Chapter 16
Liability and Limitation of Liability

Introduction

This chapter examines the issues of shipowner rights to limit liability. It does not address the conventions relating to ship-source pollution damage since these have been dealt with in the previous chapter. Conventions have been developed, particularly over the last 40 years, through IMO to be applied on an international basis. This means that the same underlying principles will be applied in all contracting states. It is a matter of regret that with the exception of the oil spill compensation conventions, which have been widely ratified (but not by the USA), other IMO liability and limitation conventions have received more limited acceptance. This, in turn, has encouraged some states and regions to take, or attempt to implement, unilateral solutions as in the case of the U.S. Oil Pollution Act referred to in the last chapter. This undermines global uniformity and creates inefficiencies resulting from differing liability and insurance requirements.

As discussed in relative detail in the previous chapter, the distinction between compensation as a civil remedy and punishment as a penal sanction must be readily appreciated. Compensation responds to liability which must be proved if based on negligence or arises because the incident, regardless of the cause or fault, is subject to strict liability such as in the case of pollution damage. The purpose is to reimburse affected parties for loss or damage which they have suffered. It is not intended to be punitive. The majority of incidents result from the natural dangers of the sea, misfortune or snap judgements in the face of difficulties where the clear view of hindsight might have suggested a different course of action. Any question of criminality or irresponsible behaviour must be dealt with in accordance with other legislative mechanisms. It is unfortunate that regulators in some areas have lost sight of this fundamental separation. As a result, their view that compensation should be used as a financial weapon to control and improve shipowner behaviour does not stand up to scrutiny.

The principle of shipowner rights to limit liability is often viewed negatively because of an inadequate appreciation of the workings of the shipping industry.

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Limitation is based on the need to predict liability exposure and purchase insurance to cover the risks which may give rise to such liabilities. As such, there is a defined reference point, regardless of fluctuating vessel values and nature of the risk. This facilitates trade by providing finite values in the event of an incident; represents a *quid pro quo* for high compensation levels; and encourages the settlement of claims by reducing the scope for disputes on liability and the quantum of damages. In contrast, unlimited liabilities are uninsurable and in practice would be capped to the extent of available cover; thereafter, shipowners' assets would be taken into account bringing us back to the flawed notion of punishment, this time through the spectre of financial ruin.

A Brief History of Limitation Rights

Limitation in England can be traced to *The Responsibility of Shipowners Act 1733* which quantified a shipowner's maximum exposure as the value of the vessel and freight. It follows that this would be of little practical use where a vessel was lost. *The Merchant Shipping Act 1854* introduced a tonnage-related valuation which, other than in relation to liabilities to passengers and goods, remains the basis for determining compensation. In the United States, limitation legislation was enacted by Congress in 1851 but the US has not subscribed to any international convention on limitation of liability.

The first internationally agreed instrument was the *International Convention for the Unification of Certain Rules to the Limitation of Liabilities of Owners of Sea-Going Ships 1924*. It was drafted by the Comité Maritime International (CMI) and provided a limitation regime for the acts or faults (which would have to be proved or agreed) of the master, crew, pilot, or any other person in the service of the vessel. The right to limit was lost if the owner was at fault.

A second instrument, the *International Convention Relating to the Limitation of the Liability of Owners of Sea Going Ships*, followed in 1957 although it was not until May 1968 that sufficient ratifications had been secured to enable the convention to enter into force. Compensation was initially set by reference to the gold franc but replaced by the Special Drawing Rights (SDR) through a 1979 Protocol. However, the right to limit was again subject to the proviso that it would be lost if the claim "resulted from the actual fault or privity of the owner". A phrase in such terms invites challenges.

IMO Instruments

Another so-called global limitation regime came into existence through the adoption under the auspices of the IMO (then IMCO) of the *International Convention on Limitation of Liability for Maritime Claims* (LLMC) in 1976. The scope of

limitation rights in this convention extends to the owner, charterer, manager and operator of a seagoing ship as well as salvors, with liability insurers, i.e., the P&I Clubs being entitled to the same benefits of the Convention as their assureds. Limitation rights are applied to a defined list of claims covering loss of life or personal injury or loss or damage to cargo and other property, including harbour, dock works and navigational aids. Claims ascertaining to the raising, removal, destruction or rendering harmless of a sunken, wrecked or abandoned vessel and/or cargo may also be subject to limitation to the extent that they do not relate to a contractual arrangement between the person undertaking the operation and the shipowner. Nevertheless, contrary to the 1957 Convention, contracting States may apply a reservation to exclude wreck and cargo removal from limitation.

Oil pollution damage is outside LLMC Convention as this is separately covered under the Civil Liability Convention as are claims for salvage, general average and nuclear damage. Shipowners are also denied limitation rights against seafarers where seafarer contracts confer more favourable provisions than the LLMC Convention.

This convention has brought about two significant changes to the previous regimes. First, the longstanding "conduct barring limitation" provisions of the 1924 and 1957 Conventions based on "actual fault or privity" of the owner have been replaced by a much more tightly drawn provision whereby the person, i.e. the shipowner as defined, claiming limitation stands to lose that right only if the loss "resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge, that such loss would probably result". This almost unbreakable test has been introduced to remove the uncertainty and accompanying scope for litigation, of the vague "fault or privity" test. The new test requires the shipowner to be shown to have engaged in an activity which was deliberate or clearly wrong. This is a very personal obligation where it is necessary for the claimant to prove that the controlling mind, i.e., the *alter ego* of the shipowner, where it is a corporate entity, had set out to act in such a fashion. Shipowners rarely set out to act in this manner and denial of limitation in such circumstances is a rare occurrence.

The second major change is the considerable enhancement of limitation levels as a trade off for the almost unbreakable right to invoke limitation. The structure of the 1957 instrument was, to some extent, maintained with limitation figures, at much higher levels, incrementally graduated by tonnage in the "general limits" on a 2:1 ratio between claims for loss of life and personal injury and other claims such as collision and property damage. Where the life/injury fund is insufficient, the property fund contributes to the outstanding balance and any concurrent property claims rank *pari passu* with life/injury claims. However, unsatisfied property claims are not settled from any unused amount in the fund for death or personal injury.

At the same time a new, and separate, limit has been introduced for claims for injury to passengers; although in a number of jurisdictions this is superseded by the provisions of the Athens Convention 1974 amended by the Convention's Protocol of 2002. The passenger limit, expressed in SDRs, was originally set at a maximum

of 46,666 multiplied by the number of passengers which the ship was authorised to carry. Nevertheless, this figure was subject to an upper limit of SDR 25 million. Individual settlement would, therefore, be reduced *pro rata* where the totality of claims exceeded the global limit. The potential pro-rating of claims would normally only become an issue in the event of a major incident. However, in such event, the implications for individuals involved and political repercussions were such that shipowner limitation rights for passenger claims were frowned upon by many regulators. Detailed provisions set out practical arrangements for invoking limitation rights, constituting and distributing any fund which might be set up; and bars to other actions against the ship or other property. It is for States Party to determine individually whether to apply the provisions to ships navigating in inland waterways and to vessels of less than 300 tons.

Also, it is important to recognise that LLMC is a global limitation instrument. The effect is that, except where liabilities are expressly excluded from the scope such as pollution damage under CLC or nuclear damage under the specialised Nuclear Convention, limitation under LLMC is all-embracing. Thus, liability under other instruments is subsumed within LLMC and claimants may therefore see their actual payments reduced where, for example, claims for cargo loss or damage have to compete with other claims.

LLMC 1976 came into force internationally in December 1986. Further amendments were introduced through a Protocol adopted at a Diplomatic Conference in 1996. The main purpose was to increase compensation limits resulting in an average rise of 240 % but with a much steeper increase for vessels below 2,000 gross tonnage where an entry threshold of up to SDR 3 million was applied. Compensation for passenger loss of life or personal injury was increased to SDR 175,000 multiplied by the number of passengers authorised to be carried. Notably, the 1996 Protocol to the Convention which entered into force in May 2004 has removed the SDR 25 million overall cap on claims arising on passenger vessels. However, depending on the jurisdiction, passenger liability in relation to a seagoing ship may arise under the Athens Convention as discussed below.

Two further provisions should be noted. The first is the option for State Parties to exclude claims for loss or damage from chemical and related pollution under the Hazardous and Noxious Substances Convention 1996. The second point is the introduction of a tacit amendment procedure to allow limits to be increased through the IMO Legal Committee, subject to certain restrictions on figures and intervals between changes. An in-built formula sets a maximum percentage uplift and places restrictions on the intervals between increases while the quantum is to be considered in the light of claims experience, changes in monetary values and the effects on insurance costs. The system enables states to agree compensation increases without the need for a full Diplomatic Conference and, from shipowners' viewpoint, avoids the risk of reopening potentially controversial issues. Revision of other provisions has to follow formal arrangements culminating in a Diplomatic Conference.

As a result of a bunker spill off Queensland in 2009, which resulted in a rare example of limits being exceeded, Australia began to press for a review of compensation levels. At the end of 2010, 20 States co-sponsored a proposal to invoke

the tacit amendment procedure to increase rates. At its meeting in April 2012, the IMO Legal Committee adopted increases of 51 % for claims for loss of life/personal injury and property damage. The higher limits take effect from April 2015.

Nairobi International Convention on the Removal of Wrecks 2007

Development of the Convention proved to be the longest running project on the IMO agenda, spanning some 30 years. Work was not continuous but went into a state of semi-suspension when more pressing matters came before the Legal Committee. The shipping industry found it difficult to understand the rationale for an instrument to deal with incidents which are always covered by P&I insurance. Once again, Governments responded emphasising the difficulties of recovering public money when a vessel has no insurance. A further problem was that wrecks cause particular difficulties when an incident arises in a busy or hazardous area beyond territorial seas where a coastal state's actions are limited. Following years of debate and discussion, a Convention was finally adopted in May 2007 which took its name from the city where the Diplomatic Conference was hosted.

The Convention applies where a physical or environmental hazard is created by a wreck, widely defined to include not only ships but, also, objects lost at sea such as containers. The main provisions are:

- Coverage in respect of wrecks in a state party's exclusive economic zone, or equivalent area, with optional extension into a contracting party's territory or territorial sea;
- Measures for reporting, locating, determining hazard and marking a wreck;
- Facilitation of removal by the owner or by the State in the event of non-compliance by the owner or if urgent action is needed;
- Strict shipowner liability under the Convention (*except* where shipowner liability would be in conflict with obligations under CLC, HNS or the Bunkers Convention);
- All ships of 300 gross tons and above to maintain insurance up to LLMC 1996 (but liability may be higher as, for example, in the UK) evidenced by a State-approved certificate of insurance; and
- Claimant rights of direct action against the insurer but only up to the certification level.

The structure of the Convention appears to be much in line with other IMO instruments but two points need to be highlighted.

The first, and most important, relates to the scope of the instrument. Other IMO Conventions apply to a contracting State's territory, territorial sea and exclusive economic zone or equivalent area. The Nairobi Convention applies to the exclusive

economic zone and may be applied to the territory or territorial sea. This was because many States already had far-reaching domestic wreck removal legislation for their own seas and did not want to see it compromised by the common denominator of an international convention but, equally, wanted rights of response in areas where they did not have the ability to act. In contrast, the shipping industry questioned the value of such an arrangement since casualties are more likely to occur in the close confines of territorial seas or port approaches and pointed to resulting practical difficulties with insurance cover. It was eventually agreed that contracting states would be able to apply the Convention to their territorial seas if they so wished. Such application would be without prejudice to whatever domestic legislation might already exist but, equally, the Convention's liability and compulsory insurance provisions would not apply to domestic requirements exceeding those in the international instrument.

The second point concerns limitation. The Convention preserves shipowner limitation rights under any applicable national or international regime, such as LLMC 1996. However, some States (including the United Kingdom through a reservation to LLMC 1976/96) exclude limitation rights for wreck removal costs. Nevertheless, P&I cover will respond up to whatever legal liability is established.

A related issue concerns certification. During discussions, the shipping industry proposed that the requirements could be satisfied by a P&I certificate of entry, already carried onboard the majority of vessels. This was not, however, acceptable to governments which insisted on State-approved certification. In that the Nairobi Convention certification provisions apply to vessels of 300 gross tonnage and above, it is estimated that some 70,000 vessels will need certification. This will place a considerable burden on administrations which have already been hard pressed to meet the demand for certification under the Bunkers Convention.

The Nairobi Convention will come into effect internationally 12 months after ten States have agreed to be bound by its provisions.

Adoption of the Convention marked the completion of IMO's work to develop a broadly comprehensive mosaic of liability and compensation regimes responding to third party claimants. A number of States have already indicated an intention to accept the provisions.

Convention Relating to the Carriage of Passengers and Their Luggage by Sea

So far those instruments have been mentioned which have conferred rights on outside third party claimants whose interests are prejudiced by a maritime incident covering, *inter alia*, collision, pollution and wreck removal. Passenger rights are secured through an international Convention which lays down carrier liabilities and compensation levels.

The IMO Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974 entered into force in April 1987. It applies to contracts for the international carriage of passengers. Under its provisions, carrier liability for passenger death or injury is fault-based against claimant proof but with a rebuttable presumption of carrier fault in the event of shipwreck, collision, stranding, explosion or fire, or defect in the ship. Rules were also set out covering loss of or damage to luggage and vehicles. Liability for passenger death or injury (originally stated in gold francs but converted to SDRs through a 1976 Protocol) was limited at SDR 46,666. Nevertheless, contracting parties were permitted to set higher levels for their own carriers. Notably, the United Kingdom used this provision on two occasions. The first was after the *Herald of Free Enterprise* disaster in 1987 when the figure was increased to SDR 100,000 per passenger and to SDR 300,000 from 1 January 1999.

In the international sphere, and in recognition of the subsequent period of high inflation and reduction in the real value of compensation levels, an attempt was made through a 1990 Protocol to the IMO Convention to increase the amount for passenger death or injury to SDR 175,000. Increases were also applied in respect of luggage and vehicles. However, the Protocol has never obtained the required ten contracting states to bring it into force. The lack of support may be attributed to the fact that, even by the standards of the time, the revised compensation levels were seen as too low for high cost economies.

Renewed efforts to amend and modernise the 1974 Convention began in earnest in the late 1990s. Discussions continued not only at sessions of the IMO Legal Committee but, also, through inter-sessional correspondence exchanges and in meetings between governments, industry, legal and consumer group representatives. The shipping industry accepted the need for higher compensation limits but voiced concerns about the means to achieve the desired end. Nevertheless, and after intensive, and sometimes passionate, exchanges during a Diplomatic Conference in October/November 2002, the following structure was agreed and set out in a Protocol which, together with the original instrument, is referred to as the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 2002 (Athens Convention 2002):

- Continued distinction between strict shipowner liability for "shipping incidents" comprising shipwreck, capsizing, collision or stranding, explosion or fire and defect in the ship (specifically defined as failures in operational and safety systems) and claimant proof of carrier fault for non-shipping incidents usually passenger "slips, trips and falls";
- Carriers required to maintain compulsory insurance of SDR 250,000 per passenger evidenced by State-approved certification with claimant rights of direct action against insurers;
- Overall carrier liability at a *per capita* maximum of SDR 400,000 with strict liability up to SDR 250,000 for shipping incidents and thereafter fault-based liability up to the maximum and "ground up" fault-based liability for non-shipping incidents;

- Carriers exonerated in the event of war but no absolute exoneration for acts of terrorism;
- Increased compensation for loss of or damage to luggage and vehicles;
- Opt-out provision permitting States to set higher maximum compensation limits.

While the content appears to be consistent with the underlying precepts in the liability instruments discussed above, the requirements of the Athens Convention 2002 have proved problematic even before the instrument has taken effect.

A particular issue, one which industry had highlighted throughout the lead-up to the Diplomatic Conference, centred on insurability. Arrangements for compulsory insurance and direct action have worked satisfactorily for many years in relation to CLC. However, compensation under the Athens Convention is significantly greater raising questions in P&I circles about the practicalities and balance between the level of exposure in passenger and other trades. At the same time, difficulties were identified in fulfilling the insurance requirements for terrorism cover and, if not resolved, could conflict with the certification requirements. Special arrangements were subsequently concluded setting out the basis of terrorism liabilities and question of compensation. It is hoped that this will facilitate eventual certification arrangements for all liabilities including shipping incidents and carrier negligence or the result of acts of terrorism.

Developments in Europe

The focus of this chapter has been on provisions agreed through IMO for worldwide application. As already explained, instruments agreed at international level offer an efficient means of harmonising and applying the same conditions and requirements. Despite industry reservations about the implications of regional approaches, as part of its Third Maritime Safety Package in response to the *Erika* incident, the European Commission brought forward legislative proposals respectively covering general limitation rights and liabilities to passengers.

A draft Directive on the Civil Liabilities and Financial Guarantees of Shipowners was introduced early in 2006. It purported to harmonise and apply international law in the EU through implementation of LLMC 1996. However, it went beyond the Convention's provisions and raised potential treaty law conflicts, particularly in relation to vessels from third party states.

Reservations were expressed by the majority of Member States leading to intensive discussions between the EU institutions—Council, Parliament and Commission. Agreement was eventually reached whereby Member States, which had not already done so, would ratify LLMC 1996. This would be the reference point for claims not covered by specific instruments such as CLC. Ships would be required to carry evidence of insurance cover to meet claims subject to limitation under LLMC 1996. However, rather than state-approved certificates as originally put forward by the Commission, the requirements would be satisfied by a P&I

certificate of entry or similar cover, thereby reflecting the position advocated by the industry. The provisions must be transposed into Member States' domestic law before 1 January 2012.

The Commission also brought forward measures to give effect within the EU to the Athens Convention 2002. Here again, questions were raised about the added value of a Regulation to implement an instrument which, it was hoped, would in any event be ratified by individual Member States. Nevertheless, the Commission pressed ahead with proposals to apply the Convention but with certain additional provisions including extension of application to certain domestic trades and a requirement for all Member States to agree any increases in compensation levels.

Discussions were protracted. As a result, it was eventually necessary for the provisions to be referred to conciliation where earlier support in the Parliament and Commission for harmonised compensation levels (seen by the shipping industry as a potential benefit of the Regulation) was given up to secure political agreement on this and other elements of the package.

The Regulation will take effect in the EU when the IMO Athens Convention 2002 comes into force internationally (expected to enter into force on 23 April 2014) or by 31 December 2012 at the latest. In order to avoid the likely difficulties of the prior regional application of an international instrument, particularly one with complex insurance and liability provisions, it was hoped that the Convention and Regulation would enter into force concurrently. However, that has not been the case.

Liability and Limitation Regimes for Carriage of Cargo

The final section of this chapter examines liability issues under contracts for the carriage of goods by sea. Unlike IMO instruments which provide a system of redress for unconnected parties covering clean-up costs and compensation, cargo liability regimes have developed to protect the interests of cargo owners, the bill of lading holder for goods.

Up until the early part of the last century, there was no internationally accepted system of minimum liability as between a carrier (not necessarily a shipowner) and the owner of goods carried. This meant that often onerous terms were imposed on shippers while a third party buyer of goods could not be certain about the extent of any obligations or liabilities which might be contained in a bill of lading. This could give rise to later unexpected and unwelcome surprises.

The Hague Rules

In order to facilitate the needs of trade and provide certainty for merchants in their commercial dealings, the issue was taken up by the Comité Maritime International (CMI), which comprised maritime lawyers, shipowners, charterers, cargo owners

and their respective insurers and provided a forum where their interests could be represented. After a series of meetings, starting in the Hague in 1921, the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the "Hague Rules") was signed in Brussels in August 1924. The necessary enabling legislation was passed, almost immediately, in the United Kingdom through enactment of the Carriage of Goods by Sea Act 1924. Other jurisdictions also enacted similar legislation. Thus the Rules received widespread endorsement by the major maritime states and entered into force in June 1931.

The Hague–Visby Rules

However, some 40 years later the world was changing. The advent of containers was beginning to have an effect on ship design and, in due course, would lead to a sharp reduction in cargo loss and damage. The need to try to accommodate the changing conditions resulted in the Visby Protocol of 1968 which increased the level of shipowner limitation amounts and introduced an alternative for limitation by reference to weight or per package, whichever was the higher. Other adjustments were also made. The revised convention, known as the Hague–Visby Rules 1968, entered into force in 1977. Effect was given to the revised Rules in the United Kingdom through the Carriage of Goods by Sea Act 1971. Many other jurisdictions also accepted the revisions and continue to subscribe to these Rules. Several states, however, significantly the USA, have continued to apply the original Hague Rules. Several states have introduced domestic legislation reflecting the basis of the Hague–Visby Rules but this is not the same as formal acceptance of the Convention. Be that as it may, it is perhaps fair to conclude that these are the Rules that are most widely followed internationally one way or another.

The main elements of the Hague–Visby Rules are as follows:

The Rules set a minimum standard in relation to the liability elements which can be imposed on the holder of a bill of lading.

- They apply to contracts of carriage evidenced by a bill of lading or similar document of title. The provisions do not apply mandatorily to charterparties but they do have effect where a charterparty bill of lading transferred to a third party governs the relationship between the carrier and the holder;
- They apply on a tackle-to-tackle basis covering the time between loading and discharging of the goods;
- They apply to goods, other than live animals and cargo agreed to be, and actually carried, on deck;
- They require the carrier to exercise due diligence "before and at the beginning of the voyage" to make the vessel seaworthy – which also means cargoworthy. Case law has shown that the courts impose a very high standard;
- They set out a fault-based liability regime which is the central feature. The carrier is not liable for loss or damage arising from:

  - unseaworthiness (including "uncargoworthiness") unless this results from failure to exercise the required due diligence;
  - a catalogue of listed defences where, in particular, the carrier is not responsible for the "act, neglect or default of the master, mariner, pilot or the servants of the carrier" in the navigation or management of the ship, the so-called "nautical fault" defence. Other defences include fire, perils of the sea, shipper error and losses arising from the packaging or nature of the cargo;
  - an all-embracing exclusion for loss or damage arising without the actual fault or privity of the carrier or fault or neglect of the carrier's agents or servants.

  The burden of proving or resisting claims, and the existence or otherwise of a causative link between unseaworthiness and loss, will often shift between the parties during settlement negotiations;
- They provide that where fault is established, the carrier may limit liability at SDR 666.67 per package or unit or at SDR 2 per kilo of gross weight – whichever is the higher. The SDR has replaced the gold franc or poincare franc which was previously used as the reference point. However, "unit or package" has not been satisfactorily defined even by case law and has caused many problems over the years with courts almost invariably interpreting the smallest parcel in a larger unit as fulfilling the package criterion.

It should be noted that shippers are, and remain, responsible to carriers for the effects and costs of loss or damage where cargo is or becomes dangerous. Shipper liability is not limited.

Carriers may, voluntarily, give up any of their rights or increase their obligations under the Rules. However, P&I insurance is normally predicated on the compulsory application of Hague Visby Rules (or where compulsorily applicable Hamburg Rules) and any departure would prejudice liability cover. A carrier responding to the additional demands of a powerful shipper would need to purchase separate cover.

There is an argument that for an industry which often, for good reason, is cautious about embracing change, the Visby Protocol was premature. Its architects could not have foreseen how shipping would change beyond recognition over the following two decades in terms of vessel type, size and the demands of shippers for door-to-door services and accompanying logistical integration.

The Hamburg Rules

The Hamburg Rules came about as a result of pressure during the 1970s for a new regime advocated, in particular, by developing countries whose representatives questioned the basis of earlier international provisions and their suitability in terms of the needs of developing economies. The Rules, which were adopted in 1978, have never been widely accepted with few major trading nations having ratified them. Even so, the Convention is in force.

As with the Hague and Hague–Visby Rules, the Hamburg Rules are not applicable to charterparties. However, the scope of application has been widened to extend carrier liability from the time the carrier takes charge of the goods at the port of loading until the goods have been handed over to the consignee or otherwise delivered on his behalf.

While carrier liability is, again, fault-based, the test is altogether more subjective. The carrier is liable for loss or damage unless he proves that "he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences". The general lack of clarity resulted in the need for an accompanying Common Understanding at the Conference that carrier liability is "based on the principle of fault or neglect" and that, as a rule, the burden of proof rests with the carrier unless otherwise modified by the provisions of the Convention. Limitation was established at SDR 835 per package or unit or SDR 2.5 per kg, whichever is the higher.

The Hamburg Rules also introduced, for the first time, prescriptive measures relating to jurisdiction and arbitration. Such provisions were, however, inconsistent with arrangements which have functioned successfully over the years whereby claimants, wherever located, normally expect to receive compensation direct from their insurers leaving any recourse action to be pursued by underwriters through a single jurisdiction, usually in a carrier's domicile. This was, perhaps, a significant reason for the failure of the Rules to gain acceptance.

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (Rotterdam Rules)

During the closing years of the last century, concerns began to emerge about the perceived diversity of cargo liability regimes across the world. The position might not have been quite as bleak as it appeared on paper but, nevertheless, the different arrangements set out in this section suggest that the objective of a single international regime had been lost. The world's major trading nations were largely using the Hague–Visby Rules, either as parties or through similar domestic legislation, but the USA remained wedded to its Carriage of Goods by Sea Act 1936, which gave continuing effect to the original Hague Rules. While the US began to look at updating its domestic legislation, in 1997 the CMI proposed an ambitious project to try to harmonise and update liability provisions to recognise the expansion of containerisation and increasing level of door-to-door carriage together with the introduction of new technology.

After several years of detailed consideration and much drafting activity, a CMI text was presented to the United Nations Commission for International Trade Law (UNCITRAL) at the end of 2001 for development as an international convention. Discussions were taken forward through a specialist Working Group, comprising

UNCITRAL member and observer government delegations together with representatives from inter-governmental organisations and observer delegations from industry. The Working Group met twice a year between 2002 and 2007 with a final session held early in 2008. The Working Group's recommendations were subsequently accepted, with little change, by UNCITRAL in June 2008 and formally adopted as a Convention by the UN General Assembly the following December.

The resulting instrument is more comprehensive than existing regimes and is, necessarily, much longer. Traditional core issues such as carrier liability continue to be a central feature but new areas have been addressed including inland carriage, shipper obligations and electronic commerce.

In brief outline, the Convention will apply to contracts of carriage involving a maritime leg between different States. Parties will be free to apply the provisions in line with traditional port-to-port carriage used particularly in bulk trades, but in recognition of the need for door-to-door arrangements to facilitate container traffic to and from inland destinations, optional provisions cover pre- and on-carriage outside of the sea transport sector. Charterparties, including slot and space charters will be excluded, as they are under current regimes, from the mandatory coverage but, reflecting existing practice, the Convention will apply where newly termed transport documents, namely, bills of lading and seawaybills, regulate the contractual arrangements between the holder and the carrier. Thus, as at present, liner trade carriage will be subject to the new Convention whereas, in the tramp trade, the provisions will not take effect until documents have been transferred to a third party.

Subject to one important exception, the provisions are mandatory with limited flexibility allowing only cargo interests to demand more favourable terms. The exception relates to liner trades where shippers and carriers will be permitted to agree tailor-made "volume contracts" reflecting individual party needs and allowing wide derogation from the underlying provisions. The term "volume contract" has deliberately not been quantified leaving parties to decide where and when the arrangements will apply. This system is much in line with the present liner service agreements or service contracts in vogue in the US trades.

E-commerce is an important innovation with functional equivalence giving equal status to paper and electronic documentation. It will enable e-systems to be used without the current limitations of shipper demands for paper bills of lading.

Carrier liability continues on the longstanding fault-based principle for loss of or damage to goods, as well as for delay in delivery. The catalogue of carrier defences, now referred to as "presumptions of absence of fault", has been maintained with the important exception of the nautical fault rule which has been removed. This, arguably, is likely to impose greater liability on carriers. In addition, carrier obligations to exercise due diligence to provide a seaworthy, and cargoworthy, ship which currently applies only before and at the beginning of the voyage, will be extended throughout the voyage.

Carrier liability will be in accordance with compensation limits set out in the Convention unless loss or damage is shown to have occurred beyond a maritime

sector in door-to-door transport and another international instrument, such as CMR (*Convention on the Contract for the International Carriage of Goods by Road 1956*), would have applied had the carrier and shipper agreed a separate contract for that part of the carriage. By way of example, an incident on cross-border road carriage in Europe would be compensated under CMR limits whereas damage during a sea leg or where the location cannot be identified (sometimes referred to as hidden or concealed damage) or where no international instrument is applicable before or after the maritime sector, will always be compensated in accordance with the Convention limits.

Limitation rights can normally be invoked in the event of carrier fault for breaches of obligations under the Convention, including misdelivery. Nevertheless, and curiously given that the actual loading will be undertaken by sub-contractors or supervised by the master, the carrier is denied limitation where goods are carried on deck in breach of an under-deck agreement. Limitation continues to be based on the longstanding package/weight formula basis but at an enhanced figure of SDR 875 and SDR 3 per kg respectively. Special arrangements apply in relation to claimed economic loss caused by delay.

An innovation is the introduction of laid down obligations for shippers covering delivery of the cargo to the carrier, its suitability for loading and carriage, provision of information and documentation and rules for dangerous goods. Shipper liability is mainly fault based but strict for documentary inaccuracies where errors may result in the vessel being held up or other action taken. It is also strict in relation to dangerous goods where an incident may have wide implications for the carrier, the vessel and third parties. There is no cap on shipper liability which is potentially open ended.

Documentation covers the use and compilation of paper and electronic negotiable and non-negotiable documentation. A comprehensive list of required information is set out while the obligation to insert shipper provided details is balanced by the carrier's right to qualify the accuracy of the information.

Expectations that a solution would be developed for the age-old problem of demands for cargo without surrender of the bill of lading, failed to materialise. A minor theoretical improvement was achieved but is likely to have limited practical benefits. Nevertheless, the ability to use electronic commerce should help to speed up the movement of documentation and may, at least to some extent, ease the problem of delayed paperwork.

Initially onerous prescriptive provisions on jurisdiction and arbitration, which would have restricted courts' rights to recognise exclusive choice of court clauses and entitled claimants to overturn an arbitration agreement, were modified. Moreover, and most importantly, they will apply only where a state positively elects to opt-in to the provisions. Few states are expected to take this up.

Other provisions include evidentiary aspects of documentary statements, delivery of goods to consignees, carrier obligations when goods are not collected, notification of loss or damage to goods, claimant rights of action and time for suit.

The Convention was opened for signature in Rotterdam on 21 September 2009 and is thus known as the *Rotterdam Rules*, with 20 contracting States required for it

to enter into force. As of July 2012, the convention has been signed by 24 States, including 10 in Europe and the USA. So far, Spain and Togo are the only states that have ratified the convention which represents the culmination of many years' work to restore international uniformity and avoid the fracturing of harmonised liability arrangements through the development of alternative regional regimes.