritime trade has made its interpretation the subject of a lot of the international codes or conventions regarding the carriage of goods by sea.¹⁹ Consequently, its interpretation is a matter of great concern to the parties involved in any contract of carriage and by extension to their respective nations.

The fact that no single code in existence today for the regulation of rights and liabilities under the contract of carriage that has so far received a worldwide acceptance poses serious implications. Such a scenario creates a situation of uncertainty in international trade, as the parties involved will not be too sure of their rights and liabilities as they enter into the contract of carriage. As a result of such unpredictability international business will certainly

¹⁸ Sweet & Maxwell proprietary Rights and Insolvency in Sales Transaction, (2nd edn 1989) 61.

¹⁹ Such codes include the Hague Rules, the Hague-Visby Rules, the Hamburg Rules and the proposed UNCITRAL Draft code to mention the main ones.

fizzle out. The need, therefore, for a regime of rules that eliminate this uncertainty cannot be gainsaid.

The various worldwide attempts at introducing a regime of rules that would bring the province of carriage of goods by sea within its purview and regulation have all failed as pointed out above²⁰. To underscore the need for an enactment of a compromise legal regime it is necessary to point out that there is a likelihood to have a dispute coming to the Kenyan courts concerning a contract subject to a bill of lading covered by the Hamburg Rules and *yet Kenya has only domesticated The Hague Rules in the form of COGSA (Cap 392 of the Laws of Kenya)*. What rules to apply in such a situation poses a big problem. This problem is further compounded by the fact that the High Court of Kenya exercises Admiralty Jurisdiction in accordance with the same procedure as in the High Court of England.²¹This situation is very undesirable as it undermines the sovereignty of Kenya as an independent state.²²The Admiralty procedure was heavily criticised by the Kenyan Court of Appeal judges in the case of *The Owners of the Motor Vessel "The Lillian" and Caltex Oil Kenya Ltd.*²³

This study will strive to offer proposals that will address the main legal gaps that exist in the several legal regimes currently being used to cover the carriage of goods by sea contract.

²⁰ See P Myburgh 'Uniformity or Unilateralism in The Law of carriage of Goods by Sea?' < <http://www.upf.pf/recherche/iridip/rjp/rjp6/4myburgh.doc>> (accessed 8 Feb 2005).

²¹ The Judicature Act Cap 8 of the Laws of Kenya Sec 4 (2) c.

²² Report of The Task Force on The Review of Maritime Laws of Kenya, Republic of Kenya, May 2003

²³Unreported.

This paper will trace the long history of the search to have uniform legal regime that will balance the interests of all parties that are affected by a contract of carriage of goods by sea.

1.3 JUSTIFICATION OF THE STUDY

The problems highlighted in the preceding paragraphs pose a real and present danger to international trade and also to peace noting that most of the wars that have been fought in the world were fought over trade²⁴. It is therefore imperative for the world to urgently develop a code, which will build on the shortcomings of the existing rules governing contracts of carriage of goods by sea.

This study aims at interrogating the existing legal and regulatory framework governing the contract of carriage of goods by sea so as to determine why all the codes and rules attempting to unify the rights and liability system in a contract of carriage of goods by sea have failed. The study will therefore contribute towards the understanding of the various pitfalls that have hitherto hampered the integration of the regime of rules regulating the carriage of goods by sea.

The writer knows of no comprehensive study in Kenya that has been carried out with the aim of comparing and contrasting the various systems of rules that are currently in use in diverse jurisdictions with a view to exposing their drawbacks and strengths and in so doing mapping a way forward. The Task Force on the Review of Maritime Laws of Kenya undertook the

²⁴ Suzanne Karpilovsky 'Causes of World War One'.
<http://www.pvhs.chico.k12.ca.us/~bsilva/projects/great_war/causes.htm >(accessed 8 Feb 2005).

only attempt that has been made in this area in Kenya.²⁵ In chapter 8 of its Report, The Task Force discusses, albeit briefly the status of the law regarding carriage of goods by sea in Kenya. Considering this state of affairs, this study will contribute greatly to the understanding of maritime law in respect to the contract of the carriage of goods by sea as it applies to Kenya.

This study will therefore be of relevance to persons with research interest in uniformity of the rules governing contracts of carriage of goods by sea, which has always been regarded as particularly important to maritime law. The study will offer some suggestions for future reform in this area.

1.4 THEORETICAL AND CONCEPTUAL FRAMEWORK

1.4.1 DEFINITION OF KEY TERMS

(i) Cargo

The word “cargo” in maritime trade refers to goods carried by a ship. Generally unless there is something in the context to give it a different signification, the word ‘cargo’ in any contract of affreightment means the entire load of the ship that carries it.²⁶ Where the contract shows that the buyer of a ‘cargo’ is to have complete control over the destination of the vessel, ‘cargo’ means the entire shipload and not a shipment, and the buyer of, for example, “a cargo of 2500 to 3000 barrels (sellers option),” may reject a tender of 3000 barrels on the ground that other barrels had been shipped by the same vessel and therefore argue that a

²⁵ Report of the Task Force on the Review of Maritime Laws of Kenya, Republic of Kenya, May 2003.

²⁶ Per Mellish L.J. in *Borrowman v. Drayton*, 2 Ex. D. 19.

‘cargo’ was not tendered.²⁷ But where the buyer buys ‘cargo’ whose quantity has been mentioned then the buyer is bound to take the cargo, whatever its quantity, unless the contrary is very plainly shown.²⁸ Where, however, the question is on a policy of marine insurance, ‘cargo’ does not necessarily mean the whole loading.²⁹

It would seem from the foregoing that anything capable of being shipped, when it is actually shipped answers to the word ‘cargo.’ However, this study adopts a more restricted definition of the term so as to exclude hazardous or toxic waste from within its ambit. It is common knowledge that in the past some ships have been arrested while carrying toxic wastes with the intention of dumping their “cargo” in the sea or third world countries; these types of cargo are illegal and this paper does not cover them. “Cargo” includes oil and “dangerous goods’ (highly inflammable chemicals and liquids) whose carriage has been aptly regulated by various conventions/rules³⁰. In a nutshell the working definition of “cargo” in this paper is goods that are legally, traditionally and internationally the subject of a carriage of goods by sea contract.

(ii) Shipping

Because in maritime trade ships mainly transport cargo, a brief mention of the shipping industry is quite in order. The law regulating shipping in Kenya is found under the *Merchant*

²⁷ *ibid* and as distinguished in *Paul v. Pim, Junior & Co.* [1922] 2 K.B. 360.

²⁸ *Levi v. Berk*, 2 T.L.R. 898.

²⁹ *Houghton v. Gilbert*, 7 C. & P. 701

³⁰ Art 4(6) Hague Rules; Art 5(6) Hague-Visby Rules; Art 13 Hamburg Rules; International Maritime Dangerous Goods Code; London Convention 1972-Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 and MARPOL 73/78-The International Convention for the Prevention of Pollution of ships, 1973.

Shipping Act.³¹ The Act defines a Kenya ship as one that is registered or licensed at a port in Kenya.³² This provision is quite different from its equivalent in the UK Merchant Shipping Act that begins by stating, “A ship shall not be deemed to be a British ship unless owned wholly by persons of the following description ” and then goes on to enumerate such persons who must be British nationals.³³ This discrepancy could be explained by the fact Kenya does not consider itself as a major shipping nation, while Britain is one of the leading ship owning nations of the world.

The *Merchant Shipping Act* contains various provisions that have a direct impact on the contract of carriage of goods by sea. For example, the Act provides at section 56 for the liability of the beneficial owner, who is beneficially interested in a ship registered in the name of some other person as the owner. The Act also has a conflict of laws’ section that provides that the law of the port of registry of the ship governs in any matter where the Act does not have a clear provision on the issue.³⁴ Various other provisions of relevance to this paper include section 230 on dangerous goods, sections 231-236 on seaworthiness of ships, sections 273-280 on limitation of liability, sections 281-284 on division of liability, and sections 308-310 on pollution.

It is imperative to point out that the Kenyan Merchant Shipping Act does not contain the necessary provisions that can adequately curb sea pollution; for instance the fine of ten

³¹ Cap 389 of the Laws of Kenya

³² Sec. 2(1) of Cap 389

³³ Section 1 of the English *Merchant Shipping Act*, 1894.

³⁴ Section 168 of Act.

thousand shillings provided for in section 309 for the offence of polluting the sea with oil is meagre and can hardly deter the would be offenders. The foregoing enumerated inadequacy of the Act clearly shows there is urgent need for the review of the Merchant Shipping Act. This project paper advocates for the enactment of a Marine Pollution Act as Proposed by the Task Force on the Review of Maritime Laws of Kenya³⁵. The Proposed Marine Pollution Act must domesticate the marine pollution international conventions such as International Convention leading to intervention of the high seas in cases of oil pollution casualties, Convention on the prevention of pollution by dumping of wastes and other matter, 1996, International Convention for prevention of pollution from ships (1973) as amended by the protocol of 1978(MARPOL 73/78), International Convention on oil pollution preparedness, response and cooperation, 1990, International Convention on Civil Liability for Oil Pollution Damage 1992 and International Convention on the establishment of an International Fund for Compensation for Oil Pollution Damage, 1992.

(iii) Marine Insurance

An appreciation of the part played by marine insurance is essential to an understanding of the shipping industry and the law governing carriage of goods by sea. Carriage of goods by sea just like any other form of carriage involves risks: on the one hand, the ship may never arrive at the point of call, either due to a collision at sea, an act of pirate, or purely bad weather; on the other hand the cargo may be delayed, lost or damaged in transit. These are risks that would ordinarily if not taken care of, or drastically reduced, constitute an impediment to international trade. Just like ordinary business has traditionally tried to minimise risks

³⁵ Report of the Task Force on the Review of the Maritime Laws of Kenya p 20

relating to commercial activity by incorporating, for example, appropriate terms to business contracts allocating particular risks between the contracting parties,³⁶ maritime trade and especially in the area of carriage of goods by sea, has adopted similar methods of limiting and apportioning liability through contracts of affreightment and also through various international conventions regulating the terms under which goods are carried by sea.

It is however, to be appreciated that contract terms only decide which of the contracting parties is to bear what risk. Moreover, some risks cannot be transferred by contract terms, as some liability is made strict by statute, for example, in the Kenyan case the *Carriage of Goods by Sea Act* (Cap 390). A person to whom a risk is allocated, either by contracting terms, or by the general law, can guard against that risk by insuring it. Any contract of insurance, whether marine or not, is therefore, effectively a contract by which a person pays someone else, the insurer, to bear a risk to which he is exposed.

In Kenya, the law regulating marine insurance is to be found in the *Marine Insurance Act*.³⁷ Under section 3(1) of the Act marine insurance is defined as "... a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against the losses incident to marine adventure." As is evidently clear this definition fails to incorporate the payment of premium and hence is incomplete in that regard. The Act provides that every lawful marine adventure may be subject to a contract of marine insurance.³⁸ In particular there is a marine adventure where: "(a) any ship's insurable interest is exposed to maritime perils; (b) the earning or acquisition of any freight, passage money,

³⁶ For instance, a clause in a contract of sale excluding the seller's liability for damage caused by the goods places the risk of such loss onto the buyer and protects the seller.

³⁷ Cap 390 of the Laws of Kenya.

³⁸ Section 4(1) of the Act.

commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils; or (c) any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.”³⁹

The import of marine insurance is that most cases of damage to a ship or damage or loss of its cargo are usually taken over by insurers. It is therefore tenable to suggest at this point that in today’s international business practise where the shipper and carrier often insure the cargo and the ship, concern should not be on the apportioning of liability between the carrier and the shipper but rather on what happens thereafter. The focus should be more on the conditions that may render the contract of insurance void and therefore affect the rights of the shipper or carrier to recover.

(iv) Double Insurance and Contribution

Double insurance arises when the assured takes two or more policies on the same interest and adventure. This often arises in marine insurance because of the many risks involved in the carriage of goods by sea and the many exceptions and limitations of liability replete in the various conventions and bills of lading. To avoid being exposed to risks the seller may insure the cargo while the buyer may also insure the same so as to avoid the risk. If the two policies cause over-insurance the excess cannot be recovered, but the assured may sue on whichever policy he desires, and may recover the whole sum to which he is entitled by way of

³⁹ Section 4(2) Para (a) – (c) of the Act

indemnity.⁴⁰ The insurer who pays may claim a contribution from any other insurer liable for the same loss.

(v) Overlapping Insurance

The uncertainty of apportionment of liability between the carrier and the shipper that has been compounded by the multiplicity of Conventions governing the same has inevitably led to overlapping insurance. Cargo owners insure those risks of loss or bill of lading resolves itself primarily into that of where damage to their goods which they feel obliged to cover either because liability for such risks is not accepted by carriers or because the risks are uncertainly allocated between the parties concerned or, by not being specified apparently fall on the cargo owner⁴¹. The extent of the insurance cover is a matter of individual preference on the part of the cargo owner. If the shipper purchases the maximum cover-eg an all-risks policy-this will almost certainly be over-insured, since it will include liabilities for which the carrier would ordinarily be responsible⁴². Thus, the additional insurance by the cargo owner includes insurance against risks for which the carriers are already responsible. In this way, insurance policies overlap, since both carrier and cargo owner are insuring against the same risk.

Overlapping insurance is a boom for the insurance industry while at the same time it is an unnecessary expense to the maritime trade and the panacea lies in the enactment of a uniform convention to govern carriage of goods by sea.

⁴⁰ Section 32(1) of the Act.

⁴¹ UNCTAD, Bills of Lading Report (UN New York 1971) p 28

⁴² *ibid*

1.4.2. CONCEPT OF UNIFORMITY AND HARMONISATION

The idea of international uniformity has always been regarded as particularly important to maritime law. However, over the past decade or so, the uniformity of the law of international carriage of goods by sea has increasingly been undermined by the unilateral adoption by maritime jurisdictions of "hybrid carriage regimes" which depart from the established international uniform rules. This trend towards the adoption of divergent carriage regimes is highly problematic, not merely because of their detrimental effects on international uniformity and the coherence of maritime law and international transport law in general, but also because of more fundamental concerns about the validity of these regimes at international law, the practical conflict of laws problems that they will generate, and their distorting effects on multimodal transport.⁴³

The harmonisation and unification of transnational commercial law is said to result in increased stability and predictability of processes and results, avoidance of conflicts of laws and litigation, a reduction of legal risks and transaction costs,⁴⁴ increased opportunities for law reform (hopefully, enlightened comparative law reform that will produce rules that can be interpreted and applied in all jurisdictions), and even the enhancement of "aesthetic symmetry in the international legal order".⁴⁵ The only bitter note seems to emanate from the on-going, and increasingly sterile debate between the "mercatorists" and "anti-mercatorists"

⁴³ P Myburgh, "Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?" (2000) 31 VUWLR 361

⁴⁴ See for example AN Yiannopoulos "The Unification of Private Maritime Law by International Conventions" (1965) 30 Law and Contemporary Problems 370; MF Sturley "Uniformity in the Law Governing the Carriage of Goods by Sea" (1995) 26 JMLC 553, 556-559 ["Uniformity in the Law"]; MA Clarke "The Transport of Goods in Europe: Patterns and Problems of Uniform Law" [1999] LMCLQ 36, 39.

⁴⁵ *Vimar Seguros y Reaseguros, SA v M/V Sky Reefer* (1995) 515 US 528, 537; 115 S Ct 2322, 2328 ["Sky Reefer"].

over whether the harmonisation and unification efforts of the last century have resulted in a coherent body of denationalised law that may accurately be characterised as a new *lex mercatoria*.⁴⁶ It is in the context of this ranging debate that this study is carried out with the aim of exploring the gap between the rhetoric of international uniformity, and the reality of increasing domestic unilateralism and accelerated deharmonisation.

The importance of international uniformity in the law governing international transport by sea has been widely recognised, since by its nature sea carriage crosses international boundaries and involves different legal systems. Generally speaking, the need to harmonise the liability rules is now stronger than ever, and more States have their independent ideas and interests in formulating rules than 80 years ago when the Hague Rules were enacted. The international community is tackling the issue⁴⁷ and its success will largely depend on whether the commercial interests will be able to agree on a compromise that represents an appropriate balance in which the needs of every major interest are addressed. Otherwise the current trend towards de-harmonisation will continue and international carriage of goods by sea will increasingly be governed by divergent national regimes.

The growth of containerised transport and the technological developments improving the systems for transferring cargo between different modes have considerably affected modern

⁴⁶ A discussion of this debate falls beyond the scope of this paper: for an overview see G Baron "Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?" (1999) 15 Arb Int 115, 118-123. See also GD Delaume "Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria" (1989) 63 Tul LR 575; K Highet "The Enigma of the Lex Mercatoria" (1989) 63 Tul LR 613; CWO Stoecker "The Lex Mercatoria: To What Extent does it Exist?" (1990) 7 J Int Arb 101; G Teubner "Breaking Frames: The Global Interplay of Legal and Social Systems" (1997) 45 Am J Comp L 149.

⁴⁷ UNCITRAL is slowly gaining ground in an effort to standardize an increasingly tangled and costly patchwork of international cargo liability laws.

transport patterns and practices. It would have been hoped that this would bring greater harmonisation on the law relating to international carriage of goods by sea but on the contrary this has had hardly any legal impact, as there is still no international uniform regime in force that governs liability for loss, damage or delay arising from multi-modal transport. Therefore, the apportioning of liability in this area still largely depends on the contractual relationship between shipper and carrier. It is in view of the foregoing that this study examines the most important regimes governing international carriage of goods by sea as all of them are applicable in different jurisdictions and also evaluates the UNICTRAL Draft Instrument in respect of its scope of application, liability regime and provisions governing the conflict with other international conventions.

According to Goode⁴⁸ types of harmonisation fall broadly into four groups, thus:

- Legislation- the task of governments and legislatures
- Judicial parallelism and judicial co-operation- the task of judges
- Business practices, codes and model forms, including contractually incorporated uniform rules published by international business community and its national and international organisations
- International restatements- the task of scholars

The most effective method of harmonisation is through legislation and this has two aspects: First is the implementation of international instruments through the ratification of international conventions and the adoption wholly or in part, of model laws. Second is the enactment of legislation which is domestic in character but which may nevertheless exert a two-way influence on transnational commercial law, because it draws on the law of other

⁴⁸ R Goode 'Insularity or Leadership? The Role of United Kingdom in the Harmonisation of Commercial Law' (2001) 50 ICLQ 752.

countries and/or because it is itself used as model or source of ideas by foreign governments and legislatures, this is also sometimes referred to as legislative parallelism.⁴⁹

Two main drivers of the move toward unification and harmonisation of the law relating to the carriage of goods by sea are that time has long passed when domestic legislation that governed internal trade could provide sensible solutions to the problems of international commerce and the need to provide neutral legal regime for the many cases where parties do not select the applicable law in their contracts. There is also the economic benefit to be drawn by the removal of the need of local experts in foreign jurisdictions as this reduces on the cost of doing business.⁵⁰

The fascination with the idea of some great universal law that would transcend the boundaries of empire and state is of long standing. Some 2,000 years ago Cicero wrote: ‘There shall not be one law at Rome, another at Athens, one now, another hereafter, but one everlasting and unalterable law shall govern all nations for all time.’⁵¹ It is a tribute to the power of Cicero’s language that this passage was relied on by the founder of English commercial law, Lord Mansfield, in a case decided in 1759,⁵² to resolve a disputed question of Admiralty law.⁵³ This preoccupation has been self destructive in its mission as ably captured by Harold Gutteridge thus:

⁴⁹ Goode (n 50) 751.

⁵⁰ Ibid.

⁵¹ De Republica, 3.22.33 as quoted in Goode (n 50).

⁵² *Luke v. Lyde* (1759) 2 Burr 882.

⁵³ It is noteworthy, with the benefit of hindsight, that Cicero’s dream was never realised or realisable.

“It would seem that much of the blame for the failure to achieve more definite and permanent results must be attributed to an excess of zeal fostered by an exaggerated belief in the need for unification and over-confidence in its feasibility.”⁵⁴

This then brings us to the question now often posed by some pragmatics whether indeed harmonisation and unification of international commercial law is necessary or even achievable. This is because the time it takes and the resources involved in trying to achieve uniformity on a world scale even on a single area of law are enormous. First there are those scholars who argue that unless the differences in various national laws constitute a serious impediment to international trade there is no point in disturbing them.⁵⁵ To this group it is important to be selective and to keep any harmonisation project within manageable limits. It would therefore be important that before any steps toward harmonisation are taken that the world community satisfy itself that the differences in national laws create a serious impediment to cross-border trade. Second there are those who argue that in consideration of multifarious legal systems in the world it would be important to limit the scope of harmonisation to what is both necessary and acceptable to States with widely differing legal philosophies; and to involve relevant interest sectors not merely through consultation on a finished product but in the creation of the product itself.

Three reasons commonly cited for the dismal performance of attempts at unification are; at policy level, the local law superiority complex where the local laws are seen as better than the international instruments by the policy makers; at industry level, the lack of industry

⁵⁴ H.C. Gutteridge, *Comparative Law*, 2nd edn. (Cambridge University Press, 1949) 157.

⁵⁵ See for example Roy Goode, “Contract and Commercial Law: The Logic and Limits of Harmonisation,” vol 7.4 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (November 2003), <<http://www.ejcl.org/ejcl/74/art74-1.html>> Accessed 28th October 2005.

pressure on governments to embrace internationalism in trade; at the legislative level, the lack of Parliamentary time to debate and enact the necessary laws.⁵⁶

(i) Apportioning Liability

Apportioning liability under a contract of carriage of goods by sea should be, in a strict sense, the concern of insurance companies who insure the shippers and the carriers alike. This is because in today's business world the concept of insuring against risks is a trite issue. Some modern commentators have suggested that the peculiar features of maritime limitation of liability have outlived their usefulness, and that the development of insurance and of the modern limited-liability company has radically altered the conditions out of which the shipowners' privilege originally grew.⁵⁷

Among the principles cited in apportioning liability under a contract of carriage of goods by sea, that of particular or general average has been widely criticised. At the heart of the criticism on the one hand lies the principle of solidarity, which seeks a distribution of voluntary sacrifices between ships and cargo for all those involved in a maritime venture, and on the other hand, there is the system of risk cover added to the factor of security, which make shipping less fortuitous and liquidation speedier and more economic.⁵⁸ The latter has been gaining ground, as taking up of insurance policies to cover maritime related risks becomes vogue.

⁵⁶ Goode (n 50) 754.

⁵⁷ "Maritime Law" in *The New Encyclopaedia Britannica: Macropaedia* (William Benton Chicago 1984) 502.

⁵⁸ Ignacio Arroyo, "Maritime Law: An Approach to the Concept." (1984) 1 *Yearbook of Maritime Law* 36.

(ii) Marine Pollution

There is no doubt that in customary international law States are now required to take steps to control and regulate all sources of pollution or of harm to the marine environment that lie within their territory and that are subject to their jurisdiction and control, such as vessels, dumping and offshore minerals exploration and exploitation.⁵⁹ Since the famous *Trail Smelter* arbitration,⁶⁰ where the tribunal applied the principle *sic utere tuo ut alienum non laedas* and held that “no state has right to use or permit the use of its territory in such a manner as to cause injury ... in or to the territory of another.” Later cases and instruments support this conclusion. For example Principle 21 of the Declaration adopted by The 1972 United Nations Conference on the Human Environment (UNCHE) postulates States’ sovereign rights to exploit their resources, pursuant to their own environmental policies but subjects this to their responsibility “to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or to areas beyond the limits of national jurisdiction.” This position has influenced the drafting of such conventions as the London Dumping Convention,⁶¹ the Basel Convention on Transboundary Movement of Hazardous Wastes,⁶² the UN Convention on the Law of the Sea,⁶³ and others. Further the International Law Commission in its draft articles on State responsibility proposes that “Massive pollution

⁵⁹ Patricia Birnie, “protection of the Marine Environment: the Public International Law Approach” in *Liability for Damage to the Marine Environment*, Colin M. De la Rue, ed., (London: CMI, 1993) p 5.

⁶⁰ 33 AJIL (1939) p 182.

⁶¹ Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (London: 1972), 11 ILM 1294 (1972); in force 1975.

⁶² Convention on the Control of Transboundary Movements of hazardous Wastes and their Disposal (London: 1972), 11 ILM 1294 (1972); in force 1975.

⁶³ (Montego Bay: 1982); 21 ILM 1261 (1982).

of the ... seas” is an international crime.⁶⁴ The various international conventions aim at ensuring that pollution of the sea is entirely eradicated or considerably reduced.

One Convention that has rose to the challenge of protecting marine environments and which deserve special mention is the International Convention for the Prevention of Pollution of Ships, 1973. This Convention, which was subsequently modified by its 1978 Protocol, introduced a stricter regulation for the survey and certification of ships so as to prevent pollution at sea. It is read as one instrument and is usually referred to as MARPOL 73/78. This IMO Convention is the most important global treaty for the prevention of pollution from the operation of ships; it governs the design and equipment of ships; establishes system of certificates and inspections; requires states to provide reception facilities for the disposal of oily waste and chemicals. It covers all the technical aspects of pollution from ships, except the disposal of waste into the sea by dumping, and applies to ships of all types, although it does not apply to pollution arising out of the exploration and exploitation of sea-bed mineral resources.

Regulations covering the various sources of ship-generated pollution are contained in the six Annexes of the London Convention and are updated regularly. Annexes I and II, governing oil and chemicals are compulsory but annexes III, IV, V and VI on packaged materials, sewage, garbage and air pollution are optional.

The MARPOL has been criticised for specifically excluding jurisdiction over pollution caused by blow-out, structural failure of an oil installation, or collision with an installation. Its failure to deal with larger environment concerns such as blow-outs reduces its importance

⁶⁴ Article 19 of Pt. I of the ILC's Draft Articles on State Responsibility, II YBILC (1980) Vol. II (Pt. 2), pp 30-34.

and accordingly it has been suggested that MARPOL as a whole is only a useful precedent, but of limited relevance to the prevention of oil pollution from continental shelf operations.⁶⁵

The Kenya Merchant Shipping Act⁶⁶ also contains provisions that protect the marine environment within Kenya's jurisdiction from being polluted by ships. Just like many instruments in this area, it adopts the *polluter pays principle*, which is an economic rather than a legal principle, to deal with the menace.⁶⁷ Section 309 provides penalties for pollution of the sea by a ship while section 310 makes it an offence for ships to pollute the air.

1.5 HYPOTHESES OF THE STUDY

This study will proceed on the basis of the following hypothesis:

(i) The various regimes of rules in existence today for the regulation of the rights and liabilities arising out of a contract of carriage of goods by sea are reflective of the great divide between the ship owning and the cargo owning nations. Each of the instruments reveals significant compromises between the competing interests, which in some instances weaken them by introducing ambiguities and internal inconsistencies.⁶⁸

⁶⁵ Edgar Gold with Christopher Petrie, "Pollution from Offshore Activities: An Overview of the Operational, Legal and Environmental Aspects" in *Liability for Damage to the Marine Environment*, Colin M. De la Rue, ed., (London: CMI, 1993) p. 220.

⁶⁶ Cap 389 Laws of Kenya

⁶⁷ See section 309 of the Act and Birnie (n 61) 9

⁶⁸ Frederick 'Political Participation and Legal Reform in the International Maritime Rulemaking Process: From The Hague Rules to the Hamburg Rules' (1991) 22 JMLC pp 81-82; W Tetley 'The Hamburg Rules – A Commentary' [1979] LMCLQ 1, 5.

(ii) Lack of a universal code has hampered international trade and impacted negatively on the shipping industry. Stand-alone domestic laws cannot adequately cover this area of trade that has always had a universal nature since time immemorial.

1.6 RESEARCH METHODOLOGY

This research will be library based due to constraints of time and resources.

The study will rely mainly on secondary data that will be sourced mainly from the University of Nairobi Faculty of Law Library at Parklands campus, the British Council Library, UN Library based at UNEP Headquarters and private law firms' libraries.⁶⁹ Other material will be accessed through the Internet from various websites.

1.7 LIMITATION OF THE STUDY

Being a library based study there will be no use of questionnaires and neither will interviews be conducted. These two very important tools of research would have definitely enriched this paper. Financial constraints have made the writer not to travel to many countries of the world to undertake research and source for relevant materials.

⁶⁹ For example, Musyoka and Wambua Advocates.

1.8 LITERATURE REVIEW AND LITERATURE ANALYSIS

There is a lot of literature on the subject of carriage of goods by sea contained in textbooks, articles and journals in the advanced economies of the world. However there is little literature on the subject in the developing economies of the world. This state of affairs is unsatisfactory as it shows that the developing world has not been contributing in every aspect in the raging debate of apportionment of liabilities in a contract of carriage of goods by sea; yet they are parties to such contracts as cargo owning nations.

Stephane Dor has written a book titled, “*Bill of Lading Clauses and the International Conventions of Brussels 1924 (Hague Rules)*”.⁷⁰ The author gives the history of the apportionment of liabilities between the shipowners and the cargo owners. He points out that the Common Law was friendlier to the interests of the shipowners who were mostly British. He explains how concerted efforts by cargo owning nations exemplified by the United States of America which enacted its domestic law (The 1893 Harter Act) to cushion itself from the unfairness of the common law led to the adoption of the Hague Rules in 1924. The author accepts the fact that The Hague Rules were not comprehensive enough since they were enacted in a compromise document that was hurriedly drafted to solve urgent concerns of cargo owners.

⁷⁰ (2 nd edn Witherby & Co., Ltd. Northumberland Press London 1960).

David A Glass and Chris Cashmore in their book, “*Introduction to the Law of Carriage of Goods*”⁷¹ appreciates the fact that issue of apportionment of liabilities between the shipowner and the cargo owner is complex and controversial. In chapter four they say, “The law relating to the carriage of goods by sea is huge in content and complex in many of its provisions. A vast body of case law has accumulated on the subject, much of it decided on the specific terms of very complex contracts. In addition carriage by sea is more than adequately covered in both reference and elementary textbooks”. In chapter five the authors aptly point out some inadequacy of common law when they aver that, “Although the transfer of a bill of lading may transfer the ownership of the goods it did not, in the early 19th century, at common law transfer the contract so as to give the transferee the right to sue the shipper on the contract.”

J milnes Holden has written a book titled “*Payne’s Carriage of Goods by Sea*”.⁷² The author has clearly defined the meaning of a bill of lading and has succinctly given its various functions. In chapter two he points out that a charterer who is a shipper is disadvantaged because the bill of lading does not protect his interests. This is because the charterer cum shipper’s rights will be governed by the charter-party. In chapter four the author expounds in detail the liability of a shipowner under common law; apart from the excepted perils (acts of God, acts of King’s enemies etc) this liability was strict. It is this strict liability that made shipowners resort to the freedom of contract to contract out of almost all the liabilities.

⁷¹ (Sweet & Maxwell London 1989).

⁷²(Butterworth & Co. (Publishers) Ltd.London 1954).

Grant Gimore and Charles L Black in their book, “*The Law of Admiralty*”⁷³ have pointed out that the contract of carriage of goods by sea is concluded by two parties (carrier and the shipper) yet it affects other parties. Bankers who finance the shipper to buy the goods and indorsees who buy the goods while in high seas have a lot of interest in the carriage of goods by sea contract. In chapter three they state, “disputes involving bills of lading between a holder of a bill and the carrier; a person claiming rights of property in the goods apart from the bill. The dual nature of the bill, which is in one aspect merely a contract of carriage and in another the symbolic representative of the goods, has led to the odd results in the choice of law governing the several types of disputes”.

Sir Michael J Mustill and Jonathan C B Gilman have co-authored a book called, “*Arnould’s Law of Marine Insurance and Average*”.⁷⁴ They have explained in detail why marine insurance is necessary pointing out the many inherent dangers in the sea that not only endanger the ship but the cargo. To safeguard his interests by taking out insurance policy for his cargo the cargo owner must first and foremost know for sure the carrier’s liability. In chapter eleven the authors point out a very important aspect of transportation of goods in the containers that is a new phenomenon that was not anticipated by common law and The Hague Rules.

E R Hardy has written a book titled, “*Casebook on Carriage by Sea*”.⁷⁵ The author has enumerated several cases that seek to point out the main functions of a bill of lading. In

⁷³ (2 nd edn The Foundations Press, Inc. New York 1975).

⁷⁴ (Vol 1 16 th edn Stevens & Sons London 1981).

⁷⁵ (2 nd edn Butterworths 1971).

section two he quotes a case⁷⁶ that ruled out that, “ The bill of lading is very good evidence of the contract but is not the contract itself”; this shows there is need to have a comprehensive code that will reduce such cases thus saving the time of parties to a carriage of goods by sea contract. In section three the author lists several cases that interpret the provisions of UK COGSA 1924 which domesticated The Hague rules. In one such case⁷⁷ Lord Atkin and Lord Macmillan aptly capture the need of uniformity in the maritime industry.

Paul Myburgh in his article titled, ‘Uniformity or Unilateralism in the Law of Carriage of Goods by sea?’⁷⁸ Points out that there have been several attempts in the world to have a uniform code to regulate carriage of goods by sea. He says, “The historical tradition of maritime law provides a sound starting point for modern harmonisation – an internationalist perspective and a (largely) mutually intelligible conceptual vocabulary for maritime lawyers from common law and civilian jurisdictions that is perhaps not as evident in other areas of law. The historical tradition also fosters a strong expectation that uniformity in modern maritime law is both desirable and achievable. However, only a few basic principles of modern maritime law still derive directly from the old codes.”

In an article titled ‘The Hague-Visby Rules’⁷⁹ Anthony Diamond gives a brief history of incidents that led to the adoption of The Hague Rules and he correctly points out that

⁷⁶ *The Ardennes (Owner of cargo) v The Ardennes (Owners)* [1950] 2 All E.R. 517.

⁷⁷ *Stag Line Ltd v Foscolo Mango & Co. Ltd* [1931] All Rep.666

⁷⁸ <http://www2.vuw.ac.nz/law_groups/nzacl/4%20%23Myburgh.pdf> (accessed 25 Feb 2005).

⁷⁹(1978) L.M.C.L.Q, 225.

Britain was acting in its own interest when it accepted the adoption of an international convention. In this article Diamond observes that in 1970, hardly two years after the adoption of The Hague-Visby Rules (1968) most nations strongly felt that was a need to have a new comprehensive and universal code to regulate carriage of goods by sea.

A book titled "*Potter's Historical Introduction to English Law and its Institutions*" authored by A.K.R Kiralfy has given a very good account of the long history of maritime law. This history shows that no single nation's legislation can adequately address legal issues in a carriage of goods by sea contract and therefore the panacea lies in an enactment of universal compromise code.

An analysis of most of the literature shows that mostly all the authors have not offered solutions to effectively address the thorny issue of apportionment of liabilities in a contract of carriage by sea. Most authors have pointed out that municipal laws whose inadequacies fail to solve them govern most disputes in this area. It is therefore submitted that the obvious problematic question of conflict of laws can only be solved by the enactment of a compromise code to govern all carriage of goods by sea contracts.

1.9 CHAPTER BREAKDOWN

Chapter One will be an introduction to the study showing why the writer is of the view that it is necessary to have universal code that will determine the apportionment of liabilities

between the carrier and the shipper. This chapter enumerates the objectives of the study and reviews the literature on the carriage of goods by sea contracts.

Chapter Two traces the history of Maritime Law showing how this special branch of law grew since the medieval times. Emphasis is given to the unit of maritime law that deals with carrier's liability giving reasons that informed the enactment of several conventions to regulate carriage of goods by sea.

Chapter Three offers a critique of the current Codes/Rules namely The Hague Rules, Hague-Visby Rules and The Hamburg Code. Several provisions of these rules/codes are analysed pointing out the weaknesses and shortcomings that do not augur well for the maritime industry.

Chapter Four examines the merits and demerits of The UNICTRAL Draft that has made various proposals towards the enactment of a compromise code.

Chapter five concludes the study and contains recommendations made by the writer towards the enactment of a consensual universal code to regulate carriage of goods by sea.

CHAPTER TWO

2.0 HISTORICAL BACKGROUND OF THE CARRIAGE OF GOODS BY SEA REGIMES

2.1 INTRODUCTION

This chapter traces the historical development of maritime law from the time of ancient Greece to the present. It traces the long and winding historical path of carriage of goods by sea dispute resolution endeavours, which eventually culminated in the drafting of the Hamburg rules. The chapter reveals that the present efforts at the unification of rules relating to the regulation of the carriage of goods by sea are traceable to similar efforts in the past that date back to the ancient times. The chapter also reveals that no single maritime law code has hitherto received worldwide acceptance and that efforts towards a common regulatory regime are necessary despite the dismal history.

2.2 HISTORICAL DEVELOPMENT OF MARITIME LAW

It is noteworthy that unlike any other field of private international law, the regulation of liability arising out of a contract of carriage of goods by sea is the subject of a plethora of contemporaneous international codes or conventions. Depending on the jurisdiction of the parties to the contract of carriage, as often but not always signified by the bill of lading, and subject to the conflict of laws situation, the rights and liabilities of the parties arising from the contract of carriage of goods by sea are determined by a number of international codes

beginning with the Hague Rules of 1924¹. Other codes that are also applicable in determining the rights and liabilities of parties under the bill of lading are the Hague-Visby Rules² of 1968 and the Hamburg Code of 1978³.

In order to appreciate and contextualise this state of affairs a brief examination of the history of the regulation of international carriage of goods by sea is critical. The law governing the carriage of goods by sea in the world predates that governing inland transport. The reason for this is that before the development of railway transport, sea transport was the most secure and reliable form of transportation way ahead of the road transport, which was relatively slow, costly, and perilous⁴. The superior ease and even safety of water carriage over other modes of transportation made it the transportation of choice for the business community where great distances were involved. It is fitting to assume that as a result of this increased carriage, trade between nations grew and with it legal problems arose, which needed specialised adjudication. Maritime law, therefore, grew as a reaction to these problems. This fact is well captured by Gilmore⁵ who correctly asserts that:

“Maritime law was secreted in the interstices of business practice. It arose and exists to deal with problems that call for legal solution, arising out of the conduct of the sea transport industry”

¹ The long title of which is the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading Signed in Brussels, August 25, 1924.

² The term “Hague-Visby Rules 1968” refers to the Hague Rules 1924, as amended by the “Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading”, adopted at Brussels, February 23, 1968”, which Protocol entered into force June 23, 1977, and is often referred to as the “Visby Rules”. Since some countries have refused to ratify it is considered as a regime of regulation in itself and distinct from its predecessor, the Hague Rules (1924).

³ Adopted at the UN Conference on the Carriage of Goods By Sea held in Hamburg in March 31, 1978

⁴ See G Gilmore & CL Black *The Law of Admiralty* (2nd edn The Foundation Press Mineola New York 1975) 3.

⁵ *ibid* 11.

2.3 MEDIEVAL MARITIME CODIFICATIONS

In the ancient world of the Greeks and as well as in the subsequent Roman Empire there seems to have been no codified form of maritime law. However, there exists clear evidence that certain principles of maritime law were in existence, or even have their genesis during these periods. For example, the sea laws of the Island of Rhodes received such prominence that part of these laws was carried, many centuries later, into the legislation of Justinian⁶. Under the Roman law the contract of carriage did not achieve the status of a distinct contractual form. It was dealt with in the framework of contractual forms, which were known to them then, such as deposit and hire of goods⁷. The only area that received special treatment was the highly distinctive maritime law system of general average, which basically refers to the principle whereby if something is sacrificed to save a ship and her cargo from a peril, the saved property contributes to make good the loss to the owner of the sacrificed property.⁸

The upshot of the foregoing discussion is that, though we may not be able to conclude with finality the exact state of the law relating to carriage of goods by sea in the ancient world of Greek and Roman antiquity, as no formal sea-code has survived from this period, the glimpses of the maritime law of that era that is occasionally stumbled on by historians⁹, serve

⁶ AN Yiannopoulos, *Law of Carriage of Goods: The New Encyclopaedia Britannica Macropaedia*, vol. 3 1973 edn. See also (n 4) 6 where the author seems to suggest that the veracity of this assertion is questionable and that the Justinian's Digest is the principal support of the "Rhodian Law" legend. A detailed discussion of this intricate debate has been done by Robert D. Benedict, *The Historical Position of the Rhodian Law* (1909) 18 YALE L.J. 223.

⁷ *ibid* 960.

⁸ Gilmore & Black (n4) 4.

⁹ A passage cited in Gilmore & Black (n4) from the Digest 14.1.9; 2 Digest of Justinian 389 (Monro Trans. 1909) captures one of the ancient references to maritime law by a certain Antoninus, thus: "I am indeed lord of the world, but the Law is the lord of the sea. This matter must be decided by the maritime law of the Rhodians, provided that no law of ours is opposed to it"

to point out that maritime law is very old and that its genesis lie in the Mediterranean region where sea-borne commerce was highly developed.¹⁰

Succeeding the Rhodian Sea Law, were various codes, chief among them being the Laws of Oleron, a small island of La Rochelle¹¹, which were developed to govern the wine trade from Bordeaux, then an English province, in the 12th Century. Later, the Hanseatic League of more than sixty cities including Lübeck, Hamburg and Bremen dominated maritime trade and transportation, and some of the provisions of the Judgements of Oleron were incorporated into the “Ancient Maritime Code of Visby”.¹² The *Consulato del Mare* or Barcelona Ordinances, which were published in 1258, were another set of rules aimed at regulating sea-borne trade in the world¹³.

These early codes, in a general sense, were sufficient for the regulation of maritime trade in an era where shippers and consignees trusted each other and employed hardworking and competent crews who knew the local trading sea routes quite well. But as maritime trade increased and the distances involved quadrupled attendant to the increased technological breakthroughs in almost all spheres of commerce and more specifically in marine transport, their use and importance in the regulation of maritime trade became increasingly threatened and limited¹⁴. Consequently these Maritime Codes had to be modified from time to time to incorporate the changing commercial practices. As trade expanded and commercial practices developed, shipping changed to suit the times, and the maritime codes of the day marched in

¹⁰ Plucknett & TF Theodore *A Concise History of the Common Law* (London Butterworths 1956) 657.

¹¹ AKR Kiralfy *Potter's Historical Introduction to English Law and Its Institutions* (4th edn Sweet & Maxwell London 1962) 1.

¹² R Tallack *The Development of Maritime Commercial Practice, Nautical Briefing supplement to Seaways* (The Nautical Institute of England London 1995) pp 4-5.

¹³ Kiralfy (n 11) 185.

¹⁴ *A Brief History of International Commercial Law* p6.

<www.lexisnexis.com.au/aus/academic/text_updater/Mo/firstch01.pdf> (accessed 20 February 2005)

lock step with these commercial realities¹⁵. However, by the beginning of the 19th century these old traditions and customs were patently insufficient to govern relations between private parties as international maritime trade increased.¹⁶ Furthermore, these ancient and medieval codes had evolved through centuries of custom and practice and had become well entrenched before the concepts of “Sovereignty” over portions of the ocean and “Territorial Sea” had become fully developed.¹⁷

In ancient history "Sovereignty" and "Jurisdiction" were similar concepts. One could only exercise "the law" over the extent of the territory one could control. There was no reason to pass laws that could not be enforced. In many cases, another power controlled the adjacent land and exerted its jurisdiction by passing or proclaiming its own laws and enforcing them over the territory under its control. Thus jurisdiction had a physical boundary. Within its own jurisdiction, the ultimate power in the land, whether legitimate or illegitimate, democratic or autocratic, could exercise control over the society within its boundaries. No external power would question the right of government to govern within its own jurisdiction. This reluctance of States to interfere with the internal matters of another State exists even today.¹⁸

¹⁵ibid

¹⁶See E Gold *Marine Transport: The Evolution of International Marine Policy and Shipping Law* (Lexington: Lexington Books 1985) 84-87.

¹⁷ *Sovereignty* over the ocean refers to the unilateral claims by states to exclusive authority over adjacent submarine areas. Such claims include the right to control activities directed at seabed and mineral exploitation and also directed at other more traditional uses of the oceans like navigation, fishing, cable, pipelines, and scientific inquiry. For an in depth analysis of the concept see McDougal, MS and Burke, WT, (1987) *The Public Order of the Oceans: A Contemporary International Law of the Sea*, New Haven: Martinus Nijhoff, 693-717. *Territorial Sea* as a concept refers to the coastal competence of adjacent coastal states over a marginal belt of relatively narrow width and includes the exclusive control over all the resources therein and also control over access. See McDougal and Burke (above) Ch 3 p 174.

¹⁸ See J G Starke *Introduction to International Law* (Butterworths London 1989) 157 where the concept of territorial sovereignty is explained as referring to the essential element of statehood whereby within its territorial domain it has exclusive jurisdiction over persons and property to the exclusion of all other states.

Nevertheless, expansionist policies by various kingdoms and nation-states often resulted in trade embargoes, blockades or unilateral declarations of jurisdiction over the seas, which, for the most part, could not be sustained or enforced to the exclusion of other States. Sometimes these assertions were backed up by force, using warships to provide protection for one's own merchant ships, or exerting control over other States' merchant ships. Reconciliation of these competing claims was often achieved by reciprocity (the mutual recognition of each other's non-conflicting, claims, or some negotiated middle ground), which eventually became customary, but unwritten, international law.¹⁹ The costs involved in war diplomacy led to the increased recognition and acceptance of round table negotiations as the preferable choice of most conflicting parties. But the arrangements for reconciliation became more sophisticated with time and soon the concept of States resolving their competing claims of jurisdiction over the seas or exclusivity of shipping and trade by bi-lateral agreements was born²⁰. However, most of these agreements were either capable of being repudiated by one party or unenforceable for any sustained period and were not necessarily recognised by other States²¹.

These medieval maritime codifications, despite their shortcomings, are the basic substrata upon which modern maritime law is built and constitute a minimum threshold for any new maritime law. The ancient codes could hardly be said to state much living law for the concerns of modern shipping and yet, once in a while, when a more recent authority fails, a

¹⁹ *Maritime Law in the South Pacific -Towards Harmonisation* p6.

<<http://www.spc.org.nc/Maritime/documents/Thesis/chapter1.pdf>> (accessed 20 February 2005)

²⁰ *ibid* 6.

²¹ Gilmore & Black (n 4) 6.

court may look back to them, and especially to the Rules of Oleron, for analogical help or reference may be vouchsafed.²²

2.4 EARLY DEVELOPMENTS IN COMMON LAW

In English common law the relationship between the carrier and the cargo owners go back to a time when neither the railways nor canals existed. Compared to the Greeks' and the Romans' law of carriage of goods by sea, the English common law was more developed. This might have been as result of the common law borrowing from its predecessors, (sic, the Roman and Greek Law), or even from decisions of the judges developed quite independently²³. What is however clear, is that, while the Roman and English law regarding liability arising out the carriage of goods by sea had a common departure in the form and concept of liability under bailment or deposit, the English common law took the law of carriage of goods by sea a notch higher in terms of apportioning liabilities. Early English decisions imposed a duty on the carrier not only to carry goods but also to carry them safely and to deliver them intact to the owner or his agents.²⁴

Before discussing the complexities of the duties and liabilities arising under the common law in regard to the carriage of goods by sea, a brief examination of how maritime law was initially administered is essential. One distinct English innovation in the regulation of maritime trade was that, from the very beginning it espoused a tradition of treating admiralty

²² *ibid* 7.

²³ Kiralfy (n 11) 186 where he states that how far the Roman law influenced common law judges in maritime affairs is a matter of some dispute.

²⁴ Yiannopoulos (n 6) 960.

matters as a *sui generis* branch of the law, which had to be adjudicated using certain principles and procedures not available to other local legal issues. For the most part, the maritime part of the *law merchant*²⁵ was administered in the local courts of the seaport towns. These courts sat sometimes on the seashore, and heard summarily, from time to time the disputes which arose between merchants and sailors, or merchants and merchants, or between sailors and sailors, whether burgesses or foreigners.²⁶

The content of the applicable maritime law that these local courts applied can be traced to the Middle Ages, a period characterised by a number of codes of maritime laws, which we briefly mentioned above. These laws, which from the thirteenth century, had become accepted as the common maritime law of the North Sea and the Atlantic Ocean were later copied into the *Black Book of the Admiralty*²⁷ in England and became the cardinal body of law regulating the carriage of goods by sea there.²⁸ A quick glance over these codes as reflected in the *Black Book of the Admiralty*, reveals that, in the first instance, they contained a number of provisions as to the position and powers of the master of a ship, and his relations to the sailors. Secondly, they contain a number of rules relative to the rights and duties of the parties to the contract of carriage. Finally, there are a number of rules as to the incidence of the loss arising from the usual risks of maritime adventure.

The *Black Book of the Admiralty* was generally sufficient to enable juries of merchants and mariners to settle most of the problems of maritime law that arose in the seaport towns during

²⁵ This refers to the bodies of customs and law which grew up in the Middle Ages in Western Europe among merchants to regulate their relations with each other. It is noteworthy that there was not a single Law merchant all over Europe but variations between different states and towns, though there was a general similarity. For a detailed definition of the term *Law merchant* see D M Walker *The Oxford Companion to Law* (Clarendon Press Oxford 1980) 726.

²⁶ W Holdsworth *A History of English Law* (Sweet & Maxwell London 1945) 120.

²⁷ *Black Book* R S I 88-131.

²⁸ Holdsworth (n 26) 120.

this period. That they would require revision and extension as maritime trade increased is clear and indeed many additions were made²⁹. The court of Admiralty was the body that eventually took on the role of developing these laws in England.

The development of common law in England, which is a body of law that has been built on judicial decisions under the doctrine of *stare decisis*³⁰, must have influenced the path that maritime law took in England. The idea of seaport towns in England adjudicating maritime disputes was not tenable. This is because unlike in civil law jurisdictions where little regard had to judicial precedents, in England the idea of a unified law was more appealing and slowly taking root.³¹ This idea of uniformity of the law rode on the wings of predictability. There was a great need to make the maritime law predictable so as to encourage trade and the integration of courts though the common law system was making this possible. This development was however resisted vigorously by the local courts of the seaport towns but in the end they had to succumb.³²

The admiralty courts in England, were, therefore, born out of the need to make maritime disputes the province of one court with general jurisdiction over such matters rather than the several local courts that were in existence then³³. It was therefore in keeping with this desire that by the fifteenth and sixteenth centuries the High Court of Admiralty in England had constituted itself as the principal court responsible for the adjudication of maritime disputes.

²⁹ *ibid* 127.

³⁰ This refers to the binding force of precedent, whereby courts when deciding cases before them are bound not only to have regard to precedents but also to stand by the decided cases. See Walker (n25) where a detailed explanation is given.

³¹ *ibid* 1174.

³² Holdsworth (n26) 120.

³³ Walker (n25) 31.

However, the idea of uniformity of law as understood under the common law presented one major complication to the independence of the Admiralty. There were chronic disputes between the courts of common law and of Admiralty over jurisdiction and even over the law to apply. The court of Admiralty since inception had come to administer maritime law based upon the Laws of Oleron, which had a civil law background and therefore not quite compatible with the general common law of England. Secondly, the common law courts did not want to be totally precluded from the regulation of such a lucrative and important sector of British economy, which the expanding foreign trade was bringing to English Lawyers.³⁴ A duel was, therefore, inevitable and, as it is, the common law must have gotten the upper hand, for in 1691 the jurisdiction and powers vested in the Lord High Admiral of England³⁵ were transferred to the Lords Commissioners of the Admiralty with appeals lying to Judicial Committee of the Privy Council.

By the end of eighteenth century it was clear that the common law had come to absorb the law merchant but at the same time preserving its peculiarities so that although the Admiralty Court had been denied jurisdiction of trying maritime cases on the custom of merchants, it was allowed to preside over cases entered into on the high seas.³⁶ This had the effect of completely separating the law merchant and those branches of maritime law, which were administered in the common law courts from that part of maritime law that remained within the jurisdiction of the Admiralty³⁷. Thus the fact that the Admiral continued to exist, on however narrow ground, there was established in England a tribunal constituted at least in

³⁴ Holdsworth (n26) 128.

³⁵ The Lord high Admiral was in charge of the courts of the Admiralty, which adjudicated maritime disputes in England.

³⁶ This was done by the Parliament enacting a statute: (13 Rich. II, c. 5 (1389)) limiting the business of the Lord High Admiral to "a thing done upon the sea". For details see Gilmore & Black (n4) 9.

³⁷ Kiralfy (n 11) 207.

theory to deal with shipping matters. The common law courts, therefore, did not succeed in totally annihilating the Admiral's jurisdiction over some maritime matters. On the contrary, by statute, the jurisdiction of the court over maritime matters had been vastly enlarged.³⁸ It is now part of the High Court of Justice; falling under the Queen's Bench Division³⁹ and there being Admiralty and Commercial Registry.⁴⁰

The changing pattern of shipping, the resultant of the voyages of discovery and the eventual colonisation of the far flung newly discovered territories of the world, was instrumental to the Mediterranean commerce yielding in importance to trade on the ocean routes, and the eventual spread of the European maritime law system throughout the world.⁴¹ Of principal interest to us is the application of this maritime heritage to Kenya vide the *East African Order in Council, 1897*, which under section 31 made the *Colonial Courts of Admiralty Act, 1890* a source of law in Kenya.

2.5 COMMON LAW LIABILITY

In order to appreciate any discussion on the rights and liabilities under contracts made for the carriage of goods, it is essential to examine and understand the fundamental obligations that a ship owner impliedly undertakes at common law, apart from any express contract. The degree of responsibility that a ship owner impliedly undertakes at common law and the extent to which these are limited will be discussed in the following paragraphs.

³⁸ 3 & 4 Vict. C. 65 (1840); 13 & 14 Vict. C. (1850); and Vict. C. 10 (1861)

³⁹ Sir R Scott 'The Supreme Court Practise 1997 Vol. 1 Part 1'(Sweet & Maxwell London 1996) Order 75 r 1/2.

⁴⁰ *ibid* Order 75 r 1/3.

⁴¹ Gilmore & Black (n4) 10

2.5.1 PUBLIC CARRIERS

The liability of public carriers⁴² at common law is strict.⁴³ The public carrier is, albeit with certain exceptions, absolutely responsible for the safety of the goods while they remain in its possession as a carrier.⁴⁴ The rule and rationale for this position were first given their modern form in *Coggs v. Bernard*⁴⁵ thus:

“As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, etc.: which case of a master of a ship was adjudged, 26 Car. II, in the case of *Morse v. Slue*⁴⁶ The law charges this person, thus entrusted, to carry the goods against all events, but acts of God, and of the enemies of the King. For though ...”.

⁴² These are professional carriers who do not hold themselves out as ready to serve general public or persons who carry goods incidentally to their main business or for one consignor only.

⁴³ RP Colinvaux *British Shipping Laws: Carriage by Sea* (Stevens & Sons London 1963) p3; JM Holden *Payne's Carriage of Goods By Sea* (6 th edn Butterworth & Co. (Publishers) Ltd London 1954) 41.

⁴⁴ RP Colinvaux(n 43) p 3

⁴⁵(1703) 2 Ld.Raym. 909

⁴⁶1 Vent. 190, 238

The corollary to the above position is that, if the carrier is not to receive a reward for the carriage of goods, he is not liable for their loss or damage except for such as may happen through want of careful management on his part.⁴⁷

2.5.2 COMMON CARRIER

The liability of a common carrier, who has been defined as “one who is engaged in the trade of carrying goods as a regular business, and who holds himself out as ready to carry for any who may wish to employ him”, just like that of a public carrier, is strict. The rationale being that it is hard to distinguish between the two.⁴⁸

Suffice it to say that both public and common carriers at common law are under a duty to carry goods lawfully delivered to them for carriage, subject to a few limitations and that they are liable for any damage or for the loss of the goods that are in their possession as carriers, unless they can prove that the damage or loss is attributable to certain excepted causes. The excepted causes at common law include acts of God, acts of the enemies of the crown, fault of the shipper, inherent vices of the goods, fraud of the shipper, peril of the sea, and particularly jettison. A carrier will not, however, be exonerated from losses arising from any of these excepted causes when there is neglect on his part or intentional misconduct, the burden of proof resting on the plaintiff.⁴⁹

⁴⁷ *Coggs v Bernard* (1703) 2 Ld.Raym. 909.

⁴⁸ See per Gorell Barnes P. in *Baxter's Leather Co. v. royal Mail* [1908] 2 K.B. 626.

⁴⁹ AN Yiannopoulos, *Law of Carriage of Goods: The New Encyclopaedia Britannica Macropaedia*, vol. 3 1973 edn p 961.

2.5.3 LIMITATION OF LIABILITY

In the absence of contrary legislation or decisions, carriers at common law have been traditionally free to exclude or limit their liabilities by contract. The contract of carriage of goods by sea has been the main instrument that has often defined the relationship of the carrier, the shipper and any other interested party. The *bill of lading*, which is a document issued by the carrier evidencing the loading of goods, has over the years, come to acquire some other usages cardinal among them being, that of a contract of carriage⁵⁰ or evidence of a contract of carriage.⁵¹ A brief discussion of the development of the bill of lading is undertaken in the following paragraphs.

2.6 THE BILL OF LADING

2.6.1 THE HISTORY OF THE BILL OF LADING

The liability of the carrier for loss or damage of goods in its care, as outlined in the preceding paragraphs, was dependent on the shipper proving the receipt of goods for carriage in good order and either non-delivery or delivery in bad order, provided that the carrier could not show that one of the common law exceptions had caused the loss or damage.⁵² The shippers started to demand some prove, from the carriers, evidencing their delivery of goods to the carrier for shipment, as this would help them in case of any damage or loss of the same in

⁵⁰ Gilmore & Black (n4) 93.

⁵¹ UNCTAD *Bills of Lading Report* (United Nations New York 1971) 6.

⁵² *ibid* 12.

while in the hands of the carrier. In time, the bill of lading then, became the document that specified the goods at risk and the basis for any claim for non-delivery or damage.⁵³

At first the merchant did not need a custody-of-cargo receipt from the carrier for in most cases he travelled with the goods, but when the merchant ceased to accompany his goods, the necessity arose for a separate document which was at first a receipt and later embodied the terms on which the carrier would transport and deliver the goods, hence, the bill of lading as a contract of carriage.⁵⁴

The bill of lading was originally a straight or non-negotiated document. But in due course, with the spread of commerce and the increased complexities of trade and partly as a result for concern with speed, the need for transferring the property in the goods even before they arrived at the port of call increased thus making negotiability of bill of lading very important. Consequently, the practice arose of transferring the ownership of the goods by endorsing the bill of lading to the buyer. By the eighteenth century this practice had become well established and the negotiable bill of lading was in vogue.⁵⁵

It is noteworthy that the early bills of lading did not contain exception clauses as a general rule, but as a result of eighteenth century common law judicial decisions, shipowners began to amend their bills of lading not only to reiterate the old common law exceptions but also to exempt themselves from liability in respect of all perils of the sea and of navigation of whatever kind and nature. As a result, a paradoxical situation emerged in relation to the

⁵³AW Knauth *The American Law of the Ocean Bill of Lading*. (4th edn: American Maritime Cases Inc Baltimore 1964.) 376. See also Lord Bramwell comment in *Sewell v. Burdick* (1884) 10 App.Cas. 74 at p. 105, where he emphasizes that a bill of lading “is a receipt for the goods stating the terms on which they were delivered to and received by the ship, and therefore an excellent evidence of those terms, but is not a contract. That was made before the bill of lading was given.”

⁵⁴ UNCTAD (n 47) p 13 fn. 61.

⁵⁵ *ibid* 13.

rights and duties arising out of the contract of carriage and as expressed in the bill of lading. The rise of the principle of freedom of contract as expressed in the common law and also in the civil law created a situation whereby the carrier was enjoined on the one hand to strict liability by maritime law, but could, on the other hand, contract out almost all liability by appropriately framing the clauses in the bill of lading to favour him.⁵⁶

Consequently, a tussle between cargo interests and ship owning interests emerged and the world maritime trade became polarised around these two, diametrically opposed interests.⁵⁷ On the one hand were the shipowners as characterised by England, whose merchant marine had come to be dominant in the world of shipping upon the development and the eventual triumph of steamships against the earlier inefficient clipper ships.⁵⁸ On the other hand were the cargo-interests, as represented by United States and British Dominions, whose ocean trade depended heavily on the United Kingdom shipowners. The net effect of this stalemate was that the world maritime trade was not smooth. This was of course not beneficial to any one, not the least, Britain. Hence the need for a compromise was urgent.

From the foregoing paragraphs it is evident that bills of lading are as old as maritime trade, meaning they have been in use since time immemorial. Bills of lading were commonly employed in the thirteenth century. They may have accompanied bills of exchange, which were used as instruments of credit in order to economize in the shipment of specie⁵⁹. One old

⁵⁶ UNCTAD (n 47) 13.

⁵⁷ A N Yiannopoulos "The unification of private maritime law by international conventions" in *Law and Contemporary Problems* (Durham, N Carolina 1965) vol 30 p 370.

⁵⁸ Gilmore & Black (n4) 142.

⁵⁹ L Blancard, ed., *Documents Inédits sur le Commerce de Marseille au Moyen Age*, (Marseilles: Barlatier-Feissat, Pere et Fils, 1884), Vol. II. p. 109; reprinted in Roy C. Cave & Herbert H. Coulson, eds. *A Source Book for Medieval Economic History*, (Milwaukee: The Bruce Publishing Co., 1936; reprinted New York: Biblio & Tannen, 1965) 159-160.

bill of lading read as follows, “April twenty-fourth in the year of the Incarnation of the Lord
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We, Eustace Cazal and Peter Amiel, carriers, confess and acknowledge to you, Falcon of Acre and John Confortance of Acre, that we have had and received from you twelve full loads of brazil wood and nine of pepper and seventeen and a half of ginger for the purpose of taking them from Toulouse to Provence, to the fairs of Provence to be held in the coming May, at a price or charge of four pounds and fifteen solidi in Vienne currency for each of the said loads. And we confess we have had this from you in money, renouncing, etc. And we promise by this agreement to carry and look well after those said loads with our animals, without carts, and to return them to you at the beginning of those fairs and to wait upon you and do all the things which carriers are accustomed to do for merchants. Pledging all our goods, etc.; renouncing the protection of all laws, etc. Witnesses, etc.”⁶⁰

The above quoted bill of lading’s statement shows that bills of ladings have along history and therefore it can be concluded with certainty that the present day bill of lading has some features of the old bills of lading; its tradition and usage is embedded in the past.

2.6.2 THE DEFINITION OF A MODERN BILL OF LADING

A bill of lading may be defined as a document evidencing the loading of goods on a ship. The corresponding term used in other languages, however, denote different meanings. For example the corresponding words in French: *connaissement*, Dutch: *cognossement* and

⁶⁰ Ibid.

German: *konnossement* mean a receipt without also implying the simultaneous placing of goods on board a ship.⁶¹ The different terms accordingly reflect varying ideas as to when and where liability begins and end and the nature of the legal liability during successive stages of the transaction.

As indicated above, the Common Law bill of lading in German law is the *Konnossement*.⁶² Three persons are involved in the legal framework of the carriage of goods by sea under a bill of lading in Common Law jurisdictions – shipper, carrier and receiver. German law, by contrast, knows five and is more precise⁶³ – (1) the *Verfrachter* (carrier) and (2) the *Empfänger* (receiver), who cause no problems of definition; (3) the *Ablader* or person who delivers the goods to the carrier either directly or indirectly through some other party (the *Ablader* can be at the same time the receiver); (4) the *Befrachter* or person who contracts with the carrier – (the *Befrachter* can be the *Ablader* or the receiver); – and, in cases where the *Ablader* does not deliver the goods to the carrier directly, (5) the *Drittablader*, who delivers the goods to the carrier instead. There is no exact English equivalent.⁶⁴ This means that the term ‘bill of lading’ may mean different things to different people yet it is a vital document in international trade and therefore there is great need for its meaning to be adequately addressed in the proposed UNICTRAL Draft.

⁶¹ UNCTAD *Bills of Lading Report*, (United Nations, New York, 1971) 5.

⁶² R Ashton ‘A Comparative Analysis of the Legal Regulation of carriage of Goods by sea Under Bills of Lading in Germany’ <‘C:\Documents and Settings\user. USER-1NZE6NHCHG\My Documents\Bills of Lading\Bills of lading -Germany99\journal7a.htm>(accessed 30 march 2005).

⁶³ *ibid.*

⁶⁴ *ibid.*

2.6.3 FUNCTIONS OF A BILL OF LADING

A bill of lading has, in the eyes of the law, various aspects⁶⁵.

(1) It is a document of title⁶⁶, without which delivery of the goods cannot normally be obtained.

(2) It is a receipt for the goods shipped and contain certain admissions as to their quantity⁶⁷ and condition when put on board.

(3) It is very good evidence of the contract of affreightment though not the contract itself⁶⁸, for the contract is usually entered into before the bill of lading is signed.

2.7 CONCLUSION

This history clearly shows that there has been a stand-off between the ship-owning nations and the cargo owning nations. The interesting reality is that both the ship owners and the cargo owners need each other and therefore there is great need to come up with a legal regime that caters for their diverse interests. This observation does not mean that there has been no effort to enact a code that balances the different interests of the various players in the international maritime trade. The next chapter traces the development of the world maritime

⁶⁵ JM Holden *Paynes's Carriage of Goods by Sea* (6 th edn Butterworth & Co. (Publishers) Ltd.London 1954) 9

⁶⁶ See generally L D'arcy, C Murray & B Cleave *Schmitthoff's export Trade: The Law and Practise of International Trade* (2nd Ed London, Sweet & Maxwell 2000) where it is shown that banks use it as security to finance purchases

⁶⁷ *Smith & Co. v Bedouin Steam Navigation Co., Ltd* [1896] A.C.70, see also *Grant v Norway* (1851) 10 CB 665

⁶⁸ *The Ardennes (Owner of cargo) v The Ardennes* [1950] 2 All E.R.517

legal regimes and critiques the various rules that have been adopted as attempts at unifying maritime trade regulation since the adoption of The Hague Rules in 1924.

CHAPTER THREE

3.0 THE CURRENT LEGAL REGIMES COVERING CARRIAGE OF GOODS BY SEA CONTRACT

3.1 INTRODUCTION

The modern regulation of international carriage of goods by sea began with the adoption in Brussels in 1924 of the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*,¹ and which has now come to be commonly referred to as the Hague Rules. The Rules adopted at the Brussels convention are referred to as Hague Rules because they were originally drafted at The Hague in 1921.² This was the first major international effort at unifying and harmonizing the rules relating to the international carriage of goods by sea.

The Hague Rules were later found to be wanting in certain aspects as the world of maritime trade and commerce became increasingly complex and also partly because some of the terms used in the Rules were found to be vague and ambiguous.³ As a result in 1968, The Hague Rules were amended by the adoption of a protocol⁴ specifically targeted at removing the uncertainties. These new Rules came to be referred to as The Hague-Visby Rules. These latter Rules were again reviewed in 1978 at Hamburg, where another version commonly

¹ For the complete Convention see *U.N. Register of Trade Law Texts* 130.

² *Infra* (n 4) fn 22 at p 15.

³ See the constraints listed in the *Report of the Task Force on the Review of Maritime Laws of Kenya*, Republic of Kenya, May 2003, 26.

⁴ *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, Brussels, February 23, 1963, MN Singh *International Maritime Law* (Stevens & Sons London 1983) Vol. 4 at p 3045.

referred to as the ‘Hamburg Rules’ was adopted.⁵ This chapter will, therefore, discuss these three main efforts aimed at unifying the regime of maritime law in the world. Due to reasons that will become evident in the course of this discussion the US Harter Act⁶ will also be mentioned briefly.

3.2 THE HARTER ACT 1893

The Hague Rules were to a great extent modeled on the American Harter Act of 1893⁷. The Harter Act, as explained in the preceding chapter, was a balanced American response to the practice, prevailing then, whereby carriers could exonerate themselves, through appropriately constructed exclusionary clauses incorporated into the bills of lading from a great number of liabilities arising from the loss and damage of cargo or from loss occasioned by late delivery of goods.⁸ The Harter Act was a commendable effort, by the US Congress, at balancing the rights and interests of parties to a contract of carriage.

Prior to this congressional effort, a state of anarchy, almost literary, prevailed over the apportionment of liability under a contract of carriage of goods by sea, which, in almost all cases, came to be represented by the bill of lading.⁹ This state of affairs was the gradual climax of a process in which the character of the bill of lading was slowly transformed from

⁵ *United Nations Convention on the Carriage of Goods by Sea* adopted on 31 March 1978.

⁶ *infra* (n 7).

⁷ 27 Stat. 445 (1893) 46 U.S.C.A. §§ 190-196

⁸ UNCTAD *Report on Bills of Lading* (United Nations New York 1971) p13.

⁹ *ibid.*

being a “straight” or non- negotiable bill of lading, which did not contain any exceptions, into a negotiable bill of lading, which bore various exception clauses.¹⁰

This transformation rode on the wings of the *laissez faire* doctrine, which favored a policy of non-interference by the State in economic matters and which gained prominence during the late eighteenth and early nineteenth centuries.¹¹ In law, the doctrine of *laissez faire* found expression in two main doctrines, to wit, the doctrine of the freedom of contract¹² and the doctrine of privity of contract. Under the doctrine of freedom of contract contracting parties are allowed to freely negotiate the terms for inclusion in their contract.¹³ While this doctrine is attractive to proponents of free market economy, who consider freedom of individual choice as the best way to allocate scarce national resources to the various competing uses, it is, however, ignorant of the fact that we do not operate in a perfect market and, therefore, other forces intervene to distort resource allocation.

Partly through the inspiration of *laissez faire* notions and partly as a result of eighteenth century judicial decisions, the stronger parties were able to contract themselves out of positions that hitherto would have been held strictly liable under the common law or under a statute.¹⁴ The bills of lading were no exception and, therefore, the carriers who were the dominant of the parties begun to limit, contractually, the strict liability imposed upon them by maritime law.¹⁵ In the end carriers came to exempt themselves from practically every

¹⁰ *ibid*

¹¹ JL Hanson *A Textbook of Economics*. (7th edn ELBS London 1976) 12.

¹² *Benjamin's Sale of Goods*. (15 th edn Sweet & Maxwell London 1997)) 14.

¹³ GH Treitel *An Outline of the Law of Contract* (5 th edn Butterworths London 1995) pp 3-5.

¹⁴ *ibid*

¹⁵ UNCTAD(n 8) 13.

liability of ocean carriage.¹⁶ There was, however a backlash as shippers, bankers and underwriters also came together and lobbied for legislation that would remove the chaos and abuse produced by the unlimited freedom of contract.¹⁷ As a result the main ‘cargo’ nations enacted individual municipal legislations that would protect their interests and thus a state of flux in maritime law ensued.¹⁸

It was in response to this state of affairs that the US Congress enacted the Harter Act, which was meant to be a compromise legislation taking into account both the interests of those who “sought (by inclusion of exculpatory clauses in bills) full exoneration for the carrier from all claims based on his negligence, and those who (relying on the view of the federal courts) sought to hold carriers responsible for the consequences of every sort of negligence”.¹⁹ Although the Harter Act is not central to our discussion, it is necessary to refer to it as it serves as the substructure upon which the Hague Rules were premised. The following brief discussion of a few clauses contained in the Act illustrates the point.

Sections 1 and 2 of the Act made it unlawful for any bill of lading covering a shipment “from or between ports of the United States and foreign ports” to contain clauses relieving the vessel or her owners from liability “for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care, or proper delivery” of the cargo, or weakening or lessening the obligation to use diligence to “properly equip, man, provision and

¹⁶ *ibid* 13.

¹⁷ *ibid* 14.

¹⁸ G Gilmore and CL Black *The Law of Admiralty* (2 nd edn The Foundation Press, Inc Mineola, New York 1975) 142.

¹⁹ *ibid* 143.

outfit said vessel, and to make said vessel seaworthy...”²⁰ It would seem from a reading of these two sections that the cargo interests got some protection from the “negligence” clauses of the carriers.²¹

The Harter Act did also take care of some of the interests of the carriers too. Section 3 of the Act provided limitation of liability *...for errors of navigation, dangers of the sea and acts of God. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults and errors in navigation or in the management of said vessel...*²²

The net effect of these Harter provisions was that the problem of the carrier’s liability was settled by making a distinction between faults in the navigation and management of the vessel and faults in the care and custody of the cargo.²³ The rationale behind this compromise was premised on the notion that the safety of the vessel was enough inducement to the owner to bring it about that the people to whom the vessel was entrusted would use due diligence and care in her navigation and management.²⁴ This compromise was so well thought out that it has led some of the leading commentators in this area to assert that the Hague Rules embodied this compromise in its main outline.²⁵

²⁰ 27 Stat. 445 (1893), 46 U.S.C.A. §§ 190-191.

²¹ Gilmore & Black (n 18) 143.

²² 27 Stat. 445 (1893), 46 U.S.C.A. §§ 192.

²³ See UNCTAD (n 8) fn 35 at p 14

²⁴ See the analysis given in Gilmore & Black (n 18) 143

²⁵ *ibid*

3.3 THE HAGUE RULES

The Hague Rules²⁶ as stated above were adopted at Brussels on 25 August 1924 and were as a result of attempts not only to provide some uniformity in international carriage of goods by sea but also to regulate the increasingly vigorous attempts made by common carriers at that time to relieve themselves of their liabilities to cargo interests.²⁷ The regulation of the terms of the contract of carriage was also particularly important because the contract of carriage could bind consignees and indorsees of bills of lading not parties to the original negotiations.²⁸ This latter aspect of the bill of lading had made it become a “currency of trade”²⁹ and therefore, the clauses in bills of lading exempting carriers from liability were seriously threatening this very important attribute of the bill of lading. Kenya’s Carriage of Goods by Sea Act³⁰ (COGSA) is actually a replica of these Rules as it is based on the UK’s COGSA (1924)³¹ which was itself a domestication of The Hague Rules. There are also other countries that continue to rely on the Hague Rules in matters concerning responsibilities, liabilities, rights, and immunities attaching to carriers under bills of lading. The most prominent of these is the United States of America, which adhered to the Hague Rules by passing, in implementation in Congress, the Carriage of Goods by Sea Act³² in 1936.

²⁶C Cheng *Basic Documents on International Trade Law* (2 nd Rev edn Dordrecht: Martinus Nijhoff 1990) 283

²⁷The Task Force on Review of Maritime Laws of Kenya (Undated Doc) “*Report on the proposed Carriage of Goods by Sea Bill*” p 1

²⁸R Bradgate & N Savage *Commercial Law* (Butterworths London 1991) 494.

²⁹C M Schmitthoff *The Export Trade: The Law and Practice of International Trade* (5 th edn Stevens & Sons London 1969) 292.

³⁰Cap 390 Laws of Kenya.

³¹See Schedule attached to The Law Reports: Statutes, 14 & 13 George 5, 1924 (Council of Law Reporting London) Vol 1 Chap 22 p 76.

³²49 Stat. 1207 (1936), 46 U.S.C.A. §§ 1300-1315.

3.3.1 THE MAIN FEATURES OF THE HAGUE RULES

In order to appreciate the true effects of the Hague Rules in regulating the terms contained in ocean bills of lading, it is more appropriate to examine the various key provisions that have been incorporated in these rules and which impact on the rights and liabilities of the parties to contract of carriage of goods by sea.

It is important to note from the on set that The Hague Rules set out a one-sided liability regime in which only the carrier's liabilities are enumerated. The rationale advanced for this phenomenon is that the Hague Rules were designed to redress the inequality in bargaining power between the carriers and the shippers.³³ There was no better way of achieving this than tying down the stronger party with specific provisions that such a party could not contract out. The only instance that the Hague Rules allow for freedom of contracting out of its terms is when the effect is to increase the shipowner's liability, and never in the direction of diminishing them.³⁴ Most of the provisions inherent in these rules relating to rights, duties, immunities and liabilities seem to target the carriers more than the shippers.

The first duty of the carrier as set out under Article 3(1) is to exercise before and at the beginning of the voyage due diligence to:

- “(a) Make the ship seaworthy;
- (b) Properly man, equip, and supply the ship;
- (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation”

³³ Gilmore & Black (n 18) 146

³⁴ *ibid* p145. This position was reiterated in *Encyclopedia Britannica, Inc. v. S.S Hong Kong Producer*, 422 F.2d 7, 12, 1969 A.M.C. 1741 (2d Cir. 1969).

The upshot of these provisions is that the carrier has a duty to furnish a proper ship to carry the goods. However, there have been difficulties in interpreting this provision; for example, the meaning of the term “seaworthy” as used in Art. 1(a) is ambiguous and it can mean different things to different persons. This ambiguity meant that that the shipper’s remedies in the event of breach were made dependent on the seriousness of the breach.³⁵

Although less demanding than the absolute duty of seaworthiness at common law, which applied at all times and at all stages of the voyage, the due diligence obligation, as incorporated in the Hague Rules, has been held to be an overriding obligation on the carrier³⁶. The carrier has the obligation of proving that due diligence has been exercised. The exercise of due diligence is only material if lack of seaworthiness was the proximate cause of the loss or damage to the goods carried³⁷. Moreover, the due diligence obligation may not be delegated³⁸. Where the contractors act carefully and competently, however, the carrier has been held to have fulfilled its obligation of due diligence³⁹.

Article 3(2) imposes on the carrier the responsibility of taking care of the Cargo, thus:

“... the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried”

The import of the subsection is that even after the carrier has provided a seaworthy vessel in the broadest sense, the carrier may still be held liable for fault in any of the respects

³⁵ *Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha* [1962] 2 QB 26

³⁶ See *Maxine Footwear Co., Ltd. v. Canadian Government Merchant Marine* [1959] A.C. 589 at pp 602-603 (P.C.)

³⁷ *Eisenerz G.m.b.H. v. Federal Commerce & Navigation Co. (The Oak Hill)* [1974] S.C.R. 1225, [1975] 1 Lloyd's Rep. 105 (Supr. Ct. of Can.)

³⁸ *Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. (The Muncaster Castle)* [1961] A.C. 807, [1961] 1 Lloyd's Rep. 57, 1961 AMC 1357 (H.L.)

³⁹ *Union of India v. N.V. Reederij Amsterdam (The Amstelslot)* [1963] 2 Lloyd's Rep. 223 (H.L.)

enumerated there under, if the goods are consequently damaged.⁴⁰ There is, however, a problem posed by this subsection as to how it is to be read together with Article 4 in view of the fact that Article 4 provides for certain immunities in favour of the carrier, which may be logically inconsistent with the obligation to take care of the goods.

Under Article 3, Rule 8 carriers cannot contract out of the rules. The subsection provides that any attempt to relieve the carrier from any liability for loss or damage arising from negligence, fault, or failure in the duties and obligations arising from the provisions of the convention “shall be null and void and of no effect”. But given the many exceptions availed to the carrier under Article 4, section 3(8) is rendered superfluous.

Article 4(1) of the Hague Rules contains the rights and immunities of carrier, thus:

“Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article 3. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article.”

⁴⁰ Gilmore & Black (n 18) 155

Article 4(2) further provides a list of causes for which the carrier shall not be liable for loss or damage, which are commonly referred to as the “Excepted perils”⁴¹ and include among others:

- “(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the Carrier in the navigation or in the management of the ship.
- (b) Fire, unless caused by the actual fault or privity of the carrier.
- (c) Perils, dangers and accidents of the sea or other navigable waters.
- (d) Act of God.
- (e) Act of war.
- (f) Act of public enemies.
- (g) Arrest or restraint of princes, rulers or people, or seizure under legal process.
- (h) Quarantine restrictions.
- (i) Act or omission of the shipper or owner of the goods, his agent or representative.
- (j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.
- (k) Riots and civil commotions.
- (l) Saving or attempting to save life or property at sea.
- (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.
- (n) Insufficiency of packing.
- (o) Insufficiency or inadequacy of marks.
- (p) Latent defects not discoverable by due diligence.”⁴²

The Hague Rules set the maximum limits of shipowner’s liabilities under Article 4(5) at UK£100 per package or unit, or “the equivalent of that sum in other currency, unless the nature and value of those goods have been declared by the shipper before shipment and

⁴¹ Schmitthoff (n 29) 314

⁴² Art.4 (2) of The Hague Rules (Brussels 1924).

inserted in the bill of lading”⁴³. However, the same article allows parties to vary this maximum limit of liability upwards.

The modern form of container transport introduced an additional challenge to the interpretation of Article 4(5)(1). It is not clear whether the subsection had contemplated a situation where the goods would be transported in containers. This is because a container can be treated as a unit or even a package in which case the UK£100 would be too little an amount to cover for any loss.

In Kenya the Hague Rules are only applicable in cases where the bill of lading or similar document of title expressly states that the Rules are to have effect subject only to the provisions of the Rules,⁴⁴ which form the Schedule to the Kenyan COGSA.⁴⁵ The clauses carrying this particular provision are commonly referred to as the “clauses paramount”.

By application of Section 2 of The Kenyan COGSA the Rules extend to carriage of goods by sea in ships carrying the goods from a port in Kenya to another port whether in or outside Kenya.

3.3.2 CRITICISMS OF THE HAGUE RULES

The Hague Rules have been the subject of a number of criticisms. The Rules have been faulted for creating uncertainties arising from the vague and ambiguous wording of the

⁴³ Art 4(5) of The Hague Rules (Brussels 1924).

⁴⁴ Sec. 4 of COGSA (Cap 392 of the Laws of Kenya)

⁴⁵ *ibid*

Rules, for example, the Rules rely on such phrases as “due diligence”⁴⁶ and “seaworthiness”⁴⁷ to set the standard of care that the carrier must observe which can be subjectively interpreted.⁴⁸

Another source of concern is the inclusion in the Rules of such wide clauses of excepted perils to the extent that these have permitted the continued use, in bills of lading, of exoneration clauses of doubtful commercial sense or validity.⁴⁹ This is more true of Article 4, which details the rights and immunities of the carrier again with such loosely definable words like ‘unseaworthiness’ and ‘due diligence’.

The Hague Rules have been further blamed for allowing the continued insertion in the bills of lading of what has come to be known as the “Himalaya Clauses”⁵⁰. This name is derived from the decision of the English Court of Appeal in *Adler v. Dickson (The Himalaya)*⁵¹. The practice of inserting Himalaya clauses in bills of lading has even been given statutory basis in some jurisdictions in the form of legislations that permit a third party to take advantage of a term excluding or limiting liability in a contract for the carriage of goods by sea.⁵² The fact that The Hague Rules have not been able to deal with this practice, it would seem, is enough

⁴⁶ Art. 3(1)(a).

⁴⁷ Art. 3(1).

⁴⁸ For a detailed discussion of this aspect see WE Astle *Shipowners' Cargo Liabilities and Immunities* (H.F.&G. Witherby Ltd London 1967) 51.

⁴⁹ Task Force on the Review of Maritime Laws of Kenya (n 27) 28.

⁵⁰ A Himalaya clause is a clause in a bill of lading extending to specified third parties, such as servants or agents of the carrier and independent contractors, for example, stevedores and terminal operator, employed by the carrier, the benefit of the exemptions, limitations, defenses and immunities of the carrier under the bill of lading.

⁵¹ [1955] 1 Q.B. 158, [1954] 2 Lloyd's Rep. 267 (C.A.)

⁵² The *Contracts (Rights of Third Parties) Act 1999* of U.K. is a good example of a statute that embraces this practice under Cap. 31, Sections 1 and 6(5) to (7)

testimony that they have fallen short of their clearly stated mandate of unifying the rules relating to bills of lading.

The Hague Rules have another drawback in regard to the monetary units applicable in settling any liability. Article 9 of the Rules provides that the monetary units mentioned are to be gold value. But many of the countries that have incorporated the recommendations of the Convention into their municipal legislation have provided otherwise.⁵³ In Kenya, for instance, Sec. 4(5)(1) provides for £100 per package or unit limitation and no gold value. As can be seen this variation in currency is bound to bring a lot of problems in the settlement of claims and did actually lead shipowning and underwriting interests to come together to sort out the issue. It was as a result of this effort that members to the “Gold Clause” Sub-Committee of the British Maritime Law Association adopted the erstwhile solution of the “Gold Clause”, which changed the limitation of liability to £200 and the “Gold Clause” of Art. 9 of the Hague Rules ignored.

Other glaring shortcomings of the Hague Rules are;

- (i) they do not cover live animals and cargo placed on the deck.⁵⁴
- (ii) they are only applicable to contracts of carriage covered by a bill of lading.⁵⁵ This means that they do not cover goods under a charter party where the charterer is also the shipper.⁵⁶

⁵³ Astle (n 48) 14.

⁵⁴ See definition of ‘goods’ given in Art. 1 of The Rules.

⁵⁵ *Pyrene v. Scindia Navigation* (1954) 2 QB 402.

⁵⁶ Art 5 of The Hague Rules (Brussels 1924).

- (iii) they allow the carrier to except itself from liability caused by negligence of navigation and management the ship.⁵⁷
- (iv) they allow carriers to divert, and to tranship or land goods short or beyond the port of destination specified in the bill of lading at the expense of the cargo owner.⁵⁸
- (v) Shipper has to lodge a claim within one year.⁵⁹ This is a very short time that makes many shippers fail to lodge claims because of the time factor.
- (vi) they place the burden⁶⁰ of proving unseaworthiness on the shipper yet the shipper does not have access to the vessel and is not very conversant to its operation.

Probably the most important incentive for calling for the revision of the Hague Rules was the political shortcoming of the convention.⁶¹ The Developing States held a reluctant view towards adhering to these Rules because it was by means of ratifications of mostly European States that they were tied to the Convention by force of ratification by their former colonial masters.⁶² It is understandable, therefore, that the developing Countries were in favour of a revision of that system to which they could contribute on an equal footing not only as a matter of self-consciousness but, also, as a matter of suspicion that the existing system on carriage of goods by sea was detrimental to their economies.⁶³

⁵⁷ Art 4 r 2(a).

⁵⁸ UNCTAD, (n 8) 17.

⁵⁹ Art 3 r 6.

⁶⁰ J Milnes *Payne's Carriage of Goods by Sea* (6 th edn Butterworth & Co. (Publishers) Ltd. London 1954) 59.

⁶¹ R Herber 'The UN Convention on the Carriage of Goods by Sea, 1978, Hamburg Rules, future, Demands Developing Countries' (1984) 1 Yearbook Maritime Law 85.

⁶² *ibid.*

⁶³ *ibid.*

Due to the above weaknesses, the demand for a revision of the original Hague Rules was overwhelming and this led to the adoption of an additional protocol to The Hague Rules, to wit, Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading Signed in Brussels on the 25th August, 1924. This Protocol as read together with The Hague Rules make up what is now referred to as The Hague-Visby Rules.⁶⁴

3.4 THE HAGUE-VISBY RULES

The Hague-Visby Rules apply to contracts for the carriage of goods by sea that are evidenced by a bill of lading or a similar document of title, if:

1. The bill is issued in a Contracting State;
2. The carriage is from a port in a Contracting State; or
3. The contract contained or evidenced by the Bill of Lading provides that the Hague-Visby Rules are to apply.⁶⁵

These Rules, however, do not directly apply to charterparties.⁶⁶ This is because a bill of lading issued to a charterer directly by the shipowner is usually a receipt for the cargo and not evidence of the contract of affreightment and may not therefore give rise to a claim under the Hague-Visby Rules.⁶⁷

⁶⁴ Signed in Brussels on 23 February 1968 and which was the result of the CMI Conference of 1963 in Stockholm, Sweden, which formally adopted the Rules in the ancient town of Visby after the Conference.

⁶⁵ See Article 5 of the Hague-Visby Rules, 1968.

⁶⁶ See the provisions of Article 5 of the Hague Rules, which seem to be in complete contradiction of the provisions of Article 1(b) of the same Rules.

⁶⁷ D A Glass and C Cashmore *Introduction to the Law of Carriage of Goods* (Sweet & Maxwell London 1989) p 176 Para 5.31

3.4.1 SCOPE OF COVERAGE

The Hague-Visby Rules cover the period of time when the goods are loaded on the ship to the time they are discharged from the ship. This is what is commonly referred to as “tackle to tackle” rule and applies the Rules only while the cargo is on the ship or in the process of being loaded or unloaded.⁶⁸

3.4.2 CARRIERS COVERED

The Hague-Visby Rules do not change the definition of the carrier under the original Hague Rules and therefore, the carriers covered under these Rules are the owners or charterers who enter into a contract of carriage with a shipper.⁶⁹

3.4.3 CARRIER’S LIABILITY/DUTY OF CARE

The Hague-Visby Rules continue the practice whereby the common law absolute duty of seaworthiness is replaced by a duty to “exercise due diligence”⁷⁰ to make the vessel seaworthy. Under these Rules a carrier is only enjoined to the exercise of due diligence in the following areas:

- (i) To make the ship seaworthy;⁷¹
- (ii) Properly man, equip and supply ship;⁷²

⁶⁸ Art 1(e) for meaning see *Pirene v Sundia* (1954) 2 QB 402.

⁶⁹ See the definition of a ‘carrier’ under Article 1 (b) of The Hague Rules.

⁷⁰ Article 3(1) of the Hague-Visby Rules.

⁷¹ *ibid* subsection (a).

⁷² *ibid* Subsection (b).

(iii) Make the parts of the ship in which goods are carried, fit and safe for the receipt, carriage and preservation of the goods.⁷³ The carrier has also the duty to properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.⁷⁴

The carrier under the Hague-Visby Rules is also under obligation not to deviate unreasonably from the agreed or customary route⁷⁵ and also to proceed without undue delay.

3.4.4 CARRIERS' DEFENSES TO LIABILITY

Exemptions to a carrier's liability under the Hague-Visby Rules remain similar to those of the Hague Rules and therefore do not merit any additional mention. The only changes introduced by the Visby Rules to Article 4 of The Hague Rules mainly deal with the pecuniary limitation of the carrier's liability and the terminology regarding packaging. This was in recognition of the fact that the monetary values under the original Hague Rules had depreciated considerably since 1924 and that new transportation techniques had emerged, such as containerization and other modes of unitizing cargo.⁷⁶ The ceiling for the liability of a carrier or a ship for loss or damage is increased to 666.67 units of Special Drawing Rights (SDRs) per package, which is approximately US\$970.00 or 2 SDRs per kilogram, which is approximately US\$1.32 per pound, whichever is higher.⁷⁷

⁷³ *ibid* Subsection (c).

⁷⁴ Art. 3(2).

⁷⁵ Art. 4 (4) of the Rules.

⁷⁶ K Grönfors 'The Hague-Visby Rules' (1968) *Journal of Business Law* 201.

⁷⁷ See Article II (1) of the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (August 25, 1924, as amended by the Protocol of February 23, 1968), Brussels, December 21, 1979.

3.4.5 LOSS OF DEFENSES AND LIMITS OF LIABILITY

Under The Hague-Visby Rules a carrier's defenses and limits of liability resulting from a loss or damage of goods arising from an act or omission of the carrier or his/her servants are lost if the carrier or the carrier's servant's or agent's conduct shows intent to cause damage, or was reckless, knowing that such loss would probably result.⁷⁸ The Hague-Visby Rules therefore, maintain a fault-based system of liability, which is friendly to the carrier. The immunities of the carrier may also be lost if an unreasonable or unjustified deviation from the contract of carriage occurs.⁷⁹

3.4.6 NOTIFICATION OF LOSS OR DAMAGE

Notice of loss or damage must be given in writing to the carrier or his agent at the port of discharge before or at the time of delivery, or where the loss or damage is latent, within three days of delivery. A failure to give such notice is *prime facie* evidence of delivery in accordance with the bill of lading.⁸⁰

3.4.7 FILING OF LOSS OR DAMAGE SUITS/ARBITRATION

Under the Hague-Visby Rules an aggrieved party to a contract of carriage by sea must bring a civil suit within one year of the date of delivery of the goods, or the date when the goods should have been delivered.⁸¹

⁷⁸ Article 3(4) of the Visby Rules as read together with Article 4 of the Hague Rules

⁷⁹ Art. 4 (4) of the Hague-Visby Rules.

⁸⁰ Article 3(6)

⁸¹ *ibid.*

3.4.8 SHIPPER LOAD, COUNT AND WEIGHT

Shipper must furnish the carrier with such information as the nature of the goods, identification of the goods, the number of packages or pieces or other quantity, and the weight of the goods to carrier, which must be included in the bill of lading. The carrier must indicate in the bill of lading the apparent condition of the goods.⁸² The shipper is deemed to have guaranteed the accuracy of such information and must indemnify the carrier against all loss, damages and expenses resulting from inaccuracies in the particulars provided by shipper.⁸³ The carrier is, however, not required to state any marks, number, quantity, or weight that he/she has reasonable ground to suspect do not accurately represent the goods actually received, or which he/she has no reasonable means of checking.⁸⁴ Just like in the original Hague Rules, the Hague-Visby Rules continue the tradition of holding the bill of lading as *prima facie* evidence of the receipt by carrier of the goods as described therein.⁸⁵

3.4.9 DRAWBACKS OF THE HAGUE-VISBY RULES

One of the main drawbacks of the Hague-Visby Rules is that it continues to maintain a structure, which is based on the “concept of each contract on carriage of goods, by sea being represented in a bill of lading.”⁸⁶ Today, however, carriage of goods without negotiable documents is more and more frequent.⁸⁷

⁸² Article 3(3).

⁸³ Art.3 (5).

⁸⁴ Proviso to Article 3(3).

⁸⁵ Art. 3(4).

⁸⁶ Herber (n61) 86.

⁸⁷ *ibid.*

The fact that many countries did not adopt the Hague-Visby Rules is usually advanced as an example of one of its failures since this is a clear pointer to fact that it failed to live to its official title, namely the “unification of certain rules of law relating to bills of lading”.⁸⁸ The goal of achieving any degree of international uniformity or even a *lex maritime* (general maritime law) in this area is considerable way off and might not happen any time soon.⁸⁹ Of the countries for which data is available slightly over two-fifths, including the United States, are signatories to the Hague Rules or apply domestic legislation mirroring the Hague Rules; slightly under two-fifths, including New Zealand, Australia, the United Kingdom, Canada and South Africa are signatories to the Hague-Visby Rules (with or without the SDR Protocol, so package limitation levels can vary dramatically) or apply analogous domestic legislation; and roughly one-fifth, including Austria, Egypt, Hungary and the Czech Republic, are signatories to the Hamburg Rules⁹⁰. Some countries are not parties to any of the Conventions, but have enacted uniform rules in domestic legislation. Other countries have adopted, or are in the process of implementing hybrid domestic regimes.⁹¹

To further complicate the picture, the Comité Maritime International (CMI) and United Nations Commission on International Trade Law (UNCITRAL) have signaled preparatory work on a revision of the Hague-Visby Rules, which might modernize the regime and align it more closely with the Hamburg Rules⁹², but without the political baggage perceived to be

⁸⁸ P Myburgh ‘Uniformity Or Unilateralism In The Law Of Carriage Of Goods By Sea?’
<http://www2.vuw.ac.nz/law_groups/nzacl/4%20%23Myburgh.pdf> (accessed 20 June 2005).

⁸⁹ Ibid.

⁹⁰ United Nations Convention on The Carriage of Goods by Sea, 1978.

⁹¹ GF Chandler "A Survey of the Cargo by Sea Conventions as They Apply to Certain States"
<<http://www.mcgill.ca/maritimelaw/glossaries/package-kilo/>> (accessed 13 May 2005).

⁹² United Nations Convention on The Carriage of Goods by Sea, 1978.

associated with the latter instrument. After a century of effort in this area this is not exactly an encouraging report card for international uniformity.⁹³ This lack of uniformity is exacerbated by the divergent methods adopted by jurisdictions to give domestic effect to the uniform regimes.⁹⁴ Some countries have treated the Conventions as self-executing, or have implemented the relevant international text directly by giving it the force of law. Others have rewritten the international text in accordance with domestic legal drafting standards and usage. This is permissible in respect of the Hague and Hague-Visby Rules, because the Protocol of Signature provides that the "High Contracting Parties may give effect to the Convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under the Convention".⁹⁵ As mentioned above, other countries, which are not parties to any of the Conventions, have enacted domestic legislation wholly or partially modeled on the uniform rules.

The Hague-Visby Rules do not take cognizance of the modern form of transportation, which is heavily reliant on the concept of containerization since the rules regarding deck cargo⁹⁶ remain the same as those of The Hague Rules. The Rules do not also provide for arbitration and therefore, do not recognize one of the modern methods of dispute resolutions, which is highly suitable for the settlement of commercial disputes.

The Hague-Visby Rules have not succeeded in resolving the problems that often arise in determining the number of packages to use in the limitation calculation since individual

⁹³ M Evans "Uniform Law: A Bridge Too Far?" (1995) 3 Tul J Int. & Comp L 145.

⁹⁴ CWH Goldie 'Effect of the Hamburg Rules on Shipowners' Liability Insurance' (1993) 24 JMLC 111

⁹⁵ See also discussion on the same in Myburgh (n88).

⁹⁶ Art 1 (c) of The Hague-Visby Rules.

packages are almost always consolidated for shipment in a container or in a pallet or similar articles of transport. The issue is whether the number of individual packages should be used in the calculation or the number of containers. In these cases, r. 5(c) provides that the number of individual packages should be used when the individual packages are enumerated in the bill of lading. For example, if the bill of lading says the cargo is “one container said to contain 500 packages” then the number of packages to use in the limitation calculation would be 500. However, if the individual packages are not enumerated in the bill of lading then the number of containers should be used.⁹⁷

Given the fact that the Hague-Visby Rules were supposed to address the weaknesses that were inherent in the 1924 Hague Rules, and given the fact that the 1968 Visby Protocol did not bring in enough changes to rectify the same⁹⁸, and also given the fact that only a small number of countries has ratified the Convention, it is clear that the review of the Hague-Visby Rules was necessary. It was with this realization in mind that the United Nations, through its agency, UNCITRAL, set out to assist in coming up with a negotiated draft convention that would overcome the drawbacks of The Hague Rules and the Hague-Visby Rules. The outcome of this initiative was what came to be referred to as the Hamburg Rules.⁹⁹

⁹⁷ C J Giaschi *Canadian Law Of Carriage Of Goods By Sea: An Overview* (2004) (Vancouver B C) <http://www.admiraltylaw.com/papers/carriage_of_goods_outline.pdf> (accessed 21 June 2005).

⁹⁸ See A J Waldron ‘The Hamburg Rules-A Boondoggle for Lawyers?’ (1991) *Journal of Business Law* 305 who is of the opinion that the piecemeal reform of the Hague Rules through the amending Protocols did little to meet the demands of shippers and only succeeded in perpetuating the bias inherent in the original rules.

⁹⁹United Nations Convention on The Carriage of Goods by Sea, 1978.

3.5 THE HAMBURG RULES

As mentioned above the Hamburg Rules were the result of many years of negotiations between various cargo and shipping interests in the world under the auspices of UNCITRAL. The rules were from the beginning meant to address the mischief, mostly occasioned by both The Hague and Hague-Visby Rules in the allocation of rights and duties between the carrier and the shipper under the contract of carriage of goods by sea. The pressure for change, therefore, was particularly exerted by nations without a significant ship fleet who perceived the Rules as too carrier oriented.¹⁰⁰

The Hamburg Rules, just like their predecessors, were a “somewhat fraught eleventh hour compromise”¹⁰¹ reached by the representatives of over 70 nations. The result of this compromise must have been stillborn as it took fourteen years for it to receive international acceptance.¹⁰² Indeed one commentator writing in 1991 has vividly captured the outcome of these negotiations thus:

“The progeny of the conference was for long seen as an ugly child with few countries rushing to act as godparents, and by 1988, 10 years after its birth, only 12 nations had become parties to the convention”

In order to properly understand why the shipping countries reacted as they did towards the Hamburg Rules, it behoves us to examine the liability and duty system set up under these Rules.

¹⁰⁰ Waldron (n 98) 305.

¹⁰¹ *ibid* 305.

¹⁰² The Hamburg Rules came into force between those countries that are parties to it On 1 November 1992

The Hamburg Rules, unlike the Hague and Hague-Visby Rules, which only apply to carriage of goods by sea evidenced by a bill of lading or “any similar document of title”¹⁰³, are much less restrictive and apply to sea carriage under “any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another”¹⁰⁴. The rules do not make any mention of bills of lading or documents of title. This particular provision makes it unnecessary to undertake any “detailed forensic analysis of the document in the hands of the shipper or consignee”¹⁰⁵. It would seem, therefore, that the scope of the Hamburg Rules is wider than that of previous Conventions. As far as the applicability of the Rules is concerned the scope of the Hamburg Rules was also further widened. The Rules vide Article 2 are applied to all contracts of carriage by sea between two different States if either the port of loading or the port of discharge or the place where a bill of lading is issued is situated in a Contracting State.

The scope of the Hamburg Rules in terms of their geographical application is also widened in comparison to the one under the two Hague regimes. The old tackle-to-tackle limitation is replaced by port-to-port criteria that impose a duty of care on the carrier while in ‘charge’ of goods, from receipt to delivery.¹⁰⁶ These Rules still permit the freedom of contract as between parties to a charter as the Rules are expressly denied application to a charter party or a bill of lading issued directly to a charterer.¹⁰⁷

¹⁰³ Art. 1(b) of the Hague/Hague-Visby Rules.

¹⁰⁴ Art. 1(6) of the Hamburg Rules.

¹⁰⁵ Waldron, (n 90) 307.

¹⁰⁶ Art. 4(1).

¹⁰⁷ Art. 2(3).

A major advancement of the Hamburg Rules over the Hague/Hague-Visby Rules is that the Rules apply to marine container transport and anticipate the U.N. International Convention on Multimodal Transport of Goods, which was adopted in 1980.¹⁰⁸ However, under Article 10(1) the initial carrier is made responsible over the whole carriage of goods, even where part of the carriage is actually performed by subsequent carriers. This provision was predictably not welcomed by carriers, but its fairness is unobjectionable as it relieves the cargo-owner from the unenviable task of establishing the precise nature of the relationship between a series of carriers, and does not bar recovery against the culpable carrier by the contracting carrier to recoup any award made against him/her. Article 11, however, provides an exemption to this principle by providing that an on-carrier can be named in the bill of lading issued to the shipper and thereby be rendered the principal defendant in an action by a cargo owner arising out of the period of carriage actually undertaken by the identified carrier.¹ However, this is of dubious value to a carrier considering the fact that quite often the carrier will not possess such information in time to notify the shipper.

‘Deck cargo’ and ‘life animals’ have been included into the liability regime of the convention. These provisions under the two Hague regimes were done away with.²

The Hamburg Rules have also made an important advance over The Hague Rules and the Protocols attendant thereto, with regard to the application of the Rules in matters relating to inbound and outbound cargo traffic from contracting states. The Hamburg Rules are made

¹⁰⁸ Art. 9 & 10 of the Hamburg Rules. Both the terms ‘multimodal transport’ and ‘combined transport’ refer to the same intermodal carriage of containers.

¹ For a detailed discussion on this aspect see A J Waldron ‘The Hamburg Rules-A Boondoggle for Lawyers?’ 1991 JBL 307 and W Tetley ‘Commentary’ 1979 LMCLQ 1.

² Art. 1(5) and Art. 9.

mandatory for the two types of cargo.³ This ubiquity of operation is fitting for a truly international Convention.

The Hamburg Rules also provide further under Article 5(1) that the damage to be compensated includes damage because of delay. This is quite a significant victory for cargo interests as it makes the liability arising from loss occasioned by delay clear.

One obvious difference between the Hague and the Hamburg Rules is the replacement of the dual standard of care owed by the carrier for ensuring, (i) the seaworthiness of the carrying vessel, and (ii) that goods are loaded, handled, stowed, carried, kept, cared for, and discharged, properly and carefully as outlined under article 3 of the Hague Rules, by a single test of carrier liability.⁴ The import of this section on carriers' liability is that it bases it on negligence with the burden of proof lying upon the carrier to demonstrate that reasonable care was exercised.

The Hamburg Rules remove the erstwhile defense of fire available to the carrier by providing in Art. 5(4)(a)(i) that the carrier is liable "for loss or damage to the goods or delay in delivery caused by fire..." This is remarkably more cargo friendly than the Hague provision.⁶ These Rules continue to limit carrier's liability, as did the Hague Rules. This is perhaps the clearest example of the fact that the Convention did not represent a radical shift towards cargo-owning interests. Indeed it has been argued that the modest levels set for limitation are "suggestive of a shift in the other direction".⁷

³ Art. 2(1)

⁴ See Art. 5(1) of The Hamburg Rules.

⁶ Art. 4(2)(a)

⁷ A.J. Waldron (n 1) 313

The use of S.D.R's of the IMF as the basic unit of account is maintained by the Hamburg Rules. The new limits of liability are set at 835 units of accounts 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 higher.⁸ The Hamburg Rules relax the strict time limits laid down by the Hague Rules for notifying the carrier of goods which are delivered damaged.⁹ They also extend the time for filing a suit to two years.¹⁰ Article 22 of the Rules also incorporates arbitration, specifically, as one of the methods available to parties to a contract of carriage by sea to settle disputes. But if this is the choice of the parties express mention is needed in the bill of lading.

3.5.1 LIMITATIONS OF THE HAMBURG RULES

The Hamburg Rules have generated significant opposition among ship owning interests and little active enthusiasm as is shown by the sluggish rate at which states have become parties. As mentioned above it took 14 years for these Rules to receive the necessary numbers to be adopted.¹¹ This has led to calls for a revision of the Hague/Hague-Visby Rules or for the adoption of a new Convention altogether. Indeed, a recent study revealed that 52% of the world trade was being conducted using Hague/Hague-Visby Rules as opposed to 2% of the world's trade that was being conducted using Hamburg's Rules.¹²

⁸ Art. 8(1)(a).

⁹ Art. 19(5).

¹⁰ Art. 20(1).

¹¹ See P Griggs *Limitation of Liability for Maritime Claims* (LLP London 1998) 102.

¹² Report of the Task Force on the Review of Maritime laws of Kenya May 2003 p 8.

The Rules suffer from similar pitfalls that have been the mill around the neck of the Hague/Hague-Visby regime, namely they were a compromise document and therefore took great interest in balancing the interests of the parties without focusing on the legal balance.¹³ It is clear, given the above state of affairs, that the Hamburg Rules did not consolidate the world of maritime trade as would have been expected given the fact that unification, clarification and simplification of the various national laws regulating maritime trade has always been the target of lawyers and business people alike at the world stage who would like to be aware of their possible legal risks in their contracts of carriage of goods by sea.¹⁴ Instead the Rules have only succeeded in the further fracturing of an already fractured sector. Now we have three main legal regimes covering the carriage of goods by sea contracts and this does not augur well for predictability and uniformity in the world trade.

3.6 CONCLUSION

It is in recognition of the above fact that again the UN has initiated moves towards the adoption of a new Convention on the carriage of goods by sea. Towards this end a draft convention model has been drafted under the aegis of UNCITRAL and which is hoped will inspire a new and genuine quest for uniformity in this vital sector. The next chapter will examine this draft convention.

¹³ R Herber 'The UN Convention on the Carriage of Goods by Sea, 1978, Hamburg Rules, future, Demands Developing Countries' 1(1984) *Yearbook Maritime Law* 96.

¹⁴ K Hakan 'The Carrier's Liability Under international Maritime Convention – The Hague, Hague-visby and Hamburg Rules' <<http://www.mellenpress.com/mellenpress.cfm?bookid=6235&pc=9>>(accessed 21 June 2005).

CHAPTER FOUR

4.0 THE UNICTRAL DRAFT

4.1 BACKGROUND TO THE UNCITRAL DRAFT INSTRUMENT ON THE CARRIAGE OF GOODS BY SEA

In view of the continued disharmony in the regulation of international carriage of goods by sea, occasioned and evidenced by the lack of a single universally accepted code in this important area, there has been an increasingly loud calls for the drafting of a new code to replace the current existing regimes contained in the *Hague Rules*, *Hague-Visby Rules* and the *Hamburg Rules*.

Various reasons examined in the foregoing chapters led to the failure of the above three regimes for the regulation of international carriage of goods by sea and there are general lessons that may be drawn from the history of reform efforts in this area. First, the *Hague Rules* have not exactly lived up to their official title. The world is considerable way off from achieving any degree of international uniformity in this area. Slightly over two-fifths of the world states, including the United States and Kenya, are signatories to the *Hague Rules* or apply domestic legislation mirroring the *Hague Rules*; slightly under two-fifths, including New Zealand, Australia, the United Kingdom, Canada and South Africa are signatories to the *Hague-Visby Rules* (with or without the *SDR Protocol*, so package limitation levels can vary

dramatically) or apply analogous domestic legislation; and roughly one-fifth, including Austria, Egypt, Hungary and the Czech Republic, are signatories to the Hamburg Rules.¹

Some countries on the other hand are not parties to any of the Conventions, but have enacted uniform rules in domestic legislation. Other countries have adopted, or are in the process of implementing hybrid domestic regimes.² The fact that after a century of effort in attempting to come up with a universal code in this area, all there is to show for it are the above conventions, is not exactly an encouraging score card for international uniformity.³

This lack of uniformity is exacerbated by the divergent methods adopted by the various jurisdictions to give domestic effect to the uniform regimes.⁴ In some countries the Conventions have been treated as self-executing and in others as a schedule to the statute that sets forth the text of the treaty and gives it the force of law.⁵ Others have rewritten the international text in accordance with their domestic legal drafting standards and usage and the general introduction form that such municipal enactments take are usually in the following manner: “An Act of Parliament making such provision as is contained in this

¹ See G F Chandler “A Survey of the Cargo by Sea Conventions as They Apply to Certain States” <<http://www.admiraltylaw.com/tetley/table.htm>>; G Holliday “The Hague, Hague-Visby and Hamburg Rules – Updated List of Parties” [1998] IJSL 150. It is impossible to be overly precise about this as methods of domestic implementation vary, information on domestic implementation (as opposed to Convention status) cannot be obtained for some countries, and there are conflicting reports on some countries' Convention status.

² P Myburgh, “Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?” (2000) 31 VUWLR 361.

³ Particularly when one considers the relatively high degree of uniformity achieved in other areas of transnational commercial law: see generally M Evans “Uniform Law: A Bridge Too Far?” (1995) 3 Tul J Int & Comp L 145.

⁴ Not to mention divergent judicial interpretations of the Rules. See C W H Goldie ‘Effect of the Hamburg Rules on Shipowners' Liability Insurance’ (1993) 24 JMLC 111.

⁵ For example, in Kenya the *Carriage of Goods by Sea Act* adopts the Hague Rules as a schedule.

Act”.⁶ This is permissible in respect of the Hague and Hague-Visby Rules, because the Protocol of Signature provides that the “High Contracting Parties may give effect to the Convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under this convention”.⁷ As mentioned above, other countries that are not parties to any of the Conventions have enacted domestic legislation wholly or partially modelled on the uniform rules.

The second lesson that can be learned from the history of the three conventions is that the whole reform process has been highly fraught with politics. Every single reform proposal put forward in the past century has been controversial.⁸ Some were so controversial that they took a long time to enact as local instruments in some countries while in other countries they were never enacted or adopted as a source of law. For example, the Hague Rules were so controversial in the United States that it took Congress twelve years to enact the same. Indeed, it took more than thirty years for The Hague Rules to be generally accepted and to create a substantial degree of uniformity in the protection afforded to carriers and cargo interests.⁹ The Visby Amendments have given us a quarter century of controversy, with no end in sight. And the Hamburg Rules have been controversial practically since the United Nations first began work on the same over twenty years ago.¹⁰ As one commentator has put it:

⁶ F A Mann “Uniform Statutes in English Law” (1983) 99LQR 376.

⁷ Protocol of Signature to the *Hague Rules* 1924.

⁸ See Sturley *infra* (n 22) 120.

⁹ J Gauthier ‘Conflict of Laws: Old Rules and Modern Problems’ 1987-1988 4 Yearbook Maritime Law 5.

¹⁰ F Reynolds ‘The Rules Governing Carriage Of Sea - An Incipient Breakdown In Uniformity’.

“Looking back, it seems as though all conceivable arguments, all possible permutations of compromise between carrier and cargo interests have been chewed over in the minutest detail. Any new dish served up, regardless of its ingredients, seems destined to be rejected as unpalatable by some or other interest group at the table. While a consideration of the rich history of the past reform debates undoubtedly enhances parties' understanding of the current situation, it also seems to strait-jacket future negotiations and foreclose the possibility of fresh starts or major compromises in the broader interests of the international community.”¹¹

Commentators who favour the Hague or Hague-Visby Rules, have often pointed out that the reform process only really became politicised in the negotiations leading up to the Hamburg Rules and that UNCITRAL and the developing countries conspired to wage economic warfare on the industrialised nations, and that this was not quite cricket.¹² However, from the perspective of the developing countries, the CMI, its processes, and The Hague and Hague-Visby Rules would have seemed equally characterised by the politics of discrimination and exclusion.¹³ Even today, there is a perception of CMI as a cosy club of shipowning interests and their lawyers from Northern Hemisphere industrialised countries.¹⁴ As it can be seen

¹¹ P Myburgh ‘Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?’ (2000) 31 VUWLR 363.

¹² See for example B W Yancey ‘The Carriage of Goods: Hague, COGSA, Visby and Hamburg’ (1983) 57 Tul LR 1238, 1249-1250, 1257, 1259, describing the process as “belligerent” and “unattractive” and declaring: “If this is ‘economic warfare’, so be it.”

¹³ R Herber ‘The UN Convention on the Carriage of Goods by Sea, 1978, Hamburg Rules, Its Future, and the Demands of Developing Countries’ (1984) 1 Yearbook Maritime Law 86.

¹⁴ See A I Mendelsohn “The Public Interest and Private International Law” (1969) 10 Wm & Mry LR 783, 794-795: Given the general orientation of the national [maritime law] associations and the fact that carrier attorneys, having the greatest vested interests, are usually the most active participants, it is not surprising that the replies to the [CMI] questionnaires generally advocate continued protection of existing carrier benefits. The CMI itself seems to be aware of this perception, but has done little to remedy it: see W Tetley “Plan of Action for the CMI” <<http://www.admiraltylaw.com/tetley/usmlacog.htm>>[“Plan of Action”], citing the latest CMI report which recommended, amongst other things, the need to avoid “the perception that the CMI is a Shipowner's Organization”, to elect “younger people to the Executive Council”, and to reduce “the impression that the CMI is a European-dominated organization”. As Tetley sarcastically quips, the Executive Council

from the foregoing, both the Hague Conventions and Hamburg Rules involved highly political processes and compromises during the drafting process and this may not augur well for international trade and commerce.

A third lesson that can be learned from the history of the three Conventions is that, the reform process in the world arena usually proceeds at a snail's pace.¹⁵ This is partly due to the fact that international conventions only produce uniform rules that countries can adopt or reject.¹⁶ The process of ratification or adoption of the uniform rules is usually left to the sovereign will of the individual nations and tends to be slow; amending them can be an even more protracted affair. The controversial nature of the reforms and the intransigent attitude of interest groups have also played a part in delaying or blocking the process at different stages.¹⁷

The "time-tested procedure" of the CMI, which has always been strong on working groups, questionnaires, and sub-committees, but light on action, has not assisted.¹⁸ And the international maritime law community, by reason of conservatism or inertia, has failed to respond in a timely and effective fashion to the technological revolution that has occurred in

implemented its report by electing "a nominating committee, composed solely of very senior persons from northwestern Europe, whose whole careers have been spent working either for or with shipowners".

¹⁵ E Selvig 'The Hamburg Rules, the Hague Rules and Marine Insurance Practice' (1981) 12 J. Mar. L. & Comm 299, 300.

¹⁶ See A J Waldron 'The Hamburg Rules- A Boondoggle for Lawyers?' (1991) JBL 305, 306 giving an example of the slow process of ratification of the Hamburg Rules, thus: "The Progeny of the Conference was for long seen as an ugly child with few countries rushing to act as godparents, and by 1988, 10 years after its birth, only 12 nations had become parties to the Convention".

¹⁷ SR Mandelbaum "Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods under the Hague, COGSA, Visby and Hamburg Conventions" (1996) 23 Transp LJ 471, 485.

¹⁸ On the process see Mendelsohn (n 14) 794-796: "the procedure has not been successful". For example, the relatively modest and technical amendments brought about by the Visby Protocol were nine years in the making. (Rijeka Conference 1959 - adoption in 1968).

the transport industry, let alone the challenges of globalisation or shifts in political and economic influence from the traditional Northern Hemisphere maritime centres to, for example, the Asia-Pacific region.¹⁹

The fourth lesson is that although the Hague Rules and Hague-Visby Rules are often characterised as favouring carrier interests, and the Hamburg Rules as favouring cargo interests, this is only true at a very general level and is the result of stereotyping rather than information. Upon scrutiny, each of the instruments reveals significant compromises between the competing interests, which in some instances weaken them by introducing ambiguities and internal inconsistencies.²⁰ This is hardly surprising, given the amount of horse-trading that accompanied their drafting. This dilution of quality by compromise is one of the criticisms which has routinely been levelled at international unification efforts²¹ and arguably one of the main drawbacks of using international conventions and mandatory rules as a means to achieve uniformity. International conventions can produce significant and immediate uniformity where reform is uncontroversial. Where it proves to be an intractable issue, however, their mandatory status can raise the political stakes to the point where all that the parties can afford to agree on is a mediocre set of compromises that pleases nobody.

One other lesson that can be drawn from the process giving rise to the Hague Rules, Hague-Visby and Hamburg Rules, is that most of the debates subsequent to the adoption of the draft

¹⁹ P Myburgh 'Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?' (2000) 31 VUWLR 356.

²⁰ W Tetley 'The Hamburg Rules – A Commentary' [1979] LMCLQ 1, 5.

²¹ See A J Waldron 'The Hamburg Rules- A Boondoggle for Lawyers?' (1991) JBL 305, 306 where the Hamburg Rules' compromise is wryly described as a "somewhat fraught eleventh hour compromise".

conventions were rarely academic or penetrating enough so as to bring out all the important attributes and issues inherent in the drafts. It has indeed been alleged that the debate over the three conventions' potential economic consequences have been characterised by a "surfeit of legal discourse, voodoo economics and generalised speculation, and an almost total lack of detailed empirical economic research."²²

As a result of the above drawbacks and of the inherent weaknesses of the individual conventions to adequately address, in a balanced way, the needs of the various interest groups involved in the international carriage of goods by sea, the reform process in this field has practically failed and no uniformity, of any substantial degree, has been achieved. The world of maritime law regarding the rights, immunities and duties arising from the contract of carriage of goods by sea remains hopelessly fractious.²³ This state of affairs has resulted in some countries adopting, over the past decade or so, unilateral maritime jurisdictions of "hybrid carriage regimes" which depart from the established international uniform rules and thus threaten to undermine the very rationality of the uniformity of maritime law relating to the international carriage goods by sea.²⁴ These hybrid regimes are unilaterally promulgated and depart from the established international uniform rules by combining elements of the different uniform regimes or by serving up "a stunning new cocktail, both shaken and stirred, with significant new ingredients".²⁵

²² M F Sturley 'Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence' (1993) 24 JMLC 119.

²³ For example it is a truism that the three conventions, to wit, the Hague Rules, the Hague-Visby Rules, and the Hamburg Rules are all applicable dependent on each bill of lading's paramount clause.

²⁴ P Myburgh (n 19) 355.

²⁵ M A Clarke 'The Transport of Goods in Europe: Patterns and Problems of Uniform Law' [1999].

This trend, of course, constitutes a serious affront to the tested and tried advantages of uniformity of maritime law as it denigrates at the very fundamentals of uniformity of international carriage of goods by sea, which have been at the driving seat of the move towards the unification of the world maritime law. The obvious advantages of a unified system have been discussed in the introduction to this study²⁶ and well summed by R Goode thus:

“The time has long passed when domestic legislation shaped for internal trade can provide sensible solutions to the problems of international commerce. Even within the field of contract law, where parties to an international instrument should be, and usually are, given a wide measure of freedom to make their own rules and choose their own laws, there may be substantial advantages in uniform law within a restricted field. The parties are able to sing from the same hymn sheet, to become familiar with the text, to read it in their own language, and to reduce their dependency on local experts in every jurisdiction in which they transact business”²⁷

It is partly in response to the reality of increasing domestic unilateralism and accelerated deharmonisation or “disunification”²⁸ of international maritime law and partly due to the fact that few countries have ratified the Hamburg Convention, that UNCITRAL embarked on a process of drafting a new convention that would most closely reflect the wishes and desires of the various interests involved in a carriage of goods by sea contract and therefore achieve

LMCLQ 36, 38 as quoted in Myburgh (n19) 358.

²⁶ See Chapter One of this Study and also R Goode ‘Insularity or Leadership? The Role of United Kingdom in the Harmonisation of Commercial Law’ (2001) 50 ICLQ 752.

²⁷ R Goode ‘Insularity or Leadership? The Role of United Kingdom in the Harmonisation of Commercial Law’ (2001) 50 ICLQ 752.

²⁸ See for example comments in J Ramberg ‘The Proposed United States COGSA – An Outsider’s View’ <<http://forwarderlaw.com/feature/ramart.htm>>(accessed 20 June 2005).

greater uniformity of laws in this area.²⁹ The process culminated in the UNCITRAL Draft Convention on the Carriage of Goods [Whole or Partly] [by Sea].

4.2 THE PREPARATION OF THE UNCITRAL DRAFT

The UNCITRAL Draft Convention on the Carriage of Goods [Whole or partly] [by Sea] of September 2003³⁰ is the modern title to the UNCITRAL Preliminary Draft Instrument on the Carriage of Goods by Sea of April 2002³¹; it is also at other times referred to as the UNCITRAL Draft Instrument on the Carriage of Goods by Sea.³² This study will adopt the latter title because it represents a better picture of the state of the draft, which has not been ratified but nevertheless seems to inspire some international uniformity in maritime law relating to carriage of goods by sea, and also represents the future of the law in this highly fractious area.

The initial stages of the drafting of the UNCITRAL Draft Instrument on the Carriage of Goods by Sea (hereinafter referred to as the (“UNICTRAL Draft ”)), were presaged by a proposal at the twenty-ninth session of UNCITRAL held in 1996 to include in its work programme a review of the current practices and laws in the area of the international carriage

²⁹ This process was initiated at UNCITRAL’s 29th session, in 1996. See, *Official Record of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)* For a more detailed history of the process see UNCITRAL, *Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea: Report of the Secretary General*, A/CN.9/WG.II/WP.21.

³⁰ Drafted under the auspices of CMI/UNCITRAL.

³¹ Drafted under by the UNCITRAL Working Group III (Transport Law) New York, April 2002.

³² See (2002) CMI Yearbook, 176.

of goods by sea, with a view to establishing the need for uniform rules where no such rules existed and with a view to achieving greater uniformity of laws.³³ This proposal was based on the realisation that the then existing national laws and international conventions had left significant gaps regarding certain issues relating to the whole concept of maritime trade and therefore had led to a discordant regime of maritime law that impeded the free flow of goods and led to the increased cost of transactions.³⁴ The use of new technologies in the carriage of goods transactions not comprehended by the earlier conventions was also cited as a reason for the need to review the then existing regime of maritime law.³⁵

This new attempt at reforming the maritime law regime was, however, given the poor showing of the past initiatives when it came to the implementation stage, to be done against a background of justified scepticism. Indeed one of the reservations expressed to the Commission at the session was that the continued coexistence of different treaties governing liability in the carriage of goods by sea and the slow process of adherence to the UN Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules), made it unlikely that adding a new treaty to the existing ones would lead to greater harmony of laws. It was actually felt that this might lead to disharmony of laws increasing rather than decreasing.³⁶ The session, however, was of the view that that since the new initiative was not targeting to review the liability regime under the contract of carriage of goods by sea as it then stood, but rather was calculated at providing modern solutions to the issues that either were not

³³ UNCITRAL, *Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea: Report of the Secretary General*, A/CN.9/WG.II/WP.21 at p. 3 Para.1.

³⁴ *ibid.* Para 2.

³⁵ *ibid.* Para. 2.

³⁶ UNCITRAL, *Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea: Report of the Secretary General*, A/CN.9/WG.II/WP.21 at p. 3 Para. 4.

adequately dealt with or were not dealt with at all in the earlier unifying instruments, it posed no threat to the adherence to the Hamburg Rules.³⁷

As the review initiative gathered momentum, so did its mandate increase. The cautious approach adopted earlier as to the mandate of the review was done away with and as a quick glance at the issues “to be dealt with in the future instrument”³⁸ which were placed before the Commission at its thirty-fourth session, in 2001, reveals, the mandate had enlarged to equal a full review of the whole regime of international carriage of goods. In essence the outcome of the initiative was to be another convention. The fact that this was to be the case was finally acknowledged in the same report when it suggested to the Commission that work should commence towards an international instrument in the nature of an international treaty that would modernize the law of carriage. The Commission finally decided that the scope of the work be enlarged as suggested in the report so that the issues of liability that had been rejected earlier were included.³⁹

The most outstanding innovation of the mandate given to the “Working Group on Transport Law”, which was itself established by the Commission at the same thirty-fourth session, was that its scope of work was enlarged to include exploring the desirability and feasibility of dealing with door-to-door transport operations. This meant that the Working Group could propose a solution to the problem posed by containerisation of cargo and that posed by

³⁷ *ibid.* Para 5.

³⁸ *ibid.* Para 20. The issues that were to be dealt with and listed under this paragraph were: the scope and application of the instrument, period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper, transport documents, freight, delivery to the consignee, right of control of parties interested in the cargo during carriage, transfer of rights in goods, the party that had the right to bring an action against the carrier and the time bar for actions against the carrier.

³⁹ UNCITRAL *Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea: Report of the Secretary General*, A/CN.9/WG.II/WP.21 at p. 3 [23].

Multimodal transportation. It is no wonder then, that the initial draft by the CMI and which formed the Annex attached to the Report of the Secretary General to UNCITRAL, was entitled *Draft Instrument on Transport Law*.⁴⁰

The Working Group after many sessions presented a detailed report on the Draft Instrument with proposals for change to the Commission, in December 2003.⁴¹ The UNCITRAL Secretariat then prepared a revised draft based on the deliberations and conclusions of the Working Group.⁴² This was considered by the Working Group at its thirteenth session in May 2004, and its report was presented to the Commission in June 2004.⁴³ This latest draft instrument is what is now referred to as the UNCITRAL Draft Instrument on the Carriage of Goods [wholly or partly] [by Sea]. This however should not be considered final as the work on it is continuing.⁴⁴

4.3 A CRITIQUE OF THE MAIN FEATURES OF THE UNCITRAL DRAFT

If we were to give credit where it is due, then it should be admitted that the UNCITRAL Draft contains significant provisions that countenance the modern state of international carriage of goods. One such key innovation is the clear definitions of terms and words given

⁴⁰ *ibid* p 9.

⁴¹ A/CN.9/WG.III/WP.32, 16 December 2003 as cited in R Goode *Commercial Law* (3rd edn LexisNexis London 2004) 1069.

⁴² A/CN.9/WG.III/WP.36, 23 March 2004. As cited in R Goode *Commercial Law* (3rd edn LexisNexis London 2004) 1069.

⁴³ A/CN.9/552, 24 May 2004.

⁴⁴ See R Goode *Commercial Law* (3rd edn Lexis Nexis London 2004) p 1069.

in article 1 and Article 38. A carrier's meaning has been extended to include an agent or performing party who enters into a contract of carriage with the shipper. This removes the uncertainty, which exists under the current legal regimes when the shipper deals with brokers/agents. Goods' definition includes all types of merchandise and articles of any kind; this solves the problem of dealing with live animals and deck cargo. Terms like "reasonable" and "good faith" have been clearly and precisely defined thus avoiding the ambiguity in the present codes.

Art 2(3) provides," This instrument does not apply to Charter Parties, [contracts of affreightment, volume contracts or similar agreements." This provision is not good because it disadvantages charterers who are also shippers. Article 3 of this Draft has recognized that electronic communication has become part and parcel of international trade and therefore has provided for its communication so long as the carrier and the shipper have given their consent. However, concerns about how secure such communications are has been raised and noted by the UNCTAD Secretariat.⁴⁵

Unlike in the existing codes where the carrier's responsibility begins when goods are put on board or are at the port, under Article 7 this responsibility has been extended to cover the time when the carrier or a performing party has received the goods until the time when the goods are delivered.

Another positive move is that the Draft recognises the fact that the modern carriage of goods by sea is increasingly a warehouse-to-warehouse undertaking; Article 10 provides,"The carrier shall, subject to this instrument and in accordance with the terms of the contract of

⁴⁵ Draft Instrument On Transport Law: Comments Submitted by the UNCTAD Secretariat, contained in University of Nairobi *GPR 622: International Maritime Law: Reading Materials for Carriage of Goods by Sea* (Unpublished) Vol 2.

carriage, [properly and carefully] carry the goods to the place of destination and deliver them to the consignee”. This is in marked departure from the tackle-to-tackle or even port-to-port concept as encapsulated in The Hague, Hague-Visby and Hamburg Rules.

Under Article 2 (1) bis the scope of application of these Draft rules has been extended to cover other legs of transport of the goods; this recognises the fact that in many instances goods that are subject to carriage of goods by sea contract are also subject to multi-modal transport. Other means of transport such as railway and road which usually precedes the sea leg are recognised under Article 8:

“1. Where a claim or dispute arises out of loss of or damage to goods or delay occurring solely during either of the following periods:

(a) from the time of receipt of the goods by the carrier or a performing party to the time of their loading on to the vessel;

(b) from the time of their discharge from the vessel to the time of their delivery to the consignee;

and, at the time of such loss, damage or delay, there are provisions of an international convention [or national law] that

(i) according to their terms apply to all or any of the carrier's activities under the contract of carriage during that period, [irrespective whether the issuance of any particular document is needed in order to make such international convention applicable], and

(ii) make specific provisions for carrier's liability, limitation of liability, or time for suit, and

(iii) cannot be departed from by private contract either at all or to the detriment of the shipper,

such provisions, to the extent that they are mandatory as indicated in (iii) above, prevail over the provisions of this instrument.]”

The UNCITRAL Draft further under Article 9 provides, “the parties may expressly agree in the contract of carriage that in respect of a specified part or parts of the transport of the goods the carrier, acting as agent, will arrange carriage by another carrier or carriers”.⁴⁶

Another innovation introduced by the UNCITRAL Draft is that of including freight into the ambit of maritime law. This is an aspect that has been totally ignored by all the conventions relating to carriage of goods by sea. Art. 42 generally deals with this aspect and provides under subsection 42(1) that “Freight is earned upon delivery of the goods to the consignee at the time and location mentioned in article 7(3), [and is payable when it is earned,] unless the parties have agreed that the freight is earned, wholly or partly, at an earlier point in time.” However, it has been observed that this article interferes with the freedom of contract in so far as it prescribes when the freight is earned as well as when it becomes due.⁴⁷

The UNCITRAL Draft also expressly deals with delay. This helps in allaying the impression held, though inaccurately, amongst non-lawyers that the law does not hold ocean carriers liable for delay. Perhaps this opinion is based upon the near-universal use of clauses in bills of lading that exclude liability for delay. But these clauses are usually only of utility value because under many legal systems there is a potential liability for delay.⁴⁸

⁴⁶ See Art. 9(1) of the UNICTRAL Draft Instrument.

⁴⁷ See comments accompanying both equivalents of the freight provisions in the Preliminary and Draft Instrument, Articles 9 and 42 respectively.

⁴⁸ P Jones ‘*Liability of Carriers for Delay*’ <<http://www.forwarderlaw.com/scripts/delay.htm>> (accessed 20 June 2005).

Article 15 of the UNICTRAL Draft has ensured that a performing party or an agent is subject to the responsibilities imposed on the carrier. This means that the shipper can claim damages in case of loss or damage from such a party; this is not possible under the existing legal regimes. Another laudable provision is Article 17 where it is provided that the compensation payable by the carrier for loss or damage to the goods shall be calculated by reference to the market value of such goods. This has replaced the unfair computation under the current codes where the point of reference is weight or package. Article 18 has also erased the uncertainty and confusion surrounding containerised cargo; individual packages stuffed in the container will be regarded as the shipping units.

Article 20 has not solved the problem of the short period within which the shipper or consignee is supposed to give notice to the carrier about a loss or damage. Definitely three working days are not adequate bearing in mind that some damages are not easily detected; for example complicated machines whose damage may only be discovered by an expert. Articles 26, 28, and 29 have balanced the interests of both the carrier and the shipper by obliging both of them to supply each other with necessary information in order to avoid loss/damage. Article 39 of this Draft has provided that the transport documents (eg bill of lading) issued by the carrier is conclusive evidence that the carrier has received the goods; this will reduce many court cases where carriers have been averring that a bill of lading does not necessarily mean that the goods were put on board. Article 41 provides that freight is payable only when goods have been delivered to the consignee and this is a great relief to the shippers/consignees because they will not be forced to pay for the freight when the goods have been lost. Article 44 has also good news for the consignees because they will not be

forced to pay for freight if the transport documents are marked “Freight prepaid”; consignees have been forced to incur extra expenses when carriers/shipping lines demand for payment of freight yet they purchased the documents at a high price thinking freight had been paid.

Article 63 provides,” Without prejudice to articles 64 and 65, rights under the contract of carriage may be asserted against the carrier or a performing party only by

(a) the shipper,

(b) the consignee,

(c) any third party to which the shipper or the consignee has

transferred its rights”. This is a very good provision because it solves the problem of privity of contract that has been making it difficult for consignees and banks to claim damages from the carrier. Article 71 is also a great relief to shippers because they have been suing the registered owners of the carriers only to find too late that the liable persons are the charterers; they will be able to sue the charterer after expiry of the one-year period. Article 71 has also appreciated the fact that arbitration is becoming the preferred choice of adjudication for many parties to international transactions and allows shippers and carriers to resort to it if they so wish. Articles 86 and 88 have ensured carriers will not use this Draft (convention) as an excuse of failing to perform their obligations under other existing conventions and they cannot contract out of their obligations.

In a general way the Draft Instrument makes clearer most of the roles, responsibilities, duties and rights of all parties involved in a contract of carriage by providing exact definitions of the same. Suffice it to say most of the provisions of this Draft have not been finally settled

and a detailed examination of them may, therefore, not be necessary or appropriate. It is noteworthy that the Working Group is continuing with the work of revising the Preliminary Draft and therefore the possibility of removal or inclusion of some terms or provisions exists.

4.4 CONCLUSION

The world is striving to get a legal regime that will cater for the interests of both the carriers and shippers. Due to the intricate nature of the negotiations aimed at balancing the interests of the carrier and the cargo owner the UNICTRAL Draft may take a while before it achieves universal endorsement. The Draft however addresses key issues of modern transport in international trade. The next chapter will sum all the issues considered and make recommendations on the way forward.

CHAPTER 5

5.0 CONCLUSION AND RECOMMENDATIONS

Given the fact that no single unifying instrument has received a complete or near complete universal acceptance, the law relating to the international carriage of goods by sea remains in need of reform. On this front UNCITRAL is leading the way by continuing to support international efforts to produce an international instrument that will help unify the legal regime applicable to carriage of goods by sea. Its Draft Instrument on the Carriage of Goods [wholly or partly] [by Sea] offers the best hope of the maritime world ever achieving uniformity in this very important sector of the world economy.

Politics have continued to play a big role in creating the confusion that is now prevalent in the world of maritime law regarding the carriage of goods.¹ The world of maritime trade seems forever divided between the carriers' interests and the cargo interests and geographically this almost fits into the traditional north-south divide. The Hague rules and its amending Visby Protocol seem to favour the carriers although they were designed to erode the protection of the carriers against liabilities arising from the contract of carriage of goods by sea. As pointed out in the preceding chapters this is not entirely the case, and therefore, it is politics that seems to be occupying the driver's seat in so far as the debate on the appropriate legal regime for carriage of goods is concerned.

¹ I Brownlie *Principles of Public International law* (4th edn Clarendon Press Oxford 1990) 625.

On the other hand the Hamburg Rules, which were meant to correct the perceived weaknesses of the preceding two regimes have failed to do so. This is attributed to politics, as the Rules are perceived to be cargo friendly and hence against the carriers' interests. The paradoxical question that this state affairs poses is this: why is that most developing countries and who form the bulk of the countries constituting the cargo interests group have failed to ratify the Hamburg Rules? It would seem the reasons for this dichotomy lie elsewhere and cannot be wholly accounted for or explained in terms only of the politics surrounding the protection of cargo and or carrier interests. Other factors like outright poor draftsmanship leading to conflicting provisions,² slow and dissimilar methods of ratification or adoption of the unifying instruments in the various domestic jurisdictions,³ lack of an international enforcement regime,⁴ lack of a straight amending process⁵ and cultural differences⁶ may be

² This particular shortcoming was listed first among the constraints facing uniformity and harmonization of the law relating to the international carriage of goods by sea in the Report of the Task Force on the Review of Maritime Laws of Kenya, 2003, para 8.3(a).

³ See FA Mann 'Uniform Statutes in English Law' (1983) 99 LQR 376 and also FA Mann 'Interpretation of Uniform Statutes' (1946) 62 LQR 278, 279 for the varying methods of adoption and for the slow nature see the slow picture of the adoption of the recent Conventions painted in R Herber 'The UN Convention on the Carriage of Goods by Sea, 1978, Hamburg Rules, Its Future, and the Demands of Developing Countries' (1984) 1 Yearbook Maritime Law 81, 83.

⁴ Observance of treaties is based upon the concept of *Pacta sunt servanda*, which is a general principle of international law providing that a treaty in force is binding upon the parties and must be performed by them in good faith (Vienna Conv. Art. 26). The effect of this principle is that there is very little the other party can do when one of the parties breaches the provisions of a treaty.

⁵ Amendment by Protocol is a slow and complex exercise as its effect is tantamount to a revision of the whole convention. See a discussion on a parallel example of protocol amendment relating to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929 in R Gardner 'Revising the Law of Carriage by Air: Mechanisms in treaties and Contract' (1998) 47 ICLQ 278, 280. The amendment depends on the consent of the parties, and the issue is primarily one of politics (n 49) 625.

⁶ See generally the argument of Goode (n 27) 754 and where also H Gutteridge *Comparative law* (Cambridge Univ. Press Cambridge 1949) 157-8 warning of over-ambition in the drive toward uniformity of laws is quoted thus:

The citizens of many countries are deeply attached to their national law; at one extreme we have, for instance, the Frenchman who carries in his pocket the *Code Civil*, the dog-eared leaves of which bear testimony to the frequency with which it is consulted, and, at the other end of the line, the Englishman who never looks at a law book but is nevertheless convinced that his common law is the quintessence of human wisdom and justice

the main inhibitions to a truly international unifying regime of law relating to the carriage of goods by sea.

In view of the many obstacles to the achievement of a single regime of maritime law relating to the carriage of goods by sea, some pragmatists (pessimists?) in the field believe that the drive for such a regime is fantasy, which can never be achieved and that even if it were to be achieved it is something not to be desired. These sentiments are echoed by R Goode who states, “I am not one of those who believe that the harmonisation is *per se* a good thing. Even if it were feasible (which plainly is not) to harmonise all private law ... I do not think it would be sensible to do so”⁷. Such views are propped up and buttressed by the realisation that the world is made up of diverse nations with diverse legal systems that have come to symbolize nationhood to some people, and therefore any move towards the erosion of these institutions is seen as a threat to sovereignty. This position has been ably stated with regard to the European Community attempts at harmonising the laws of member countries, thus:

“We have today in Europe a whole range of legal cultures... We should be profoundly grateful for this diversity. We can learn far more from these diverse systems than we could have ever derived from a single monolithic regime.”⁸

It is this nationalistic preference for domestic law and a suspicion of both the new and the foreign that has greatly hampered the harmonisation process.⁹ Be this as it may, the

⁷ R Goode ‘Insularity or Leadership? The Role of United Kingdom in the Harmonisation of Commercial Law’ (2001) 50 ICLQ 752.

⁸ ‘Coming Together – The Future’ in B S Markesinis (ed) *The Clifford Chance Millennium Lectures*, (Hart Publishing London 2000) 239 as quoted in R Goode ‘Insularity or Leadership? The Role of United Kingdom in the Harmonisation of Commercial Law’ (2001) 50 ICLQ 75.

⁹ R Bradgate & N Savage *Commercial Law* (Butterworths London 1991) 483 para [28.4].

pessimists are however few and majority of the nations recognise the benefits to be drawn from the harmonization of the law relating to the carriage of goods.¹⁰

The way forward in this fractured sector of international trade law needs to be re-examined against the back drop of the endemic failures of the harmonization efforts that characterize the regulation of carriage of goods by sea. There are a number of proposals that we feel if adopted may go a long way in bringing about the desired unity and harmony in the regime regulating international carriage of goods by sea.

Firstly it is our suggestion that, given the politics and suspicion surrounding the process of drafting, ratification and implementation of conventions meant to harmonize and standardize the laws relating to international carriage of goods, it would be better for UNCITRAL to promulgate model codes for voluntary adoption by individual businesses, along the lines of the INCOTERMS and Model Procurement Law. This would remove suspicion and may help to make such Codes popular with time so that that individual states may end up domesticating the same.

The second proposal, which find favour with most scholars is that instead of a new code being drafted, it is more sensible and pragmatic to amend or revise the existing Hague-Visby Rules so as to make them conform to modern carriage of goods realities. This position is buttressed by the fact that since the Hague Rules and the Hague-Visby Rules are now ratified

¹⁰ UNCTAD *Bills of Ladings United* (United Nations New York 1971) 17.

by quite a number of countries¹¹ they offer a better starting point than formulating a new convention which has to await ratification by the required number of states before it come into force. This position is similar to that adopted by the Task Force on the Review of Maritime laws of Kenya,¹² which recommends that the current *Carriage of Goods by Sea Act*¹³ be repealed and a new Act incorporating the Hague-Visby Rules be enacted and implemented.

The main reason why the task force recommended that Kenya adopts the Hague-Visby Rules is that most of Kenya's trading partners have advocated for the adoption of the Hague-Visby Rules. For example, the United Kingdom, which has got both historical and economic ties with Kenya, has adopted the Hague-Visby Rules and are incorporated in the English COGSA, 1971. Second, as mentioned above the Hague/Hague-Visby Rules controlled, at least by the year 2002, the largest share of world trade as compared to the Hamburg rules¹⁴ and hence the Task Force pragmatic recommendation. Thirdly the Task Force's recommendation was informed by the fact that a recent survey conducted by the Committee Maritime International (CMI) on the desirability of whether to make changes to the Hague - Visby Rules or the Hamburg Rules clearly showed a widespread preference for the Hague - Visby Rules¹⁵.

¹¹ A stakeholders meeting held in Nairobi in September 2002 revealed that 52% of the total world trade was conducted under the Hague and Hague-Visby Rules in comparison to 2% under the Hamburg Rules (see Report of the Task Force on the Review of Maritime Laws of Kenya 2003 p 29).

¹² *ibid* para [8.4].

¹³ Cap 392 of the Laws of Kenya.

¹⁴ See note 11 above.

¹⁵ Report of The Task Force on the Review of Maritime Laws of Kenya 2003 p 29.

Since the main cause of unilateralism in the regulation of liability arising from the contract of carriage arises from the failure of the existing regimes to countenance the modern developments in the carriage of goods by sea, it is important that any new development in this area captures all the latest developments, like the Multimodal nature of international carriage and the dynamics introduced to international trade by the internet. The UNCITRAL Draft is ahead in this approach and may, therefore, offer guidance in this area.

The method of amendment of treaties relating to international trade should be relaxed so as to enable them to be revised and modified as the changes in this fast changing sector occurs. This would help to keep them up to date rather than waiting until the clamour for change is so loud and the tensions between states as interest groups high.

There should be an independent and interest-neutral oversight body, more appropriately, a UN agency like the UNCITRAL, which should constantly monitor the adoption of and adherence to a new convention. This would serve in revealing when a discordant develops between an instrument and the realities on the ground and thereby assist in helping make any necessary amendments ahead of any revision. Under the current arrangement some strong parties with deep financial pockets are capable of influencing the way forward. It has been argued that the CMI and P&I Club represent the carriers' interests and yet they have always led the way forward in the review of drafting of the main conventions. Indeed, the initial drafting of the UNCITRAL Preliminary Draft Instrument on the Carriage of Goods by Sea¹⁶

¹⁶ Annex to UNCITRAL Transport Law: *Preliminary Draft Instrument on the Carriage of Goods by Sea: Report of the Secretary General*, A/CN.9/WG.II/WP.21 at p. 3 [23].

was the work of CMI¹⁷ and it would seem CMI had also bankrolled the initiative given the reservations made at the twenty-ninth session, in 1996, concerning the scarcity of resources for such an exercise.¹⁸

The importance of acceptability of a convention is as crucial as its provisions and therefore legitimising the process by a more inclusive process should be encouraged and pursued if a truly and uniform system of cargo liability is to be established in the world. We propose that a neutral body should lead all the interested parties in amending the Hague-Visby Rules; this is because enacting a new code is tedious and time consuming. These amendments must borrow heavily from the UNCTRAL Draft; this is because as we pointed out in chapter four the Draft has very innovative and good proposals. The amendments must be made while taking cognisance of other existing International Conventions especially those on other modes of transport and warehousing; this will ensure that there will be no contradictions.

¹⁷ UNCITRAL *Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea: Report of the Secretary General*, A/CN.9/WG.II/WP.21 5.

¹⁸ *ibid* 3.

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