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Ocean Carriers' Duty of Care to Cargo in Port: The Rotterdam Rules of 2009

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Prof. Dr. David Morán Bovio

Abstract

On December 11, 2008, the General Assembly of the United Nations adopted General Assembly ("G.A.") Resolution 10798, accepting a Convention prepared by the United Nations Commission on International Trade Law on "Contracts for the International Carriage of Goods Wholly or Partly by Sea," in lieu of a diplomatic conference, and scheduled the convention to be signed, subject to subsequent ratification, on September 23, 2009 at Rotterdam.¹⁰ The new Convention is designed to replace two earlier international conventions, popularly known as the Hague Rules of 1924 ("HR"), with the Visby Amendments of 1968, and the Hamburg Rules of 1978 ("HamR"), thus the new Convention will be known as the Rotterdam Rules. The Rotterdam Rules will apply to the international movement of goods "door to door," that is from the seller to the buyer including the period or phase while the goods are in a port and not on the ship and subject to loading, storage, relocation, and unloading. This Article will deal with the new provisions and relate them to the background of previous treaties in order to determine the parts that represent harmonization of law as well as its progressive development.

OCEAN CARRIERS' DUTY OF CARE TO CARGO IN PORT: THE ROTTERDAM RULES OF 2009

*Prof. Dr. David Morán Bovio**

INTRODUCTION GRATULACIÓN (CONGRATULATIONS)

A. Motive

There are two meanings to the word “Congratulations”: to commend someone while feeling joy in yourself at the same time,¹ so I am delighted to be able to salute Professor Sweeney on his seventy-fifth birthday while recalling the work of the United Nations Commission on International Trade Law (“UNCITRAL”) to harmonize and develop international trade laws. I am glad for this opportunity to remember the past twenty years of work at UNCITRAL meetings with Professor Sweeney and other colleagues on complex questions of international transport laws.

Both of my mentors at the University of Seville, Professors Manuel Olivencia and Rafael Illescas had represented Spain at meetings of UNCITRAL, and they suggested the new topic of the liability of terminal operators in international trade that was being studied by UNCITRAL as a subject for my academic research. I was already familiar with earlier projects of UNCITRAL, and I began to study the UNCITRAL Convention on Ocean Carrier Liability of 1978, known as the Hamburg Rules.

I joined Professor Illescas as part of the Spanish Delegation at the UNCITRAL Plenary in May 1989 in Vienna,² ancient heart

* Professor of Commercial Law at the University of Cádiz (Spain). Member of the Spanish Delegation in the Working Group III (Transport Law) of the United Nations Commission on International Trade Law (“UNCITRAL”) (2002-08). The opinions expressed are personal, not official.

1. DICCIONARIO DE LA LENGUA ESPAÑOLA [DICTIONARY OF THE SPANISH LANGUAGE] 1057 (Real Academia Española ed., 21st ed. 1992).

2. 1989 U.N. COMM'N ON INT'L TRADE LAW Y.B. 20, U.N. Doc. A/CN.9/SER.A/1989 (1989) [hereinafter UNCITRAL Y.B.]. UNCITRAL Y.B. includes, together with the Session Report (*Report of the U.N. Comm'n on Int'l Trade Law on the Work of its Twenty-Second Session*, U.N. Doc. A/44/17 (1989)); the documents utilized (second part): *Liability of operators of transport terminals: compilation of comments by Governments and international organizations on the draft Convention on the Liability of Operators of Transport Terminals*

of the Hapsburg Empire that had once included Spain. There I was able to put a face and a voice to the words I had read in the *Journal of Maritime Law and Commerce*,³ becoming better acquainted with Professor Sweeney in formal sessions and hallway conversations at the Vienna International Centre (“UNO City”), and especially at the interminable and exhausting meetings of the drafting committee at which I had been assigned as the representative of the Spanish language nations.⁴

The drafting committee encounters brought me closer to our honoree, as it was apparent that Professor Sweeney was paying complete attention to the basic English text and the French and Spanish versions of the text. His calm demeanor and alertness surprised me because of the contrast with the fatigue of others in the room as these evening sessions lengthened *after* the full day of meetings at which he often spoke with clarity and live-

in International Trade: report of the Secretary-General, U.N. Doc. A/CN.9/319 (1989); *Limits of liability and units of account in international transport conventions: report of the Secretary General*, U.N. Doc. A/CN.9/320 (1989); *Liability of operators of transport terminals: draft final clauses for the draft Convention on the Liability of Operators of Transport Terminals in International Trade: report of the Secretary-General*, U.N. Doc. A/CN.9/321 (1989).

3. Joseph C. Sweeney, *The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part I)*, 7 MAR. L. & COM. 69 (1975-76); Joseph C. Sweeney, *The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part II)*, 7 J. MAR. L. & COM. 327 (1975-76); Joseph C. Sweeney, *The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part III)*, 7 J. MAR. L. & COM. 487 (1975-76); Joseph C. Sweeney, *The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part IV)*, 7 J. MAR. L. & COM. 615 (1975-76); Joseph C. Sweeney, *The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part V)*, 8 J. MAR. L. & COM. 167 (1976-77); Joseph C. Sweeney, *UNCITRAL and the Hamburg Rules: The Risk Allocation Problem in Maritime Transport of Goods*, 22 J. MAR. L. & COMM. 511 (1991).

The link between the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules), U.N. Doc. A/RES/48/34 (1978) [hereinafter HamR or Hamburg Rules] and the one that would become the United Nations Convention on the Liability of Operators of Transport Terminals (1991) has been the object of my attention in different publications. See David Morán Bovio, *Notas para la historia del Convenio sobre la responsabilidad de los ETT (Empresarios de Terminales de Transporte) [Notes for the History of the Convention on the Liability of the OTT (Operators of Transport Terminals)]*, 9 ANUARIO DE DERECHO MARITIMO (Y.B. OF MARITIME LAW) 89-160 nn.27-32, 37-40 (1991); David Morán Bovio, *La unificación de la responsabilidad de los empresarios de terminales de transporte: una presentación [The Unification of the Liability of the Operators of Transport Terminals (OTT): A Presentation]*, REVISTA DE DERECHO MERCANTIL (COM. L.J.) 207-30 nn.76-77 (1993); David Morán Bovio, *The OTT Convention Viewed in the Light of Decisions on the Hamburg Rules* 3 UNIF. L. REV. (REVUE DE DROIT UNIFORME) 601-14, § 1 (1998).

4. To which I was sent by another Vice President of the session, Professor Abascal (Delegation from Mexico), with the approval of the Spanish-speaking Delegations and the recommendation (and the appropriate directives) of Professor Illescas.

liness.⁵

Our contacts resumed at the Diplomatic Conference to Complete the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade at Vienna in April, 1991.⁶ In that setting, the observations of the plenipotentiaries are more fully recorded in the Official Record on which governments base their decisions whether to ratify or accede to the Convention.⁷ Because of our interest in this Conven-

5. See generally UNCITRAL Y.B., *supra* note 2. The revision work shows the following: eighty-one pages, compiling twenty-one declarations. I must here note the active presence of Paul Larsen from the Delegation of the United States of America, who naturally, intervened together with Professor Sweeney. Also acting as delegates for the United States were Mr. Davies and Mr. Falvey who also spoke, although less than the others, as did Mr. Pfund. If we consider that there are some subjects on which other members of the Delegation spoke, we can easily conclude that Professor Sweeney had a very active presence in the discussions of the Twenty-Second Plenary Meeting of UNCITRAL. I mention this because I must praise the generous and willing attitude of Professor Sweeney at the meetings of the Drafting Committee. It would be decidedly much more interesting and enlightening to examine the colloquies in the Summary Records of the meetings. However, such a task exceeds the scope of this exercise; it could (and perhaps should) constitute another article altogether.

6. Vienna, April 2-19, 1991. See generally *United Nations Conference on the Liability of Operators of Transport Terminals in International Trade*, U.N. Doc. A/CONF.152/14 (1993).

7. The resultant Instrument generated several publications. The following partial list provides a sense of the interest that was raised: Joseph C. Sweeney, *New U.N. Convention on Liability of Terminal Operators in International Trade*, 14 FORDHAM INT'L L.J. 1115, 1115-38 (1990-91); Paul B. Larsen, Joseph C. Sweeney, Patrick J. Falvey & David C. Davies, *The 1991 Diplomatic Conference On Uniform Liability Rules for Operators of Transport Terminals*, 21 J. MAR. L. & COM. 449, 449-79 (1990); Paul B. Larsen, Joseph C. Sweeney, Patrick J. Falvey & JoAnne Zawitowski, *The Treaty on Terminal Operator Liability in International Trade*, 25 J. MAR. L. & COM. 339, 339-92 (1994); Jose M. Abascal Zamora, *La Convención de las Naciones Unidas sobre la responsabilidad de los Empresarios de Transporte en el Comercio Internacional [The United Nations Convention on the Liability of Operators of Transport Terminals in International Trade]* 6 REV. DE DERECHO PRIVADO 615, 615-26 (1991) (Mex.); S.K. Chatterjee, *The UN Convention on the Liability of Operators of Transport Terminals in International Trade: The End of the Himalaya Clause?*, 1994 J. BUS. L. 109, 109-20 (1994); Rolf Herber & Dirk J. Harten, *Die Diplomatische Konferenz der Vereinten Nationen über die Haftung der Umschlagbetriebe im Internationalen Handelsverkehr [The Diplomatic Conference of the United Nations Convention on the Liability of Handling Operations in International Trade]* 11/12 TRANSPORTRECHT 401, 401-10 (1991) (F.R.G.); S. M. Carbone, *I limiti temporale e quantitative della responsabilità dell'operatore terminalista nella recente normativa nazionale en el Diritto Uniforme [The Quantitative and Temporal Limits of Liability of the Terminal Operator in the Recent National Legislation in the Right Uniform]*, 1994 RIVISTA INTERNAZIONALE DI ECONOMIA DEI TRASPORTI 29, 29-44 (1994) (Italy); Guido Camarda, *La Convenzione sulla responsabilità dei gestori di terminali di trasporti. Una verifica preventiva di costituzionalità [The Convention on the Liability of Operators of Transport Terminals. Prior Verification of Constitutionality]*, 8 DIRITTO DEL COMMERCIO INTERNAZIONALE 269, 269-314 (1994) (Italy); DIRK J. HARTEN, DAS INTERNATIONALE ÜBEREINKOMMEN ÜBER DIE HAF-

tion and other UNCITRAL projects we have kept up correspondence ever since, exchanging publications and observations. It has also been my duty to attend UNCITRAL Working Group and Plenary Meetings in New York where it is possible to converse and dine with Professor Sweeney and his wife, Alice.⁸

B. Topic

On December 11, 2008, the General Assembly of the United Nations adopted General Assembly ("G.A.") Resolution 10798,⁹ accepting a Convention prepared by the United Nations Commission on International Trade Law on "Contracts for the International Carriage of Goods Wholly or Partly by Sea," in lieu of a diplomatic conference, and scheduled the convention to be signed, subject to subsequent ratification, on September 23, 2009 at Rotterdam.¹⁰ The new Convention is designed to re-

TUNG DER TERMINAL OPERATOR IM INTERNATIONALEN HANDELSVERKEHR UND SEINE ANWENDBARKEIT AUF DIE DEUTSCHEN GÜTERUMSCHLAGBETRIEBE [THE INTERNATIONAL CONVENTION ON THE LIABILITY OF TERMINAL OPERATORS ON INTERNATIONAL TRADE AND ITS APPLICABILITY TO THE GERMAN CARGO OPERATIONS] (Neuwied, Luchterhand eds., 1993).

Prior to the Diplomatic Conference, there were other writings. See, e.g., Paul B. Larsen, Joseph C. Sweeney & Patrick J. Falvey, *The Uniform Rules on the Liability of Operators of Transport Terminals*, 20 J. MAR. L. & COM. 21, 21-54 (1989); F. Enderlein & D. Richter-Hannes, *Konventionsentwurf über die Haftung von Transportterminal-Unternehmen (OTT)—Stand der UNCITRAL-Vorbereitungsarbeiten [Draft Convention on the Liability of Transport Terminal Operators (OTT)—State of the UNCITRAL Preparatory Work]*, 19 DDR-VERKEHR 55, 55-59, 81-91 (1986) (F.G.R.); Ingo Koller, *Der Entwurf eines Übereinkommens über die Haftung von Umschlagbetrieben im Internationalen Handel [The Draft Convention on the Liability of Handling Commercial Establishments in International Trade]*, 3 TRANSPORTRECHT 89, 89-98 (1991); Dirk J. Harten, *Die Haftung des Terminal Operators [Liability of Terminal Operators]*, 2 TRANSPORTRECHT 50, 54-57 (1990); Gerald F. Fitzgerald, *The Proposed Uniform Rules on the Liability of Operators of Transport Terminals*, 10 ANNALS OF AIR AND SPACE LAW 29, 29-60 (1985); JOHAN G. HELM, *DER UNIDROIT—ENTWURF FÜR EIN ÜBEREINKOMMEN ÜBER DEN INTERNATIONALEN LAGERVERTRAG*, DEUTSCHEN VEREIN FÜR INTERNATIONALES SEERECHT [THE UNIDROIT DRAFT CONVENTION ON THE INTERNATIONAL CONTRACT, THE GERMAN ASSOCIATION FOR INTERNATIONAL MARITIME LAW] (1981); Richard W. Palmer & Frank P. DeGiulio, *Terminal Operations and Multimodal Carriage: History and Prognosis*, 64 TUL. L. REV. 281, 352-53 (1989); JoAnne Zawitowski, *Federal, State, and International Regulations of Marine Terminal Operators in the United States*, 64 TUL. L. REV. 440, 461-64 (1989).

8. An excellent writer, whose contribution to the good style of her husband I dare label as important, in spite of its indirect nature most of the time.

9. G.A. Res. 10798, U.N. Doc. A/Res/63/122 (Feb. 2, 2009) (which in numbered paragraph 3, "recommends that the rules embodied in the Convention be known as the "Rotterdam Rules.").

10. See Rep. of the U.N. Comm. on Int'l Trade Law, Forty-first Session, June 16-July 3, 2008, ¶¶ 264-67, ¶ 298, Annex II (2008).

place two earlier international conventions, popularly known as the Hague Rules of 1924 ("HR"),¹¹ with the Visby Amendments of 1968,¹² and the Hamburg Rules of 1978 ("HamR"),¹³ thus the

11. The customary term for the Brussels Convention (International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading). Adopted on August 25, 1924, it came into effect in 1931, by the ratifications of Belgium, Hungary, Spain, and the United Kingdom, followed in the same year by Portugal and Monaco; later, in 1936, Poland; and in 1937, the United States, France, and Romania. The list of Member States grew so much that it is possible to claim, on seeing it, that it is the Instrument that regulates the greater part of international traffic by sea.

The term "Hague Rules" for this Instrument was censured by René Rodière: "*C'est un hommage historique exact, mais un erreur de terminologie incontestable.*" René Rodière, *TRAITE GENERAL DE DROIT MARITIME* 365 (1968). He later added some nuances: "*Que les Anglais la dénomment ainsi, passe, puisqu'ils ont calqué leur Carriage of Goods by Sea Act sur ces Règles, mais nous, non!*" RENÉ RODIÈRE, *LE DROIT MARITIME FRANÇAIS* 451 (1978).

For the formal aspects of the process leading to the Brussels Convention, the failure of which resulted from the attempt of making the shippers and carriers follow the Hague Rules ("HR") voluntarily, see Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 *J. MAR. L. & COM.* 1, 1-57 nn.195-249 (1991). See also RENÉ RODIÈRE, *TRAITE GENERAL DE DROIT MARITIME*, *supra*, at 365; FERNANDO SANCHEZ CALERO, *EL CONTRATO DE TRANSPORTE MARÍTIMO DE MERCANCÍAS* 1 (1957); ARNOLD WHITMAN KNAUTH, *THE AMERICAN LAW OF OCEAN BILLS OF LADING* 113-31 (4th ed. 1953); Antonio Pavone La Rosa, *Appunti sull'Evoluzione storica della polizza di carico*, in *I RIVISTA DEL DIRITTO DELLA NAVIGAZIONE* 166 (1955); Paul De Rousiers, *Les Règles de la Haye et leur mise en application. Le point de vue des armateurs français*, 33 *REVUE INTERNATIONALE DU DROIT MARITIME* 688-92 (1922); Georges Ripert, *L'unification du Droit Maritime*, in *JDI* 213-15 (1923); MALCOM A. CLARKE, *ASPECTS OF THE HAGUE RULES* 3-7 (1976); Joseph C. Sweeney, *The UNCTRAL Draft Convention on Carriage of Goods by Sea*, 7 *J. MAR. L. & COM.* 69, 70-72 (1975); Sergio Carbone, *L'ambito di applicazione della normativa uniforme nella nuova disciplina del trasporto marittimo internazionale del Protocollo di Visby*, in *DIRITTO DEL COMMERCIO INTERNAZIONALE* 453-58 (1987); G. Aucter, *La Convention des Nations-Unies sur le transport de marchandises par mer de 1978 ("Règles de Hambourg, 1978")*, in *ETL* 34-56 (1979); Georges Van Bladel, *CONNAISSANCE ET RÈGLES DE LA HAYE* 6-7 (1929).

The works quoted above show the reply of the *Comité Maritime International* ("CMI") on facing the above-mentioned lack of success of the Hague Rules by shaping them into a Convention. About the institution, see generally ALBERT LILAR & CARLO VAN DEN BOSCH, *LE COMITÉ MARITIME INTERNATIONAL 1897-1972* (1972); Joseph C. Sweeney, *From Columbus to Cooperation—Trade and Shipping Policies from 1492 to 1992*, 13 *FORDHAM INT'L L.J.* 481, 494-99 (1989-90); A.N. Yiannopoulos, *The Unification of Private Maritime Law By International Conventions*, 30 *LAW & CONTEMP. PROBS.* 370 (1965); see also HENRI AUBRUN, *LES TRANSPORTS DE MARCHANDISES PAR MER* 25-30 (1938).

The role of the Harter Act in the entire movement mentioned above has been presented by Professor Joseph Sweeney. See Joseph C. Sweeney, *Happy Birthday, Harter: A Reappraisal of the Harter Act on its 100th Anniversary*, 24 *J. MAR. L. & COMM.* 1 (1993); Joseph C. Sweeney, *The Prism of COGSA*, 30 *J. MAR. L. & COMM.* 543 (1999); see also Michael F. Sturley, *The History of COGSA and the Hague Rules*, *supra*, at nn.60-108.

12. Thirty years after the Brussels Convention was signed, its reform was promoted by the same CMI at the Rijeka Conference in 1959. The work was finished at the Stockholm Conference (1963), in which the Project, already named the Visby Protocol ("VP"), was prepared. The Visby Protocol was adopted in 1968, in a Diplomatic Conference that had to be held in two sessions: the first in May, 1967, and the second in

February, 1968, both in Brussels. See PLINIO MANCA, INTERNATIONAL MARITIME LAW 245-54 (2nd ed. 1970); Plinio Manca, *Le Regole di Visby*, in IL DIRITTO MARITTIMO 108 (1967); Jean Van Ryn, *La Convention de Bruxelles du 25 Août 1924 pour l'unification de certaines règles en matière de connaissance: resultats de son application et projets d'amendement 1964 I-III*, in IL DIRITTO MARITTIMO 165 (1964); P. Simon & M.R. Hennebicq, *La modification de la Convention du 25 Août 1924 en matière de Connaissance (Protocole de Bruxelles du 23 Février 1968)*, 46 REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARÉ 15-18 (1969). More information, and an abundance of reflections are also in Sergio Carbone, *L'ambito di applicazione della normativa uniforme nella nuova disciplina del trasporto marittimo internazionale del Protocollo di Visby*, *supra* note 11, 458-80.

For reporting on the period before the Diplomatic Conference was held, see José M. Gondra Romero, *El proyecto de reforma del Convenio de Bruselas de 25 de Agosto de 1924, sobre transportes marítimos en régimen de conocimiento*, 39 REVISTA DE DERECHO MERCANTIL 313-27 (1965); F. Berlingieri, P. Manca, C. Dagna & C. Medina, *La Conferenza di Stoccolma del Comité Maritime International*, in IL DIRITTO MARITTIMO 225-46 (1963); C. Legendre & P. Lureau, *La Conférence de Stockholm du Comité Maritime International*, in LE DROIT MARITIME FRANÇAIS 387-445 (1964); J. Lebuhn, *C.M.I.—Konferenz Stockholm*, in VERSICHERUNGSRECHT 693 (1963); H.G. Röhreke, *Die Stockholmer Seerechtskonferenz des Comité Maritime International*, in HANSA-SCHIFFFAHRT-SHIFFBAU-HAFEN 1502 (1963).

For each of the amendments see generally CLARKE, *supra* note 11; C. Persico, *Dieci lustri di applicazione della Convenzione internazionale di Bruxelles sulla polizza di carico*, in RIVISTA DEL DIRITTO DELLA NAVIGAZIONE 91-143 (1971). A critical view of the reform and of the very Convention can be obtained from G. Auchter, *supra* note 11, at 52.

13. Convention Project on the transport of goods by sea, exactly as approved by UNCITRAL. See UNCITRAL Y.B. *supra* note 2, ¶ 45. The insertion of Annex III, which is a resolution of the Diplomatic Conference and which recommends that the approved text be known as "Hamburg Rules," is adopted in the final act (without any known precedent among the documents of the Diplomatic Conference) together with the common understanding of Annex II, which can be tracked among the documents. See *Report of the First Committee*, ¶ 263, U.N. Doc. A/CONF.89/10 (1978); see generally THE HAMBURG RULES ON THE CARRIAGE OF GOODS BY SEA (1978); THE HAMBURG RULES: A CHOICE FOR THE E.E.C. (Bruxelles, F. Berlingieri ed., 1994); René Rôdière, *La responsabilité du transporteur maritime suivant les Règles de Hamburgo*, in LE DROIT MARITIME FRANÇAIS 451 (1978); R. Matilla Alegre, *Reglas de Hamburgo: principios fundamentales*, in REVISTA GENERAL DE LEGISLACIÓN Y JURISPRUDENCIA 281, 281-82 (1981); S.R. Katz, *Uniformity of International Trade Law and economic interests: the case of the Hamburg Rules*, in DIRITTO DEL COMMERCIO INTERNAZIONALE 107-09 (1989); A. Emparanza Sobejano, *Transporte marítimo bajo conocimiento de embarque: su régimen jurídico internacional tras la entrada en vigor de las Reglas de Hamburgo*, in EL DERECHO DEL TRANSPORTE MARÍTIMO INTERNACIONAL 46-52 (J.M. Eizaguirre ed., 1994); D.A. Werth, *The Hamburg Rules Revisited—A look at U.S. Options*, 22 J. MAR. L. & COM. 59 (1991); C.C. Nicoll, *Do the Hamburg Rules Suit a Shipper-Dominated Economy?*, 24 J. MAR. L. & COM. 151 (1993); A.J. Waldron, *The Hamburg Rules—A Boondoggle for Lawyers*, J. BUS. L. 306 (1991); A. Diamond, *Responsibility for Loss of, or Damage to, Cargo on a Sea Transit: The Hague or Hamburg Conventions?*, in CARRIAGE OF GOODS BY SEA 120 (Koh Soon Kwang ed., 1986); O. BLAS SIMONE, LAS REGLAS DE HAMBURGO (ANÁLISIS NORMATIVO) (1980); J.O. Honnold, *Ocean Carriers and Cargo; Clarity and Fairness—Hague or Hamburg?*, 24 J. MAR. L. & COM. 75 (1993); F. SÁNCHEZ CALERO, LAS REGLAS DE HAMBURGO SOBRE EL CONTRATO DE TRANSPORTE MARÍTIMO DE MERCANCIAS. UNA VALORACIÓN CRÍTICA (1981); P. Mankowski, *Jurisdiction Clauses und Paramount Clauses nach dem Inkrafttreten der Hamburg Rules*, in TRANSPORTRECHT 301 (1992); J. Basedow, *Seefrachtrecht: Die Hamburger Regeln sind in Kraft*, in ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 100 (1993); J.M. Alcántara, *Las Reglas de Hamburgo ante in-*

new Convention will be known as the Rotterdam Rules .

The Rotterdam Rules will apply to the international movement of goods "door to door," that is from the seller to the buyer including the period or phase while the goods are in a port and not on the ship and subject to loading, storage, relocation, and unloading. This Article will deal with the new provisions and relate them to the background of previous treaties in order to determine the parts that represent harmonization of law as well as its progressive development.

C. Restrictions

Where we are, where we are going, and how we get there, could be the focus of the present exercise. That is where the order and the method of this Article come from. At the same time, its purpose is focused on the harmonization of national laws on the transport of goods during the port phase. First, the

minente entrada en vigor. Una valoración actualizada, in DERECHO DE LOS NEGOCIOS 1 (1993); R. Herber, *United Nations Convention on the Carriage of Goods by Sea*, (1978) (*Hamburg Rules*), in 11th ASIAN PACIFIC REGIONAL TRADE SEMINAR, 1984, (Austl. Att'y Gen.'s Dep't, 1985); R. Herber, *Gedanken zum Inkrafttreten der Hamburg Regeln*, in TRANSPORTRECHT 382 (1992); J.A. Gómez Segade, *El transporte marítimo de mercancías: de las Reglas de la Haya a las Reglas de Hamburgo*, in REVISTA DE DERECHO MERCANTIL 221 (1980); W.E. ASTLE, THE HAMBURG RULES (1981); D. RICHTER-HANNES, DIE HAMBURGER REGELN. NEUREGELUNG ÜBER DIE GÜTERBEFÖRDERUNG ZUR SEE (1982); P. Bonassies, *Le domaine d'application des Règles de Hambourg*, in IL DIRITTO MARITTIMO 281 (1993); S.M. CARBONE, LE REGOLE DI RESPONSABILITÀ DEL VETTORE MARITTIMO. DALL'AJA AD AMBURGO ATTRAVERSO LA GIURISPRUDENZA ITALIANA (1984); J. KIENZLE, DIE HAFTUNG DES CARRIER UND DES ACTUAL CARRIER NACH DEM HAMBURG-REGELN (1993); E. Selvig, *An Introduction to the Hamburg Rules, 1978*, in TRASPORTI. DIRITTO. ECONOMIA. COMMERCIO 15 (1979); H.M. Kindred, *From Hague to Hamburg: International Regulation of the Carriage of Goods by Sea*, 7 THE DALHOUSIE L.J. 585 (1983); C. Scapel, *Les Reformes Apportées par les Règles de Hambourg à la Responsabilité du Transporteur Maritime*, in IL DIRITTO MARITTIMO 338 (1993); W. Tetley, *The Hamburg Rules—A commentary*, in LLOYD'S MAR. COM. L.Q. 1 (1979); A. GAST PINEDA, EFECTOS LEGALES Y PRÁCTICOS DE LAS REGLAS DE HAMBURGO (1989); R. Achard, *Les Règles de Hambourg à nouveau mises en examen*, in LE DROIT MARITIME FRANÇAIS 254 (1994); J. Ramberg, *Claims Under the Hamburg Rules*, in DEMETRIOS MARKIANOS IN MEMORIAM 63 (1988); C.W. O'Hare, *Cargo Dispute Resolution and the Hamburg Rules*, 29 INT'L & COMP. L.Q. 219 (1980); Michael F. Sturley, *Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence*, 24 J. MAR. L. & COM. 119 (1993); C.F. LÜDDEKE & A. JOHNSON, A GUIDE TO THE HAMBURG RULES. FROM HAGUE TO HAMBURG VIA VISBY. AN INDUSTRY REPORT. (1991); K.H. Necker, *Zur Statutenkollision im Seefrachtrecht. Von den Haager zu den Hamburger Regeln*, in RECHT ÜBER SEE. FESTSCHRIFT ROLF STÖDTER 89 (1979); R. ASARIOTIS, DIE ANWENDUNGS—UND ZUSTÄNDIGKEITSVORSCHRIFTEN DER HAMBURG—REGELN UND IHRE AUSWIRKUNGEN IN NICHTVERTRAGSSTAATEN (Münster et. al. eds., 1999). For the U.S. jurisprudence, see generally *Compañía Sudamericana de Vapores, S.A. v. I.T.O. Corp. of Baltimore*, 940 F. Supp. 855 (D. Md. 1996).

current law will be reviewed, as well as the progress from the current law to its successor. This vast issue requires extreme conciseness to fit within this one Article.

Three large sections, therefore, must be created, always in keeping with our single purpose: to try to clarify the most important aspects of the liability regime for the objects in transport while they are on the pier. Part I synthesizes the current uniform law; Part II describes the milestones in the genesis of the new law; the last section, Part III, points out the new law's most prominent features.

Each section must have divisions. In the first section, Part I, the divisions separate the Brussels Convention ("BC") (Part I.A); the BC-Visby Protocol ("VP") (Part I.B); and the HamR (Part I.C), as the main branches of this subject. Part II makes use of the three readings which the Project was subject to in order to schematize its formative process (Part II.B), being preceded by a note containing information about what previously happened in UNCITRAL and in the *Comité Maritime International* ("CMI") (Part II.A).¹⁴ These are followed by a division devoted to the Plenary Commission Meeting that approved the Project (Part II.C). Part III studies the geographical and legal limits of the port area (Part III.A); the regulations in that area of goods, with the condition that they be controlled by the carrier (Part III.B); by the shipper or by the consignee (Part III.C); or by the maritime performing party (Part III.D). In addition to those already mentioned, it is possible that none of the aforementioned parties have control over the goods in transport while on the pier (Part III.E). The Article is closed with some conclusions.

A separate methodology is used for each of the three principal concerns of this task. In Part I, it is possible to say that, by necessity, it can only constitute an abridged (and partial) synthesis of legal works and decisions, with the purpose of pointing out the main problems detected during the application of those works and decisions. In Part II, the sequence of the formation of the new law will provide the reader the primary sources. Part III,

14. The CMI is a non-governmental international organization specializing in the problems of the maritime industry. It was created in 1897 by members of the International Law Association (founded in 1871) who felt the need to have an organization consistently available to consider the problems of the maritime industry as they arose. It is made up of fifty-seven national maritime law associations (the United States has been a member since 1899).

finally, seeks to offer an answer, from the perspective of the projected law, to the regulation of liability for the merchandise during the port phase.

In fact, a book¹⁵ and a series of monographs¹⁶ brought me closer to the current law, and as a member of the Spanish Delegation I attended all the sessions of the Working Group.¹⁷

The foregoing implies something I must confess: This Article (particularly Part I) will lack the doctrinal and legal references of the twenty-first century. Since March 2002, the projected law has been the focus of my work on this subject, with just a few exceptions. About this subject, I have barely devoted any time to reflections other than my own,¹⁸ no matter how interesting and remarkable they may have seemed to me. In other words, Part I will express the most important aspects of other, previous exercises.¹⁹ In the rest, everything is the product of

15. See generally DAVID MORÁN BOVIO, *EXTREMOS DEL PERIODO DE APLICACIÓN MÍNIMO EN LA CB-PV (CONVENCIÓN DE BRUSELAS-PROTOCOLO DE VISBY SOBRE TRANSPORTE DE MERCANCÍAS BAJO CONOCIMIENTO DE EMBARQUE)* [END OF THE APPLICATION IN MINIMUM BC-VP (BRUSSELS CONVENTION-VISBY PROTOCOL ON TRANSPORT OF GOODS UNDER BILL OF LADING)] (1998).

16. See David Morán Bovio, *Los límites del periodo de la responsabilidad del porteador en las Reglas de Hamburgo*, in 3 ESTUDIOS JURÍDICOS EN HOMENAJE AL PROFESOR AURELIO MENÉNDEZ 3947-87 (1996); David Morán Bovio, *Mercancías en la fase portuaria: problemas y soluciones*, in 2 ESTUDIOS DE DERECHO MERCANTIL, HOMENAJE AL PROFESOR JUSTINO DUQUE DOMÍNGUEZ 1473-95 (Valladolid ed., 1998); David Morán Bovio, *Mercancías en la fase portuaria: problemas y soluciones*, in DERECHO UNIFORME DEL TRANSPORTE INTERNACIONAL: CUESTIONES DE ACTUALIDAD 168-212 (Agustín Madrid Parra ed., 1998); David Morán Bovio, *Primeras sentencias en aplicación de las Reglas de Hamburgo*, 627 REVISTA GENERAL DE DERECHO 13303-14 (1996); David Morán Bovio, *The First Decisions Applying the Hamburg Rules*, 3 LLOYD'S MAR. COM. L.Q. 351-58 (1997).

17. This was not the case with regard to the informal meetings, where Manuel Alba and Tatiana Arroyo (she almost always, in all of those meetings) represented the Spanish Delegation.

18. Those that have been published appear on the UNCITRAL web page, in the publications and on-line resources section. See generally UNCITRAL Publications and On-line Resources, <http://www.uncitral.org/uncitral/en/publications.html> (last visited Feb. 16, 2009).

19. Only in that way, by means of references to other places, can that part be resolved in a discrete way, since its treatment demands a greater scope than what I have covered here. For example, the work mentioned *supra* note 15 covers more than three hundred legal decisions from the most relevant countries in the application of Brussels Convention/Hague Rules ("BC/HR") and Brussels Convention-Visby Protocol/Hague Rules-Visby ("BC-VP/HR-V"). Such references to previous works are made with respect to the footnotes and pages where they are; it is important, however, to understand that they incorporate the accompanying text, which they compliment.

both the careful observation paid to the crystallization of the Project (II), and of my own critique of it (III).

Last, the works that inform Part I of this Article were concerned only with what is considered the key problem, the setting of limits for the application of the current law in the succession of activities required in the transport of goods. That entire Part is concerned only with this issue which, it is worth pointing out, is not of little importance, especially if we consider that most of the losses and damages to goods being transported by sea actually occur on land in the port area.²⁰

I. CURRENT LAW

A. *Brussels Convention ("BC")/Hague Rules ("HR")*

To begin with, in liner transportation the bills of lading have a temporal limitation on the liability of the carrier, and restricts liability to the period of the voyage between the loading and unloading of the goods in such a way that each moment indicates respectively, the beginning and the end of the liability of the carrier, utilizing the possibilities featured in BC/HR Article 7, together with another Himalaya Clause,²¹ which extends the benefits of the carrier to his cooperators on the pier.

1. Difficulties in its Application

In such a context, two contradictions occur, discussed below in subsections (a) and (b), and one exceptional case, reviewed in subsection (c).

20. David Morán Bovio, *Mercancías en la fase portuaria: problemas y soluciones*, *supra* note 16, at 1474 nn.1-6. For the European occurrences of the subject in the same time period of the aforementioned work, see R. Illescas, *El Convenio de las Naciones Unidas sobre la responsabilidad de los Empresarios de Terminales de Transporte en el Comercio Internacional*, in 2 ESTUDIOS DE DERECHO MERCANTIL, HOMENAJE AL PROFESOR JUSTINO DUQUE DOMÍNGUEZ 1453-61 (Valladolid ed., 1998) (synthesizing the Mercer Report from the European Union ("EU") at page 1459).

21. Joseph C. Sweeney, *Crossing the Himalayas: Exculpatory Clauses in Global Transport*, 36 J. MAR. L. & COMM. 155 (2005). A Himalaya Clause in an ocean bill of lading extends carrier defenses provided by statute to other transportation industry participants not protected by statute, such as the one year time bar and the US\$500 package limitation on recovery for cargo damages.

a. Liner Terms and Initial and Final Limits of the Liability of the Carrier

In liner practice, the carrier (through its employees, agent, or independent operator) takes custody of the goods to be transported before they can be loaded on the vessel and keeps them in its possession after they are unloaded.

That this has been the case, and continues being so, is evidenced, on the exit pier, by the provisions of the received for shipment bill of lading (Articles 3.3 and 3.7 BC/HR), as well as by the involvement of a series of printed documents. All of these documents share the noun "receipts," by which they identify their main characteristic: the goods are not under the shipper's custody anymore. The documents are distinguished by the genitives that indicate the issuer: "Mate's Receipt," "Dock's Receipt," "Tally-clerk's receipts."²²

Similarly, in such circumstances, if the goods are damaged while in the custody of the carrier, it will be responsible for them, even if the bill of lading has not yet been issued.²³

On the pier: goods in transport are transferred to the custody of the employees, the agents, or the independent operators that collaborate with the carrier, and they take care of facilitating the delivery to the final recipient by notification, to arrange subsequent custody of the goods, as well as complementary tasks required before the consignee can take them.²⁴

All things considered, the clause that strictly limits the temporal liability of the carrier on the bill of lading states a boundary that is contradicted by the practices of liner traffic. This would leave us without a unitary answer for the question of who is liable for the goods on the pier and how. According to the strict limitation clause, the carrier would not be liable in this period, while the liner terms say the contrary.

b. The Himalaya Clause and the Strict Period of the Liability of the Carrier

The second contradiction in the statements of the bill of lading is apparent when we contrast the strict temporal limita-

22. See David Morán Bovio, *Mercancías en la fase portuaria: problemas y soluciones*, *supra* note 16, at 1476-77 nn.22-25.

23. For details see *id.* 1477 n.26.

24. For the justification of what is stated see *id.* 1477-78 nn.27-29.

tion for the carrier and the Himalaya Clause. In the former case, some of the obligations and liabilities of the carrier prior to loading and after unloading are excluded (e.g., Article 7 BC/HR). With the latter clause, the carrier declares that its collaborators and assistants on the pier are governed by the same statutory liability regime as the carrier: quantitative limitation of liability (Article 4.5 BC/HR: US\$500 package), temporal limitation for the exercise of the actions (Article 3.6 Paragraph 4 BC/HR: one year), and the list of exemptions from any liability (Article 4.2 BC/HR).

Two contrary propositions emerge about the same reality: the liability of the principal and that of its agent; the agent's liability is exculpated in a field voluntarily excluded from the liability of the principal.²⁵ In the bill of lading clause, the principal is declared not liable during those periods. In the Himalaya Clause, it is stated that the liability of the carrier's agents or servants during that period are reduced or eliminated like that of the carrier. Once identified, the conflict must be resolved according to the circumstances, lessening or increasing the validity of the relevant clause.²⁶

c. Exceptional Case: Transport Terminals Controlled Exclusively by Public Entities

The exceptionality of the situation outlined by the heading of this section leads to a tendency to make the carrier exempt from any liability whenever it is unable to exercise any control on the pier over the goods in transport because the terminals

25. As an argument for the above stated, the allegation of a "double period" is well known: the coincidence of the stretch of the application of HR (the scope of which is measured by the strict limitation clause) and the application of the relevant National Law (for the rest). I also had to consider the absence of any grounds for such an allegation. *See id.* 1479 nn.34-35; 1481 nn. 45-47; MORÁN BOVIO, *supra* note 15, §§ 5.1.4-5.1.5; 5.2.2-5.2.4; 2.2.2. In brief, it is worth remembering that if the carrier is liable before loading and after unloading, but only under the regulations of the national law, then there is a question as to how the carrier's agents or assistants can have different regimes (with respect to their extended liability). It also raises the question about which method is less advantageous to the users.

26. For the justification of this see David Morán Bovio, *Mercancias en la fase portuaria: problemas y soluciones*, *supra* note 16, at 1478 n.30. This is particularly important for the traffic to and from the United States, because it comments upon the incident in *Wemhoener Pressen v. Ceres Marine Terminals*, 5 F.3d 734 (4th Cir. 1993), in which the court keeps to the thesis of Zawitowski. *See* JoAnne Zawitowski, *supra* note 7, at 454 (states thesis and cites portion of case that shows how the court keeps to this thesis).

are in the exclusive control of public entities.²⁷

2. How to Resolve the Conflicts

With the exceptions inherent in any generalization, the indiscriminate acknowledgement of the Himalaya Clause and the disregard for the strict limitation of the carrier's liability period, represents a way to adjust BC/HR to the reality of liner traffic.

That result is preferable, since it is considered as the arrival of an interpretation, in which the reality of the traffic overrides the statements of the contracting parties in the bill of lading. Alternatively, it is an interpretation through which it is possible to underscore the inadequacy of conventional agreements in the bill of lading in contrast to the usual practices in a particular sector. Therefore, the reality of the facts is set before whatever the contracting parties agreed to in the bill of lading.

This is why the limitation clauses for the period of liability of the carrier are set aside and the Himalaya Clauses are approved. The reality demands that, in fact, the carrier control the goods from the moment they are on the pier (provided it has been notified about them and is able to take care of them). Likewise, liability extends beyond the terms of the bill of lading at the destination port. Despite the fact that the liability of the carrier has ended according to the bill's stipulation that there is a strict temporal limitation, the carrier answers for any goods under its control (or that of its assistants) before the recipient is able to pick them up.

With the exception derived from the actions on the pier of a warehouse or transporter (other than the ocean carrier) whose responsibility is regulated by local rules, as governed by bills of lading with the two clauses mentioned above (the strict limitation of the liability period and the Himalaya), the duties and obligations with respect to the goods during the port phase are governed by the Himalaya Clause, which proves to be more adequate for liner traffic, whereupon the actions of the carrier or those of its servants or agents will be regulated by the BC/HR.²⁸

27. For a little more elaboration see David Morán Bovio, *Mercancias en la fase portuaria: problemas y soluciones*, *supra* note 16, at 1479 nn.36-37.

28. For details see *id.* 1480-82 nn.38-49.

B. *Brussels Convention-Visby Protocol ("BC-VP") /
Hague Rules-Visby ("HR-V")*

1. Two Topics as an Example

Opinions about the evolution from BC/HR to BC-VP/HR-V, and any reckoning about how much can be learned from that sequence of events²⁹ will be left aside. Rather, we will focus on two aspects of the amended text.

a. Period of the Carrier's Liability (and Art. 4
bis.2 BC-VP/HR-V)

The solution accepted in the VP generalizes one of the contradictions expressed in Part I.A. Here, however, it is even more difficult to accept a strict limitation on the carrier's period of responsibility (within the boundaries of loading and unloading), when the carrier's collaborators at the port (except for independent operators) benefit from the regulations about the carrier's liability. An effort to deal with the independent operators was not successful and no provision for them was made.

The carrier and collaborator operating on the pier receive the goods and complete the stowage plan, or guard them after the voyage, until the person authorized to receive them comes to pick them up. The agent enjoys all the advantages that BC-VP/HR-V concedes to the carrier, in order to conclude that the validity of the boundary delineated by the loading and unloading of the goods on the ship, as a term for the application of the BC-VP/HR-V, makes no sense and will prove useless, since Article 4 bis.2 determines application of the Instrument in the periods before and after the ocean voyage.

The literal and systematic interpretation of Article 4 bis.2 BC-VP/HR-V use the same reasoning. The finality of the reform and the social reality to which it is applied necessarily follow the same direction.

It can be said, also, that the acknowledgment on the part of the courts of the validity of the Himalaya Clause (in spite of its contradiction to the clause of limitation of the carrier's responsibility by the loading and unloading of the goods) implies an indirect denial of the validity of the strict limitation clause, as well

29. In brief, see *id.* 1484-85 nn.58-65. For a somewhat more extensive treatment see MORÁN BOVIO, *supra* note 15, at 43-57.

as a broadening of the ordinary scope of application of BC-VP/HR-V.³⁰

b. Misdelivery and Application of BC-VP/HR-V

The doubts expressed by the legal system and by the institutions about the application of the amended Instrument (and its precedent) to misdelivery cases are significant in number. These doubts have obvious grounds and have been made public in different jurisdictions, in spite of the fact that they are among the reasons for moving from BC/HR to BC-VP/HR-V.³¹

In defending the application of BC-VP/HR-V (and its precedent) to misdelivery cases—as seems preferable with regard to the predominant interpretative criteria and, particularly, in order to prevent such an easy evasion of the carrier's liability provided for in the Instrument (amended or not)—thus the limit of cargo unloading is made ineffective to indicate the boundary of the carrier's liability (and implicitly, the limit of loading), in spite of the statement that operates on the bill of lading.³²

C. *Hamburg Rules*

Probably because its authors worked in a completely open and fairly scientific way by analyzing issues and examining solutions in the preparation of the Instrument, the result, with regards to the temporal limits of the carrier's liability, HamR Article 4, can be considered exemplary. The carrier is liable for the goods while they are in its possession, including any periods in which they are in the hands of third parties who provide the carrier with services for the completion of its transport function.³³ In other words, when the goods are in the port under the control of the carrier's collaborators, it is liable for them as if they were aboard the ship, but at some ports the goods must be

30. See David Morán Bovio, *Mercancías en la fase portuaria: problemas y soluciones*, *supra* note 16, at 1485-86 nn.66-71. About the limits of that "ordinary scope of application" see MORÁN BOVIO, *supra* note 15, at 191-203.

31. The magnitude of this detail requires prompt reference. See David Morán Bovio, *Mercancías en la fase portuaria: problemas y soluciones*, *supra* note 16, at 1486-87 nn.72-77.

32. See *id.* 1487-88 nn.78-81. I may point out that in MORÁN BOVIO, *supra* note 15, at 213-27 the last and first possible commercial fault become the minimum limits of the sea carrier's period of liability ruled by BC-VP/HR-V, or by its precedent.

33. See David Morán Bovio, *Mercancías en la fase portuaria: problemas y soluciones*, *supra* note 16, at 1488 nn.83-89.

in the physical possession of the Customs or Agricultural inspectors.

Some have perceived in this phase a defect in HamR, because these rules do not consider the case in which the goods—either to be transported or already transported—are under the control of “*some authority or a third person to whom the merchandise must be delivered according to the applicable law or regulations at the unloading port . . .*”³⁴ The lack of consideration of this case should not be considered a legal lacuna. It is rather a voluntary restriction adopted as of the beginning of the deliberations that found its final expression in HamR, in order to create a space for the OTT Convention.³⁵

II. PROJECTED LAW

A. Prior to the UNCITRAL Working Group

As is immediately apparent, both with respect to UNCITRAL and with regards to CMI, the coming into effect of HamR and their subsequent application mark a revolution; without the advent of HamR, it is very likely that none of what is expressed in the following paragraphs would have occurred when it did. Therefore the adoption of HamR must be in turn adopted as a gateway to understanding the future regulations.

1. In UNCITRAL

The idea of the lack of uniformity in the law about the transport of goods by sea increases with the coming into effect and the full application of the HamR.³⁶ The spectacle of regulations

34. Hamburg Rules, *supra* note 3, arts. 4.2.ii-iii.

35. See David Morán Bovio, *Mercantías en la fase portuaria: problemas y soluciones*, *supra* note 16, at 1488-89 nn.90-94.

36. Such is the conclusion, as a particularly relevant example due to its time and location of J. Smart's lecture to UNCITRAL. J. Smart, Lecture, *From The Hague to Hamburg: Towards Modern Uniform Rules for Maritime Transport* at the Congress of the United Nations Commission on International Trade Law, in *UNIFORM COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW*, NEW YORK, 18-22 MAY 1992, 191-96 (U.N. ed., 1995). At the same forum, the representative of the International Bar Association, Lennard K. Rambusch, closed his remarks in a similar way: “[T]he supporters of these conventions [BC/HR, its byproducts, and HamR] will work together and will listen to each other with a view to . . . unifying and harmonizing international law relating to the carriage of goods by sea The quest for uniformity must continue” Lennard K. Rambusch, Remarks at the Congress of the United Nations Commission on Interna-

in force with no coherence among them, does not immediately translate (for the Secretariat or for the Commission), into a demand to promote some sort of understanding with those who defend BC/HR and its byproducts, but it does spur the promotion of a greater adherence to the HamR.³⁷

During the 1994 Plenary Meeting everything proceeded in the same direction,³⁸ but the CMI's intervention expressed interest in a joint effort with UNCITRAL to promote uniformity. The statement was appreciated by the Commission, which welcomed such a possibility.³⁹ That paragraph probably contains the first formal element for the genesis of the Rotterdam Rules.⁴⁰

tional Trade Law, in *UNIFORM COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW*, NEW YORK, 18-22 MAY 1992, 207 (U.N. ed., 1995). Within the same volume, G. Jones unambiguously expresses the industry's opposition to The Hamburg Rules ("HamR") and suggests that the regulations of BC/HR or BC-VP/HR-V be improved. G. Jones, *International Union of Marine Insurers*, in *UNIFORM COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW*, NEW YORK, 18-22 MAY 1992, 210 (U.N. ed., 1995). John O. Honnold confesses openly in his comments great difficulties in overcoming the opposition of insurance interests to the HamR in his country. See John O. Honnold, *Goals of Unification*, in *UNIFORM COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW*, NEW YORK, 18-22 MAY 1992, 211 (U.N. ed., 1995).

37. I find revealing the absence of any explicit reference in the Secretary-General's Report and its addendums, U.N. Doc. A/CN.9/378 (July 5-23, 1993) (24 UNCITRAL Y.B. 1993) (U.N. Pub., Sales No. E.94.V.16), where a series of topics for the task ahead were presented at the twenty-sixth session of the Commission. The closest thing mentioned, is a "Legal guide on marine insurance contracts" in "*Proposals on specific types of contracts*". See *id.* at 3. The Commission's position for the promotion of HamR, is obvious in the Report of the United Nations Commission on International Trade Law on the Work of its Twenty-Sixth Session, in which paragraphs 325 to 328 recall the coming into effect of the Instrument and the coordination needed at the heart of the United Nations. See U.N. GAOR, 48th Sess., Supp. No. 17, U.N. Doc. A/48/17 (1993).

One of its agencies, the Economic and Social Commission for Asia and the Pacific ("ESCAP"), was truly exceeding normal bounds by advising States in a manner running "counter to the recommendations contained in General Assembly resolutions." *Id.* ¶¶ 326-28.

38. A note from the Secretariat pertaining to the status of HamR was presented. Its conclusions are quite explicit, particularly Paragraph 39, which labels as "inaccurate, unproven or exaggerated" the criticism linked to the strong lobbying campaigns against the Instrument. *Status of the Hamburg Rules*, ¶ 39, U.N. Doc. A/CN.9/401/Add.1 (1994).

39. See U.N. GAOR, 49th Sess., Supp. No. 17, ¶ 251, UN Doc. A/49/17 (1994). This does not prevent the report from emphasizing the need to step up the efforts toward achieving growth in the number of HamR endorsements. See *id.* ¶ 252.

40. This statement is far from being a point in common. It is not shared by the UNCITRAL documents. For the Reports of Working Group III see, e.g., UNCITRAL, *Report of the Working Group on Transport Law on the Work of Its Ninth Session*, U.N. Doc. A/

In fact, in the next Plenary Meeting, the passage mentioned above was used as a reminder to the Commission, that without making any decisions considers a CMI report about how its work is progressing.⁴¹

In 1996, the twenty-ninth session of the Plenary Meeting of the Commission, the comments of the report have an unusual origin: the discussion of the report from the Working Group on Electronic Data Interchange (“EDI”).⁴² The Commission further debated issues involving the documents pertaining to transport by sea in an electronic context.⁴³ Logically, the transference and negotiation of the bill of lading (and of the other transport documents) encompassed other aspects, about which the Working Group found it necessary to consult with the Commission, convinced that it was important to have input into a decision at that higher level.⁴⁴

CN.9/510 (May 7, 2002) [hereinafter *Ninth Session Report*]; UNCITRAL, *Report of the Working Group on Transport Law on the Work of Its Tenth Session*, U.N. Doc. A/CN.9/525 (Oct. 7, 2002) [hereinafter *Tenth Session Report*]; UNCITRAL, *Report of the Working Group on Transport Law on the Work of Its Eleventh Session*, U.N. Doc. A/CN.9/526 (May 9, 2003) [hereinafter *Eleventh Session Report*]; UNCITRAL, *Report of the Working Group on Transport Law on the Work of Its Twelfth Session*, U.N. Doc. A/CN.9/544 (Dec. 16, 2003) [hereinafter *Twelfth Session Report*]; UNCITRAL, *Report of the Working Group on Transport Law on the Work of Its Thirteenth Session*, U.N. Doc. A/CN.9/552 (May 24, 2004) [hereinafter *Thirteenth Session Report*]. Nor is it shared by the CMI. See generally *infra* note 58 and accompanying text (the President’s words at the opening of the Conference of July 6, 2000, in the U.N.). Both series of documents locate the point of departure at the 1996 UNCITRAL Plenary Meeting.

41. See UN GAOR, 50th Sess., Supp. No. 17, ¶¶ 430-33 (1995). As in the past, the convenience of achieving greater adherence to the HamR was reiterated. See *id.* ¶ 433.

42. UN GAOR, 51st Sess., Supp. 17, U.N. Doc. A/CN.9/421 (1996).

43. The subject came up throughout a document sent to the thirtieth session of the Working Group for its consideration. See U.N. GAOR, 51st Sess., U.N. Doc. A/CN.9/WG.IV/WP.69 (1996). Paragraphs 1-3 of that document explain that the study of the possibility of transforming the bills of lading into the object of trade and transference in the EDI context led to the topic of the document. See *id.* ¶¶ 1-3.

44. The Working Group Report lists the aspects mentioned throughout the discussion, including, *inter alia*, relations between buyer and seller; retention of the document; right of control over the goods to which the document refers; possibility of using the document as a warranty. See *id.* ¶¶ 31, 36, 67.

The emphasis was on the agreement about how little regulation Uniform Law exercised over those points, as well as the flimsiness of the Model Law in resolving them. See *id.* ¶¶ 86-87.

There was agreement about the convenience of revising the Uniform Law in order to realign the subjects being debated, and a caution that such a task would have to be performed in tandem with the main actors in the field: CMI, etc. See *id.* ¶¶ 67-68, 87.

The need for the Commission to debate the subject and arrive at some conclusion would seem to be quite obvious.

The Commission was divided in the discussion, since there were some who considered the task to be appropriate⁴⁵ while others considered that it would damage the progress made in ratifying HamR,⁴⁶ and still others were of the opinion that it was an inappropriate issue due to the Secretariat's shortage of resources.⁴⁷ Consequently, a minimal agreement was adopted. Without including the subject in the agenda for the Commission's future work, the Secretariat was instructed to begin collecting information for the purpose of presenting an analysis that would provide the basis for a decision from the Commission.⁴⁸

In 1998, the Plenary Meeting of the Commission—which had not addressed the issue the year before—considered a statement from the CMI expressing its satisfaction in working together with the Secretariat in the collection of information and materials, for the purpose of making the Commission better able to make a well-informed decision.⁴⁹ The CMI explained the need to expand the boundaries for such an exercise, both in its content, and in the entities consulted (even if this meant dedicating greater effort and time), in order to allow for an adequate evaluation of future action.⁵⁰

The response from the Commission was one of strong support for the prior work of the Secretariat and the CMI, with the expectation that it was an important project of considerable scope, without precedent at the supranational level.⁵¹

In 1999, the Coordination and Cooperation Section of the Plenary Commission Meeting was opened once again with the subject of Transport Law. The CMI presented its statements about the progress of its work: the implementation of a Working Group to prepare a study on a wide range of subjects, the first steps in that task (with which it is possible to detect the presence of national law in sectors that should have universally harmonized rules, and in which electronic communication is empha-

45. See U.N. GAOR, 51st Sess., Supp. 17, ¶¶ 210-11, U.N. Doc. A/51/17 (1996).

46. See *id.* ¶¶ 213-14.

47. See *id.* ¶ 212.

48. See *id.* ¶ 215. Here the CMI is mentioned for the first time as an indispensable organization with which to work.

49. See U.N. GAOR, 53d Sess., Supp. 17, ¶ 264, U.N. Doc. A/53/17 (1998).

50. See *id.* ¶ 265.

51. See *id.* ¶ 266.

sized); the preparations for an upcoming conference in London; the plan to create an International Sub-Committee (once all the replies to the forwarded survey were received); and the perceived enthusiasm in the sector's industry about the task initiated; as well as pointing out that the task would have to result in the proposal of a universally accepted and uniform system of regulations.⁵² The CMI concluded with the suggestion of a one-day-conference on the occasion of the UNCITRAL following the plenary meeting.⁵³ The reply from the Commission was to commend the work done and to encourage its continuation (but the Report does not contain the decision about the conference indicated).⁵⁴

The first Plenary Meeting of the new millennium (New York, June 12 to July 7, 2000) has a Report from the Secretary General of UNCITRAL about possible future work in the area of Transport Law.⁵⁵ The Commission was satisfied with that document and listened to the verbal report presented by the CMI.⁵⁶ This plenary was followed by a symposium with a large attendance from industry and insurers.

The most notable points of the subsequent discussion were: the general agreement about the need to promote a more active uniformity in the matter, to restrict the discussion to transport operations from warehouse to warehouse, to consider the transport contract in a way that will facilitate import and export operations, including the relations between buyers and sellers, as well as the financing of transactions.⁵⁷ There was likewise mention of the discussion organized by the Secretariat on the day reserved

52. See *Report of the United Nations Commission on International Trade Law on the Work of its Thirty-Second Session*, 30 UNCITRAL Y.B. 47, ¶¶ 413-15, U.N. Doc. A/54/17 (1999).

53. *Id.* ¶ 416.

54. *Id.* ¶¶ 417-18.

55. The Secretary-General, *Report of the Secretary-General of UNCITRAL*, U.N. Doc. A/CN.9/476 (Mar. 31, 2000). It has three sections: in addition to the introduction, a section about the progress of the work of the CMI, and the most extensive one devoted to a consideration of the main aspects and their hypothetical solutions (inspection of the goods and their description in the documents, documentation of the transport, and rights of the carrier, among others). It closes with some conclusions. The document is reproduced (with the permission of UNCITRAL) in the CMI NEWS LETTER (Comité Mar. Int'l.) No. 2-2000, at 14-21.

56. See *Report of the United Nations Commission on International Trade Law on the Work of its Thirty-Third Session*, 31 UNCITRAL Y.B. 55 ¶ 423, U.N. Doc. A/55/17 (2000).

57. *Id.* ¶ 424.

for the preparation of the Report of that Session (July 6).⁵⁸ It ended by urging the Secretariat to complete the task of cooperation with the CMI as soon as possible, in order to be able to adopt a well-informed decision at the next plenary meeting.⁵⁹

At the 2001 Plenary Meeting the Delegations had at their disposal a document,⁶⁰ which was used in the debate.⁶¹ The debate concluded in an agreement to establish a Working Group, and in the determination of its mandate and terms.⁶² Its evolution will be discussed after a consideration of the developments with the Comité Maritime International ("CMI").

2. In CMI

Before the HamR came into effect in 1992, the CMI held meetings that considered the problems generated in the changed conditions of the shipping industry.⁶³ These were

58. *Id.* ¶ 426. For the presentation speech by the President of the CMI, Patrick Griggs, see *Opening Statement from the President of the CMI*, CMI NEWS LETTER (Comité Mar. Int'l.), No. 3-2000, at 6-8.

59. *Report of the United Nations Commission on International Trade Law on the Work of its Thirty-Third Session*, *supra* note 56, ¶ 427, at 56.

60. The Secretary-General, *Possible Future Work on Transport Law: Report of the Secretary General*, 32 COMM'N INT'L TRADE L. Y.B. 455-62, U.N. Doc. A/CN.9/497/2001 (2001).

Here, the milestones (from 1996) of the work (discussing the results of the dialogue in 2000) are discussed and, above all, a summary is presented with a brief development on the main aspects that the future Instrument (very inspired, as the text acknowledges in the discussions that took place at the heart of the CMI), with the idea that it would allow the Commission to make a decision. The Secretariat proposed either the formation of a Working Group or that the Commission take the task upon itself (at least until the next Plenary Meeting). *See id.* at ¶ 54.

61. *Report of the United Nations Commission on International Trade Law on the Work of its Thirty-Fourth Session*, ¶¶ 319-40, U.N. GAOR, 56th Sess., U.N. Doc. A/56/17 (2001). With respect to the prefaces of the discussion, see *Possible Future Work on Transport Law: Report of the Secretary General*, *supra* note 60, ¶¶ 341-44, at 51 for the summary of this document.

62. *Possible Future Work on Transport Law: Report of the Secretary General*, *supra* note 60, ¶ 345, at 52; *id.* ¶ 425, at 63 (listing the dates of the first meeting in the spring of 2002).

63. The UNCITRAL Working Group started its work with a Project written entirely by the CMI, thus the *raison d'être* of a good part of the provisions has to be found in the documents of that organization. The preceding constitutes one of the links (probably one of the main ones for an important number of precepts) in the chain of the Project's precedents: after BC/HR, BC-VP/HR-V and HamR (eventually, the Operators of Transport Terminals ("OTT") Convention), we will have to keep in mind the preliminary discussions that took place at the heart of the CMI until we have the document presented to UNCITRAL in December of 2001. *See* David Morán Bovio, *Mercancías en la fase portuaria: problemas y soluciones*, *supra* note 16, at 168, 188 nn. 83-86. Additional

ongoing when the 1996 UNCITRAL Plenary Meeting was held. In the late 1970s the CMI had shifted its focus from its own treaty-preparation to advising international agencies that were seeking solutions to international problems.

Since then, the proposals have become more concrete and intensified:⁶⁴ based on the fact that UNCITRAL expressed its satisfaction in knowing that the CMI had adopted a leading position in the process,⁶⁵ in that the International Working Group continued and the International Sub-Committee (which had been dealing with the liability issues, while waiting for such issues to be completely introduced in the new work),⁶⁶ a Working Group was created, in May of 1998, on Transport Law issues,⁶⁷ the Working Group on EDI⁶⁸ continued, being all that labor coordinated by a steering committee.⁶⁹ Considering only the progress of the CMI up until the creation of the UNCITRAL Work-

references can be found in 1995 COMITÉ MARITIME INT'L Y.B. 109-244 [hereinafter CMI Y.B.], which contains the justification for the survey sent to the National Associations of Maritime Law, the questionnaire itself and the answers, the amendment recommendations for BC/HR, the Protocols, their recommendations to HamR, and the report from the first session of the International Sub-Committee about the regulations for the transport of goods by sea (London, November, 29-30, 1995). The documents of the CMI are available at <http://www.comitemaritime.org> (last visited Feb. 16, 2009).

64. See 1996 CMI Y.B. 343-403. This represents the first step in that direction: The Report of the President of the International Sub-Committee (Prof. F. Berlingieri) echoed the Plenary Meeting of UNCITRAL and opens the subjects that would be considered by the Sub-Committee. See *id.* at 344-45. It continues with Addendum 1, which summarizes certain aspects pertaining to the transport of goods by sea. See *id.* at 346-53. Addendum 2, presents the relevant paragraphs of the Report of the Plenary Meeting UNCITRAL are inserted. See *Official Records of the General Assembly, Fifty-First Session, Supplement No. 17*, U.N. GAOR, 51st Sess., ¶¶ 210-15, U.N. Doc. A/51/17 (1996). Addendum 3 presents a survey project that develops the questions that arose at the Plenary Meeting, as well as the Reports of the second, third and fourth sessions of the International Sub-Committee. See 1996 CMI Y.B. 360-403.

65. See *Report from the Steering Committee*, 1998 CMI Y.B. 109, about the reply of the CMI to the request from UNCITRAL.

66. Which I have mentioned in previous notes (under the presidency of Prof. Berlingieri). See 1998 CMI Y.B. 110(ii).

67. Presided by Mr. Stuart Beare, recently retired from a law office. See *CMI Draft Instrument on Transport Law*, CMI NEWS LETTER (Comité Maritime Int'l), No. 3-2001, at 2, ¶ 3, available at http://www.comitemaritime.org/news/pdfiles/nl01_3.pdf; Patrick Griggs, UNCITRAL/CMI Colloquium: *Opening Statement from the President of the CMI*, CMI NEWS LETTER (Comité Maritime Int'l), No. 3-2000, at 7, available at http://www.comitemaritime.org/news/pdfiles/nl00_3.pdf (where all of its members are mentioned); see also 1998 CMI Y.B. 110(iii). For the areas in which that group would work, see 1998 CMI Y.B. 111-17.

68. See 1998 CMI Y.B. 110(iv).

69. See *id.* 110(i).

ing Group, it is worth noting that: following the fifth session of the International Sub-Committee (on liability subjects),⁷⁰ the Report about the first activities of the Working Group on transport subjects, and the implementation of the corresponding International Sub-Committee, the results of activities began to appear.⁷¹

This International Sub-Committee on transport issues held four meetings in 2000⁷² and two more in 2001.⁷³ Since the end of May of that year it had at its disposal a Project Draft,⁷⁴ (prepared for the CMI Singapore Conference (February 11-17, 2001),⁷⁵ which was immediately circulated among the national Associations of Maritime Law and other interested organizations, a document that pointed out the nine areas in which more detailed answers were expected.⁷⁶ With the publication of those

70. See *id.* 105-16; Francesco Berlingieri, *Uniformity of the Law of the Carriage of Goods by Sea—Report on the Work of the International Sub-Committee*, CMI NEWS LETTER (Comité Maritime Int'l), No. 2-1999, at 1-5, available at http://www.comitemaritime.org/news/pdfiles/n199_2.pdf.

71. See 1999 CMI Y.B. 117-20; see also *id.* 121 (about the list of subjects to be studied by the International Sub-Committee); *id.* 122-31 (a study of Prof. M. Sturley's *Scope of application, duration of coverage, and exceptions to coverage in International Transport Law Regimes*, describing those subjects); *id.* 132-38 (a related questionnaire); *id.* 139-319 (the answers selected and uniformly presented); *id.* 320-23 (the minutes of the round table about that particular subject held at the end of July, 1999). Previous information can be found in *Minutes of the Assembly*, CMI NEWS LETTER (Comité Maritime Int'l), No. 3-1999, at 4, available at http://www.comitemaritime.org/news/pdfiles/n199_3.pdf (words of Prof. von Ziegler (Secretary-General of the organization) to the Assembly of the CMI, May 8, 1999, New York). See also Patrick Griggs, *Maritime Transportation Law—Renewed Efforts at Uniformity*, CMI NEWS LETTER (Comité Maritime Int'l), No. 3-1999, at 10 (letter from the President, P. Griggs, to the National Associations of Maritime Law). It is also worth pointing out the initiative of the round table in which the representatives of the most prominent entities in the sector participated. The contribution of that set of persons could be decisive, because the liability issues that have been studied by the corresponding International Sub-Committee (the one presided by Prof. Berlingieri) were incorporated thanks to their participation. See *CMI Draft Instrument on Transport Law*, CMI NEWS LETTER (Comité Maritime Int'l), No. 3-2001, at 4-5, ¶ 5.

72. See 2000 CMI Y.B. 176-289, available at http://www.comitemaritime.org/singapore/issue/issue_intro.html.

73. See *Report of the Fifth Meeting of the International Sub-Committee on Issues of Transport Law*, 2001 CMI Y.B. 265, available at <http://www.comitemaritime.org/singapore2/singafter/issues/report5.pdf>.

74. See *Draft Outline Instrument*, 2001 CMI Y.B. 357, available at <http://www.comitemaritime.org/singapore2/singafter/issues/draft.pdf>.

75. See *CMI Draft Instrument on Transport Law*, 2001 CMI Y.B. 532, 532-33, available at <http://www.comitemaritime.org/singapore2/singafter/issues/cmিদraft.pdf>.

76. See *Consultation Paper*, 2001 CMI Y.B. 379, available at <http://www.comitemaritime.org/singapore2/singafter/issues/consultation.pdf>.

replies and the conclusion of the Project,⁷⁷ the entire project was presented to UNCITRAL on December 11, 2001,⁷⁸ thus the direct task of the CMI with regard to the Project came to an end.

The CMI continued to collaborate in the sessions of the Working Group through its representative, Mr. Stuart Beare (particularly active in the first three meetings in presenting the precepts and explaining their meaning, also later in clarifying what was originally intended in controversial provisions). This influence was possibly greater, since (not being under the control of UNCITRAL, and with the mutual affection of those who, for quite a while, have worked so much in unison) most of those who participated in CMI's text were also actively engaged in the UNCITRAL Working Group.

It is worth pointing out that the precedents mentioned above express only some of the milestones and documents that are indispensable to understanding the path leading to the text received by UNCITRAL. The above makes evident, however, that in order to appreciate the origins of the Rotterdam Rules (even if only by the number of pages referred to in the footnotes), the CMI documents have to be considered.

B. *The meetings of the UNCITRAL Working Group*

1. First reading (Sessions: 9th⁷⁹, 10th and 11th: 2002-03)

In the spring of 2002, in New York, the UNCITRAL Working Group III, Transport Law, met for the first time.⁸⁰ The head

77. See 2001 CMI Y.B. 383-531 (for a synopsis of the answers); *id.* 532-97 (for the Project, dated December 10).

For a synopsis of the answers, see *CMI Draft Instrument on Transport Law*, *supra* note 78, at 383-531; for the project dated December 10, see *CMI Draft Instrument on Transport Law*, *supra* note 74, at 532-97, available at <http://www.comitemaritime.org/singapore2/singafer/issues/cmraft.pdf>.

78. See *CMI Draft Instrument on Transport Law*, CMI NEWS LETTER (Comité Maritime Int'l), No. 3-2001, at 2, available at http://www.comitemaritime.org/news/pdfiles/nl01_3.pdf.

79. The justification for the ordinal (the number nine) corresponding to the first session of the Working Group is that the Working Group on the international regulation of maritime transport previously established by UNCITRAL already had eight sessions. That Working Group was dissolved on May 7, 1976, when it fulfilled its mandate and delivered the Project (what would end up being the HamR). See *United Nations Commission on International Trade Law*, [1976] 7 Y.B. U.N. COMM'N ON INT'L TRADE L. 13, ¶ 36 n.14, U.N. Doc. A/CN.9/SERA/1976.

80. U.N. Doc. A/CN.9/510 is the Report of that Session to the Thirty-Fifth Plenary Meeting of the Commission. See generally *Ninth Session Report*, *supra* note 40.

of the Spanish Delegation, Professor Rafael Illescas, was elected president.⁸¹

Issues relative to ocean transport were examined from the beginning of the session,⁸² preceded by a more general discussion on each chapter about the general framework of the task. The intention was to provide the Commission with a first evaluation on the viability and coherence of the Project, about which the Working Group manifested approval,⁸³ as well as on the utility of the text provided by the CMI, for which they expressed their gratitude.⁸⁴

Perhaps the most remarkable aspect of this session was that the Working Group had a positive reaction to the first reading of the text.⁸⁵

The second meeting⁸⁶ debated the subject of the liability of the maritime carrier, in spite of the agreed milieu for the Project, which includes non-maritime transport in the door-to-door transport contract. In such a context, the agreement on the elimination of nautical fault or navigational error as an exception to carrier liability⁸⁷ was decisive, notwithstanding the intense debate about preserving the exception for fire.⁸⁸ It was decided, however, also after a long exchange of views, to keep

It thus began a pattern, which would not be interrupted or changed, of alternating the meetings between New York (in the Spring) and Vienna (in the Fall). Except for the last one, which was held again in Vienna, in January of 2008, in order to allow more time for the preparation and distribution of the documents for the Forty-First Plenary Meeting. All of the sessions lasted two weeks, except for the second meeting, the Tenth Period of Sessions of the Working Group, which lasted one week (having immediately requested to extend it another week). UNCITRAL, *Report of the United Nations Commission on International Trade Law on its Thirty-Sixth Session*, ¶ 208, U.N. Doc. A/58/17 (June 30-July 11, 2003).

81. The Working Group kept him in that position for each session, and he was also elected Chairman of the Forty-First Plenary Meeting. *Ninth Session Report*, *supra* note 40, ¶ 18; UNCITRAL, *Report of the United Nations Commission on International Trade Law on its Forty-First Session*, ¶ 9, U.N. Doc. A/63/17 (June 16-July 3, 2008).

82. In the nomenclature of UNCITRAL the CMI Project is called: A/CN.9/WG.III/WP.21.

83. *See Ninth Session Report*, *supra* note 40, ¶¶ 26-32.

84. *Id.* ¶ 22.

85. If we wish to conclude the task proposed, it is not possible to stop to consider the details of the criticisms and praise. In the first session, however, the idea that this is a preliminary reading during which it is not advisable to adopt any definitive decisions is predominant. *See, e.g., id.* ¶¶ 116, 119, 127.

86. *See generally Tenth Session Report*, *supra* note 40.

87. *Id.* ¶¶ 35-36.

88. *Id.* ¶ 37.

temporarily the list of exceptions featured in the Project.⁸⁹ The issues of shared liability or contributing cause, deviation (including the cargo on deck) and delay, were likewise addressed.⁹⁰ There was also agreement about freight.⁹¹

Sectors of the industry interested in the Project appeared to give their opinions about the text. Comments were made by the representatives of the Baltic and International Maritime Council and the International Chamber of Shipping, Protection & Indemnity Club Group at the end of the session.⁹²

The third meeting of the Working Group was highlighted by the conclusion of the first complete reading of the Project⁹³ (except for the electronic documents, which were left for later). There was a series of decisions adopted by the Working Group;⁹⁴ four subjects were discussed in greater detail: documentary aspects of the goods which are the object of transport, delivery of the goods to the consignee, right of control over the goods in transit, and transference of ownership during transport.⁹⁵ The five remaining great subjects⁹⁶ required less attention from the Working Group, either due to the high degree of agreement about their existence in the international community, or due to the fact that at the present stage of the Project it would be premature to begin discussing them in detail.

The discussion of the President's list was opened with the general question about the objective scope of the Instrument, for the purpose of moving to determine four other main subjects: types of transport covered, relations of the Instrument to the Conventions and to the national laws, coverage that maritime performing parties would receive, the limits of liability, and the way of resolving the issue of non-localized damages. Logi-

89. *Id.* ¶ 38 (about the beginning of the comments and their claims); *id.* ¶ 45 (with respect to the conclusion).

90. *Id.* ¶¶ 46-56; *id.* ¶¶ 71-80; *id.* ¶¶ 65-70.

91. *Id.* ¶¶ 106-23.

92. *Id.* add.1; *id.* add.2.

93. *Eleventh Session Report, supra* note 40, ¶ 23.

94. The series of issues in epigraph "B" of the *Eleventh Session Report, supra* note 40, ¶¶ 219-67, are well-identified in the, so-called in the room, "President's list," the decisive nature of which is evident just by looking at the table of contents of that document.

95. *Id.* ¶¶ 24-61, 62-99, 100-26, 127-48 (respectively).

96. *Id.* ¶¶ 149-82 (exercise of the actions and term); *id.* ¶¶ 183-90 (general average); *id.* ¶¶ 191-202 (other Instruments); *id.* ¶¶ 203-18 (limits to contractual freedom).

cally, it was just a matter of adopting a provisional solution, with the goal of a progress report to the Plenary Meeting.

To summarize, there was agreement to talk about transport by sea with phases of land transport, before or after sea transport. It was pointed out that one of the main pitfalls of the work was to be found in the relation of the Project to the existing transport conventions (i.e., CMR and COTIF) and to the national law. The other subjects depended, in great measure, on how this would be solved.⁹⁷

2. Second reading (Sessions: 12th, 13th, 14th, 15th, 16th, 17th, 18th: 2003-06)

This three-year period could be characterized, in relation to the rest of the genesis of the Rotterdam Rules, as “the crossing of the desert”: it takes considerably more time than the other two discrete parts in the development of the text together⁹⁸ and it

97. *Eleventh Session Report*, *supra* note 40, ¶¶ 219-67 (with respect to the details).

98. In addition to the Sessions in the title, the ordinary sessions of the Working Group, there were other informal ones. See UNCITRAL, *Report of Working Group III on Transport Law on the Work of its Fourteenth Session*, ¶ 166, U.N. Doc. A/CN.9/572 (Dec. 21, 2004) [hereinafter *Fourteenth Session Report*]; UNCITRAL, *Report of Working Group III on Transport Law on the Work of its Sixteenth Session*, ¶ 243, U.N. Doc. A/CN.9/591 (Jan. 4, 2006) [hereinafter *Sixteenth Session Report*].

There are also very abundant electronic communications. See *Thirteenth Session Report*, *supra* note 40, ¶ 167; *Fourteenth Session Report*, *supra*, ¶ 166 (for a couple of clear references).

Irrespective of the above, in each of the sessions indicated, the meetings of the interested Delegations occurred again, outside the schedule of the ordinary sessions, for the purpose of writing a text that would conform to what was outlined in the room, normally so that the Working Group would be able to adopt it before the end of the period of sessions in question. See UNCITRAL, *Report of Working Group III on Transport Law on the work of its Fifteenth Session*, ¶ 216, U.N. Doc. A/CN.9/576 (May 13, 2005) [hereinafter *Fifteenth Session Report*] (for references, together with the other aspects mentioned).

However regional in nature, I must add to the ones already mentioned, the meetings of the Delegations of the European Union, particularly important and intense from the beginning of the discussions in the second reading about the jurisdiction issues, eventually extendable—without imperative character—to arbitration (with eventual attempts to extend the agenda to other issues, such as volume contracts, which was immediately rejected in view of the forceful reply of some Delegations).

The inclusion of innovations in the working method outlined above was echoed at the Plenary Meeting about the notification of the Thirty-Seventh Plenary Meeting, eventually arousing reservations. See *Report of the U.N. Commission on International Trade Law on the work of its Thirty-Eighth Session*, New York, U.N. GAOR, 60th Sess., Supp. No. 17, ¶ 182-84, U.N. Doc. A/60/17 (2005).

has a notable (sometimes outstanding) documentary complexity.

The text prepared by the Secretariat⁹⁹ which reflects the agreements of the Working Group in the first reading, is gradually replaced by documents that modify, partially, some of the articles, or sections of the same.¹⁰⁰ Such texts, in turn, are replaced by others¹⁰¹ at a hectic pace that, toward the end of the period we are considering, already required skill in preserving the sequence,¹⁰² a virtue for which there would always be demand.¹⁰³ It is revealing, concretely, that the complete text of the

99. *Note by the Secretariat on Transport Law: Draft instrument on the carriage of goods, addressed by the U.N. Commission on International Trade Law Working Group III on Transport Law, 12th Sess., Vienna, Oct. 6-17, 2003, U.N. Doc. A/CN.9/WG.III/WP.32 (Sept. 4, 2003).*

100. *See, e.g., UNCITRAL, Working Group III (Transport Law), Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]—Provisional redraft of the Articles of the draft instrument considered in the Report of Working Group III on the work of its Twelfth Session, U.N. Doc. A/CN.9/WG.III/WP.36 (Mar. 23, 2004) (allowing the Working Group in its thirteenth period of sessions to follow the amendments agreed to in the twelfth period of sessions in UNCITRAL, Working Group III (Transport Law): Draft instrument on the carriage of goods [wholly or partly] [by sea], U.N. Doc. A/CN.9/WG.III/WP.32 (Sept. 4, 2003)).*

In turn, those amendments are the cause, in part, of the debate around a crucial proposal of the U.S. during the development of the text. *See UNCITRAL, Working Group III (Transport Law): Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]. Proposal by the United States of America, U.N. Doc. A/CN.9/WG.III/WP.34 (Aug. 7, 2003).*

101. *See, e.g., UNCITRAL, Working Group III (Transport Law): Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]—Scope of Application Provisions, U.N. Doc. A/CN.9/WG.III/WP.44 (Feb. 17, 2005) (containing a document prepared by the Secretariat with an eye on the fifteenth period of session consolidating the contributions of an “informal drafting group” and an “informal Working Group,” which were adopted by the Working Group as solid grounds to continue the discussion).*

102. *See UNCITRAL, Working Group III (Transport Law): draft convention on the carriage of goods [wholly or partly] [by sea], ¶ 2, U.N. Doc. A/CN.9/WG.III/WP.56 (Sept. 8, 2005) (“While the Working Group has not yet completed [sic] second reading of the draft convention, it was thought that the [high] number of revisions to the most recent consolidated text of the draft convention (contained in document A/CN.9/WG.III/WP.32) that have been agreed upon by the Working Group called for the publication of a more recent consolidated text.”) (emphasis added).*

103. All that I intend to show is illustrated with particular clarity upon reading the reports of the Working Group to the Plenary Meeting (a quite excellent work from the Secretariat, which allows one to understand, with a dose of patience, the reason for every expression in the text of the Convention) during the period under consideration in particular, the reports were not concerned with the sessions immediately following the one in which a new text presented by the Secretariat was available. *See, e.g., Fourteenth Session Report, supra* note 98 (revealing in its table of contents two consecutive drafts on Article 14); *Fifteenth Session Report, supra* note 98 (opening the discussion of

Instrument had two versions in the period under consideration.¹⁰⁴

Sometimes the Secretariat would be unable to provide a text while the Working Group was reaching agreement because of the fast pace of the debates.¹⁰⁵ This stage of the process required a great number of hours of intense work by an increasing number of persons.¹⁰⁶

Accordingly, this Section of the Article must be limited to pointing out some of the most prominent aspects of the text, some of them of a material nature, others of a merely formal nature. Of the formal statements, the first is related to increased attendance at the Working Group, particularly by Delegations from Africa.¹⁰⁷ The second is related to the order of proceeding

one of the precepts; even though it is true that it is concerned with one of the principal aspects of the Project).

104. See, e.g., UNCITRAL, Working Group III (Transport Law): *Draft instrument on the carriage of goods [wholly or partly] [by sea]*, U.N. Doc A/CN.9/WG.III/WP.32 (Sept. 4, 2003) (replaced in the sixteenth meeting of the Working Group by UNCITRAL, Working Group III (Transport Law): *Draft convention on the carriage of goods [wholly or partly] [by sea]*, U.N. Doc. A/CN.9/WG.III/WP.56 (Sept. 8, 2005), which in turn is replaced by another complete text of the Instrument Project, UNCITRAL, Working Group III (Transport Law): *Draft convention on the carriage of goods [wholly or partly] [by sea]*, U.N. Doc. A/CN.9/WG.III/WP.81 (Feb. 13, 2007), which starts being considered at the nineteenth period of sessions).

105. The initial note of UNCITRAL, Working Group III, Transport Law: *Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea], Scope of Application Provisions*, U.N. Doc. A/CN.9/WG.III/WP.44, demonstrates this point, which is evidenced by the table of contents of the *Fourteenth Session Report*, *supra* note 98, and the *Fifteenth Session Report*, *supra* note 98, ¶ 12.

106. The final statements in the reports are a good guide in understanding the joint effort. For example, documentation from the Working Group's Fifteenth Session states:

This informal intersessional work was said to have been extremely useful for educational purposes, exchanging views and narrowing contentious issues. It was said to be essential to the successful completion of the draft instrument that that informal intersessional work continue, bearing in mind the need to ensure that the quantity of documents produced by that process should be compatible with the production by the Secretariat of official documents in all official languages for presentation to the Working Group. The view was also expressed that the use of small drafting groups within the Working Group had been enormously helpful for the Working Group as a whole. There was full support in the Working Group for the above views.

Fifteenth Session Report, *supra* note 98, ¶ 216.

107. This is difficult to notice by reading only the reports referred to in the previous notes, since the list of Delegations does not give information about their activities. The number of initiatives and the performance of the African Delegations were already very prominent. Their presence was increasing and will likely be a determining factor in the future. Also, some of the opposition to the work of the CMI is rooted in the fact

in the debates determined by the President.¹⁰⁸ The third statement referred to the considerable number of documents that the various Delegations contributed during the debate.¹⁰⁹

Among the most outstanding material aspects in the period and without mentioning more than three points, even if only by reason of balancing them with those just noted, the first one could be the consolidation of the rules on carrier liability;¹¹⁰ the second change affects the jurisdiction and arbitration rules,¹¹¹

that the African Delegations were not represented in CMI. The issue is highlighted by one of the informal documents that circulated on the occasion of the Seventeenth Session of the Working Group III (Transport Law) in 2006: a contribution from Senegal which began by increasing the number of ratifications for HamR to thirty-one and called attention to the number of African countries (nineteen) that were represented.

108. The content of the final paragraphs of each report is revealing, as the President therein designates the subjects to be examined in the succeeding sessions. *See, e.g., Thirteenth Session Report, supra* note 40, ¶ 166; *Fourteenth Session Report, supra* note 98, ¶ 165; *Fifteenth Session Report, supra* note 98, ¶ 215; *Sixteenth Session Report, supra* note 98, ¶ 242; UNCITRAL, *Report of Working Group III (Transport Law) on the Work of its Seventeenth Session*, ¶ 235, U.N. Doc. A/CN.9/594 (Apr. 24, 2006) [hereinafter *Seventeenth Session Report*].

109. The Delegations' submissions are sometimes informal; for example, the document presented by Senegal. *See supra* note 107 and accompanying text.

However, when there is time, official submissions are made with reference numbers and translations in all of the languages of the United Nations. To make an itemized list of the total formal contributions and try to reflect on their specific influence would be a much larger work than I intend. Nonetheless, the compilation of official texts can be found on the UNCITRAL homepage. *See* UNCITRAL Working Groups, Working Group III, Transport Law, http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html (last visited Feb. 26, 2009).

110. This is probably the first question of consequence. It is interesting to note that once the provision was written, in spite of the fact that it was subject to various attacks, the substance of the document did not change significantly. Where change is present, it is purely formal. The Working Group embraced that text and adopted the new agreement with loud applause. *See generally* UNCITRAL, *Report of Working Group III (Transport Law): Draft convention on the carriage of goods [wholly or partly] [by sea]*, *Sixteenth Session, (Vienna, 28 Nov.-9 Dec. 2005)*, U.N. Doc. A/CN.9/WG.III/WP.56 (Sept. 8, 2005). The Report of the Sixteenth Session on the Draft Convention on the Carriage of Goods [wholly or partly] [by sea] contains a footnote that demonstrates its origin in the Fourteenth Session Report. *See Fourteenth Session Report, supra* note 98, ¶¶ 31, 33, 75, 80 (noting the "broad support" for the adoption); *see also* UNCITRAL, Working Group III (Transport Law): *Draft convention on the carriage of goods [wholly or partly] [by sea]*, art. 17, U.N. Doc. A/CN.9/WG.III/WP.81 (Feb. 13, 2007). Article 17 of the Draft Convention on the Carriage of Goods [wholly or partly] [by sea], U.N. Doc. A/CN.9/WG.III/WP.81, states in footnote fifty that the only changes introduced are of a formal nature. The numeration is kept in the final text. For the preliminary draft, *see* UNCITRAL, Working Group III (Transport Law): *Preliminary draft instrument on the carriage of goods by sea*, Ninth Session, (New York, 15-26 April 2002), arts. 6.1.1, 6.1.2, 6.1.3, U.N. Doc. A/CN.9/WG.III/WP.21 (Jan. 8, 2002).

111. The subjects of jurisdiction and arbitration arose for the first time during the

finally, the third change codifies the difference between liner transportation and non-liner traffic.¹¹²

3. Third reading (Sessions 19, 20, 21: 2007-08)

The new sessions have new text, written by the Secretariat with help from a group of experts.¹¹³ In the table of contents of the report of the nineteenth session, the extraordinary progress made is immediately apparent: on the first day alone, ten articles (Article 2 through Article 12) were considered.¹¹⁴

Fourteenth Session. In the Fifteenth Session, the Working Group laid out the guidelines for international arbitration practice. *See generally* UNCITRAL, Working Group III (Transport Law): *Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]—Arbitration: Uniform international arbitration practice and the provisions of the draft instrument*, U.N. Doc. A/CN.9/WG.III/WP.45 (Mar. 2, 2005).

This document in turn formed the basis for the commitment from the Delegation of the Netherlands to present a set of proposals, which were presented at the Sixteenth Session. *See generally* UNCITRAL, Working Group III (Transport Law): *Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]—Proposal by the Netherlands on arbitration*, U.N. Doc. A/CN.9/WG.III/WP.54 (Sept. 13, 2005). Note that this proposal coincided with another document sponsored by the Delegation of the United Kingdom. *See generally* UNCITRAL, Working Group III (Transport Law): *Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]—Comments by the United Kingdom of Great Britain and Northern Ireland regarding arbitration*, U.N. Doc. A/CN.9/WG.III/WP.59 (Nov. 18, 2005).

Also, the Conference Room Papers (“CRP”) contributed to the solution of the issue, which was essentially resolved by end of the session. The pending details regarding jurisdiction and the final insertion are documented. *See* UNCITRAL, Working Group III (Transport Law): *Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea], Chapter 16: Jurisdiction*, U.N. Doc. A/CN.9/WG.III/WP.75 (Aug. 23, 2006).

However, these changes were approved without too much difficulty during the Eighteenth Session of Working Group III (Transport Law) in the Fall of 2006, when the issue of arbitration was completed. *See generally* *Report of Working Group III (Transport Law) on the work of its eighteenth session*, U.N. Doc. A/CN.9/616 (Nov. 27, 2006) [hereinafter *Eighteenth Session Report*].

112. The original point of departure for the final agreement (adopted at the Seventeenth Session in the Spring of 2006) was Finland’s Proposal. *See generally* UNCITRAL, Working Group III (Transport Law): *Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]—Proposal by Finland on scope of application, freedom of contract and related provisions*, U.N. Doc. A/CN.9/WG.III/WP.61 (Jan. 27, 2006).

113. *See generally* UNCITRAL, Report of Working Group III (Transport Law): *Draft convention on the carriage of goods [wholly or partly] [by sea]*, U.N. Doc. A/CN.9/WG.III/WP.81 (Feb. 13, 2007).

114. *Compare generally* UNCITRAL, *Report of Working Group III (Transport Law) on the Work of its Nineteenth Session*, U.N. Doc. A/CN.9/621 (May 17, 2007) [hereinafter *Nineteenth Session Report*], with *Eighteenth Session Report*, *supra* note 111. There were delegations at the Nineteenth Session that questioned the need for the anticipated Twenty-First Session.

This pace was maintained at the twentieth session, where the President began with a warning about the amount of time the Project had already taken, demonstrating graphically the entire six months that resulted by adding the weeks taken by the Working Groups to the days of informal meetings outside of the ordinary sessions.

As a result, members agreed to advance the meeting scheduled for the Spring of 2008 to the second and third weeks of January of the same year. This was done in order to allow more time to complete the final reading of the draft, to circulate the draft for analysis and comment to the governments,¹¹⁵ and to prepare the Instrument to be adopted at the Forty-First Plenary Meeting.¹¹⁶

This review can be focused on some of the issues to be decided. But first, it ought to be stated that the group of African countries spoke in unison¹¹⁷ in opposition to what generally constituted the majority in the room.¹¹⁸ However, this does not mean that they participated with one voice on all occasions.

The Report of the Session does not hide the thorniest issue:¹¹⁹ the insertion of volume contracts in the Instrument.

115. See U.N. GAOR, 40th Sess., *Report of the United Nations Commission on International Trade Law on the Work of its Fortieth Session*, ¶ 184, U.N. Doc. A/62/17 (July 23, 2007).

116. See UNCITRAL, *Report of Working Group III (Transport Law) on the Work of Its Twentieth Session*, ¶ 281, U.N. Doc. A/CN.9/642 (Nov. 2, 2007) [hereinafter *Twentieth Session Report*].

117. See *id.* ¶¶ 2-7 (citing the “Seminar of Barcelona,” an initiative from the Spanish Delegation, together with the Secretariat and other Delegations (Italy and Switzerland), with the help of the law firm *Cuatrecasas Abogados*, which summoned Delegations from Africa at the “count city” some days before the Vienna session in order to examine the Project and try to bring some positions closer together).

118. As in previous sessions, the Delegation from Chile (a HamR state party) tended to separate itself from the positions defended by the Delegation of Senegal. Senegal was generally the first to express its opinion, followed by the other African Delegations (and backing their statements mainly in HamR). Along with Chile, Austria (also a HamR state party) tended to distance themselves from the positions defended by Senegal and the other African Delegations.

119. See *Twentieth Session Report*, *supra* note 116, ¶¶ 279-80 (The Delegation is not herein identified.); see also *Nineteenth Session Report*, *supra* note 114, ¶¶ 161-72; see generally UNCITRAL, Working Group III (Transport Law): *Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea], Joint Proposal by Australia and France concerning volume contracts*, U.N. Doc. A/CN.9/WG.III/WP.88 (Mar. 14, 2007); U.N. GAOR, 39th Sess., *Report of the United Nations Commission on International Trade Law on the Work of its Thirty-Ninth Session (19 June-7 July 2006)*, ¶¶ 197-99, U.N. Doc. A/61/17 (ending in an agreement to confine that discussion to the Working Group).

This question is related to almost everything in the Project, since it marks a large area of non-application of the text by exculpations that some Delegations rejected,¹²⁰ although opposition decreased over the last sessions.

The meeting also clarified the issues still awaiting resolution in the final negotiation: the so-called negotiation basket. The “basket” includes Articles 62, 63, 99, 26 and 26bis,¹²¹ which are presented with the determination of the amount of limited liability.

Finally, Session 21, the last session of the Working Group, was devoted to an article by article revision of the last Project Draft.¹²² The Delegations performed the revision with attention

120. See generally UNCITRAL, Working Group III (Transport Law): *Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea], Proposal by the United States of America*, U.N. Doc. A/CN.9/WG.III/WP.34 (Aug. 7, 2003) (a proposal by the U.S. Delegation on the then-called, Ocean Liner Service Agreements (“OLSA”)); UNCITRAL, Working Group III (Transport Law): *Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea], Comments from Denmark, Finland, Norway and Sweden (the Nordic countries) on the freedom of contract*, U.N. Doc. A/CN.9/WG.III/WP.40 (Sept. 30, 2004) (containing the Nordic countries’ reply to the above-mentioned U.S. proposal). *Contra* UNCITRAL, Working Group III (Transport Law): *Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea], Proposal by the United States of America*, U.N. Doc. A/CN.9/WG.III/WP.42 (Nov. 8, 2004); UNCITRAL, Working Group III (Transport Law): *Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]*, U.N. Doc. A/CN.9/WG.III/WP.46 (Feb. 18, 2005) (comments by the United Nations Conference on Trade and Development (“UNCTAD”) Secretariat on Freedom of Contract); UNCITRAL, Working Group III (Transport Law): *Draft convention on the carriage of goods [wholly or partly] [by sea], Sixteenth Session, (Vienna, 28 Nov.-9 Dec. 2005)*, U.N. Doc. A/CN.9/WG.III/WP.56 (Sept. 8, 2005) (a note by the Secretariat regarding the proposition adopted in November 2005); UNCITRAL, Working Group III (Transport Law): *Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]*, U.N. Doc. A/CN.9/WG.III/WP.61 (Jan. 27, 2006) (a proposal from Finland on the scope of application, freedom of contract and other related provisions); UNCITRAL, Working Group III (Transport Law): *Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]*, U.N. Doc. A/CN.9/WG.III/WP.66 (Feb. 17, 2006) (this note was a response to a request for help from the Comité Maritime International); UNCITRAL, Working Group III (Transport Law): *Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]*, ¶ 6, U.N. Doc. A/CN.9/WG.III/WP.70 (Feb. 27, 2006) (containing contributions of the Italian Delegation regarding transport documents, the scope of application, freedom of contract and other related provisions).

121. See *Twentieth Session Report*, *supra* note 116, ¶¶ 133-66.

122. See UNCITRAL, Working Group III (Transport Law): *Draft convention on the carriage of goods [wholly or partly] [by sea], Note by the Secretariat*, ¶ 2, U.N. Doc. A/CN.9/WG.III/WP.101 (Nov. 14, 2007) (stating that the resolutions of the Group in its nineteenth and twentieth meetings are consolidated).

to the two large issues of Volume Contracts and the Limits of Liability.

The new draft led the President to highlight the policy of the session: the session would only review the aspects about which no agreement had yet been made, absent a strong consensus to do otherwise.¹²³ The Delegation from Senegal replied immediately with a notification that the African countries demand a better balance in the Convention in order to accomplish greater acceptability of the Instrument.¹²⁴

As before, the definitions are analyzed following the substantial nouns of the precepts that refer to them. The definitions of “transport,” “document,” and “container” are modified accordingly,¹²⁵ although the modification is limited.¹²⁶ Most crucially, Finland led the adoption of a formula for volume contracts, which was followed by almost all of the Delegations.¹²⁷

With that agreement, the great issues were reduced to the amount of the limits of the liability of the carrier and related issues (i.e., the negotiation basket). In order to resolve them, once the fourth reading was ended on Tuesday, the twenty-second, at noon, the President summoned an evening session where a reduced group of Delegations brought their positions closer to each other and achieved consensus. That meeting ended on Wednesday at half past ten in the morning, with the presentation to the Working Group of CRP.5: the resolution document. In brief, the amount of the limited liability was SDR875

123. See UNCITRAL, *Report of Working Group III (Transport Law) on the Work of its Twenty-First Session*, ¶ 9, U.N. Doc. A/CN.9/645 (Jan. 30, 2008) [hereinafter *Twenty-First Session Report*].

124. See *id.* ¶ 10.

125. See generally UNCITRAL, Working Group III (Transport Law): *Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea], Proposal by the delegations of Italy, the Republic of Korea and the Netherlands to delete any reference to “consignor” and to simplify the definition of “transport document,”* U.N. Doc. A/CN.9/WG.III/WP.103 (Dec. 31, 2007).

126. See generally UNCITRAL, Working Group III (Transport Law): *Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea], Proposal of the delegation of the Netherlands to include “road cargo vehicle” in the definition of “container,”* U.N. Doc. A/CN.9/WG.III/WP.102 (Dec. 31, 2007).

127. See *Twenty-First Session Report*, *supra* note 123, ¶¶ 235-52 (which presented CRP 4 (based on the favor of a significant number of Delegations, and using a more precise formula for Article 83)). The *Twenty-First Session Report* synthesizes the previous steps (see *id.* ¶¶ 235-42); summarizes the deliberations over the current step (see *id.* ¶¶ 243-49); and points out the minor modification to the definition of volume contracts (see *id.* ¶¶ 250-53).

per package or freight unit, and SDR3 per kilogram, and two and a half times the actual freight in case of delay.¹²⁸

C. *The Forty-first Plenary Meeting of UNCITRAL*

After electing Professor Illescas as President, the forty-first Plenary Meeting of UNCITRAL initiated debates on the Project using the same procedure as in the Working Groups: substantive articles, one by one, and according to their order (when the proposals or observations presented by the governments would also be dealt with), to proceed with the related definitions, before or after examining the basic provisions.¹²⁹

Very few modifications were added to the text, which does not mean that no proposals were presented.¹³⁰ However, the Plenary Meeting accepted the choices of the Working Group,¹³¹ with few exceptions.¹³² In some instances, the Plenary Meeting

128. See *id.* add., art. 61.1 (incorporating the Project Draft pursuant to the resolutions of the Twenty-First Session); see also *id.* ¶¶ 183-88 (discussing the draft); *id.* ¶¶ 196-203 (discussing the adoption of the resolution and explaining some of the dis-sents).

The currency value of the SDR is determined by summing the values in U.S. dollars, based on market exchange rates, of a basket of major currencies (the U.S. dollar, Euro, Japanese yen, and pound sterling). The SDR currency value is calculated daily and the valuation basket is reviewed and adjusted every five years. International Monetary Fund, SDR Valuation, http://www.imf.org/external/np/fin/data/rms_sdrv.aspx (last visited Feb. 16, 2009).

129. See U.N. GAOR, 41st Sess., *Report of the United Nations Commission on International Trade Law, Forty-First Session*, ¶¶ 9, 15, U.N. Doc. A/63/17 (July 2008) (regarding the election of the table and the working method).

130. See UNCITRAL, *Draft convention on contracts for the international carriage of goods wholly or partly by sea. Compilation of comments by Governments and intergovernmental organizations*, Adds. 1-14, U.N. Doc. A/CN.9/658 (Apr. 15, 2008) (providing an itemized list of proposals submitted with sufficient notice). There were oral proposals as well.

131. See *id.*, add. 11, ¶ 7 (containing a proposal from Germany, which includes interpretative issues). For the debate, see *Report of the United Nations Commission on International Trade Law, Forty-First Session*, *supra* note 129, ¶¶ 39-44. With regard to the preference for the option adopted in the Working Group, see *id.* ¶ 43. Another example of a similar solution refers to the discussion of Article 18 (particularly, its third paragraph). Senegal intervened to reiterate the position of the group of countries favoring a redraft of Article 18. See *Draft convention on contracts for the international carriage of goods wholly or partly by sea. Compilation of comments by Governments and intergovernmental organizations*, *supra* note 130, add. 1, ¶¶ 8-12. This proposal was followed in various iterations by some of the Delegations. See *id.* ¶¶ 31-37. However, the provision is not modified. See *Report of the United Nations Commission on International Trade Law, Forty-First Session*, *supra* note 129, ¶¶ 67-77.

132. See *Draft convention on contracts for the international carriage of goods wholly or partly by sea. Compilation of comments by governments and intergovernmental organizations*, *supra* note 130, ¶ 23; *id.* add. 11, ¶ 11; *id.* add. 9, ¶ 10; *Report of the United Nations*

followed the practice of the Working Group when faced with extremely difficult cases: to have the President invite certain Delegations to present a clarifying proposal to decide the matter.¹³³

With respect to the two most disputed questions (volume contracts and limits of liability), the Plenary Meeting endorsed the resolution from the Working Group without any alterations, in spite of amendments and attempts to modify them.¹³⁴ For convenience of reference, articles of the Convention relevant to the port phase are appended, as approved by the Forty-First Plenary Session of UNCITRAL.

III. LIABILITY FOR THE GOODS AT THE PORT IN THE CONVENTION

A. Limits

1. Geographic

The Project lacks a definition of the “port area,” or “port,”¹³⁵ in spite of the fact that the Instrument employs both terms.¹³⁶ When the question was examined, not even the vague definition operative in the OTT Convention was approved.¹³⁷

Commission on International Trade Law, Forty-First Session, supra note 129, ¶¶ 45-52, ¶¶ 59-61. Another example of a complete amendment adopted, is the one that follows the suggestion from Australia. *See Draft convention on contracts for the international carriage of goods wholly or partly by sea. Compilation of comments by Governments and intergovernmental organizations, supra* note 130, ¶¶ 46-47.

133. *See Report of the United Nations Commission on International Trade Law, Forty-First Session, supra* note 129, ¶¶ 112-21.

The proposal from the African Delegations noted some insertions. *See* Draft convention on contracts for the international carriage of goods wholly or partly by sea. *Compilation of comments by Governments and intergovernmental organizations, supra* note 130, add.1 ¶¶ 13-15.

134. *See Report of the United Nations Commission on International Trade Law, Forty-First Session, supra* note 129, ¶¶ 195-200, 243-46.

135. *See id.* ¶¶ 79-81. The last time a definition of the port area was proposed, at the Forty-First Plenary Meeting, it did not take effect.

136. *See generally* UNCITRAL, Report of the Drafting Group (Transport Law): Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, U.N. Doc. A/CN.9/XLI/CRP.9 (June 27, 2008) [hereinafter Rotterdam Rules] (Article 1.7 relates to the definition of “maritime performing party”, Article 19 relates to the liability of maritime performing parties; Article 5 relates to the general scope of application of the Instrument; Article 39 relates to the “deficiencies in the contract particulars”; Article 50 relates to the “exercise and extent of right of control”; Article 66 relates to the determination of jurisdiction in matters against a carrier; Article 68 relates to jurisdiction in matters against a maritime performing party; Article 75, relates to arbitration agreements).

137. *See* UNCITRAL, *United Nations Convention on the Liability of Operators of Trans-*

Instead, the Commission preferred to defer the matter to whichever national law regulated the port in question, with confidence that, in any specific case, national law would govern to determine the port area boundaries.¹³⁸

Consequently, the “port phase” of the goods for the Rotterdam Rules, constitutes one stage of the many that can be distinguished during transport. It will only be possible to determine transport section limits by using a case by case analysis. Determining these limits depends on the port in question, its geography, the modality of the subject goods, other details of the contract, and, most importantly, the law regulating the port.

The sector’s geographic limits are important for the Instrument to help to determine the concept of the “maritime performing party.”¹³⁹ However, the delineation of those limits in

port Terminals in International Trade, art. 1(a), U.N. Doc. A/CONF.152/13 annex (1994) [hereinafter *OTT Convention*] (defining “Operator of a transport terminal” as a “person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or to procure the performance of transport-related services with respect to the goods in an area under his control or in respect of which he has a right of access or use.”).

138. Compare *Twelfth Session Report*, *supra* note 30, ¶ 30, with *OTT Convention*, *supra* note 137, ¶¶ 50, 69 (which reflect the insistence on the same point from different perspectives).

The subject was not treated again until the Nineteenth Session Report, when the ideas expressed up until then were reiterated, adding the failure of the HamR to define the meaning of the term, despite continued usage of the term. See *Nineteenth Session Report*, *supra* note 114, ¶¶ 149, 153. For the debate on other points, see *id.* ¶¶ 142, 144-48.

139. See *Rotterdam Rules*, *supra* note 136, art. 1. The debate about the notion of the port area emerged precisely from the discussion of the “maritime performing party.” Article 1.7 of the *Rotterdam Rules* reads:

“Maritime performing party” means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

Id. art. 1.7. The typical facilities of the port area are what introduce the distinction between the “maritime performing party” and a general “performing party,” which helps the carrier in its duties. For this reason, space is left for such a definition in Article 1.6, which is divided into two paragraphs:

(a) “Performing party” means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.

each specific case is left to the ruling national law of each port.¹⁴⁰ Therefore, if we consider the Instrument's text in relation to any port and not a specific pier or class of goods, legal limits trump the importance of geographic limits. This raises the questions, addressed in the next Sections: what legal consequences are implicated when speaking of "goods during the port phase," and what are the principal legal coordinates for the Rotterdam Rules?

2. Legal

A primary legal implication of the port phase, illustrated previously, is the distinction between "performing party" and "maritime performing party." The only difference between "performing party" and "maritime performing party" is the relationship each has with the port where one or the other exists as an operator who replaces the carrier in carrying out its obligations.

That difference invites us, first, to mark the legal distinction of the port area and, second, to clarify who can manage the goods in that period of time.

In answer to the first question: port area means where the goods are between (using Article 1.7 language) their "arrival . . . at the port of loading of a ship and their departure from the port of discharge of a ship."¹⁴¹

The second interrogative presents four options about the provider of services for the goods on land, before the journey by sea begins and after its conclusion. The first option is the carrier,¹⁴² which is excluded in Article 1.7; then the maritime performing party, carrying out obligations of the carrier. Secondly,

(b) "Performing party" does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.

Id. art. 1.6.

140. *See Convention for the Unification of Certain Rules for International Carriage by Air*, art. 18.4, May 28, 1999, 1999 U.S.T. LEXIS 175 [hereinafter "Montreal Convention"]. Article 18.4 gives a similar importance to the airport setting, since it has created multiple jurisprudential difficulties. *See id.*

We addressed this subject in David Morán Bovio, *La responsabilidad del porteador aéreo internacional de mercaderías un estudio acerca del artículo 18 de la Convención de Varsovia*, in *DIRITTO DEI TRASPORTI* 1-43 (1996). The Warsaw Convention and the Montreal Convention are almost in agreement on this point.

141. *Rotterdam Rules*, *supra* note 136, art. 1.7.

142. *See infra* Part IV.B.

it could be the shipper or the consignee.¹⁴³ The third option is the maritime performing party.¹⁴⁴ Finally, the fourth option is the “[customs] authority . . . or other third party.”¹⁴⁵

B. *Controlled by the Carrier*

The carrier may have facilities and personnel at the port terminal that do not require the participation of another operator and the authority of the terminal may not require the goods to be delivered to it or to a third party.¹⁴⁶

In such a case, the carrier remains liable for the goods while they are on the pier in the same way as if they were in another section of the area during which the carrier has liability for them. Such liability attaches from the moment the carrier (or a performing party) receives the goods for transport, until they are delivered¹⁴⁷ to the person entitled to receive them.¹⁴⁸

This liability is established by Article 17, with the noteworthy exception of Article 26, by which the carrier’s liability can be modified, before loading and after unloading in the port area by the party responsible under the CMR or the COTIF.¹⁴⁹ These

143. See *infra* Part IV.C; *Rotterdam Rules*, *supra* note 136, art. 13.2. (“[T]he carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.”).

This provision contains the express limits of Article 12.3, which declares the nullity of any clause that postpones the beginning of the liability of the carrier to the loading operations, or anticipates the end of such period before the unloading operations begin. See *id.* art. 12.3.

Article 17 considers that option in its list of exceptions to carrier liability. See *id.* art. 17.3(i) (eliminating carrier liability in cases of, “Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with [A]rticle 13, [P]aragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee.”).

144. See *infra* Part IV.D.

145. See *Rotterdam Rules*, *supra* note 136, art. 12.2.

146. See *id.* art. 1.5 (defining “Carrier” as “a person that enters into a contract of carriage with a shipper.”).

147. See *id.* art. 12.1.

148. See *generally id.* (Chapter 9, including Article 43, regarding the consignee’s obligation to accept delivery of the goods).

149. See *id.* art. 26. CMR is the 1956 Convention Concerning Shipment by Road and COTIF is the 1980 Convention (replacing the earlier CIM) Concerning Shipment by Rail. The conditions for the applicability of Article 26 are narrow. In order for the provision to apply, the shipper has to have made “a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred.” *Id.* Additionally, the provision applies exclusively to localized damages.

treaties are not in force in North America, thus the exception will be of concern to Europeans (and to some states in Asia and Africa) for the most part.

With the regulation of liability provided for in Article 17, other provisions control the carrier's liability for the goods: Article 18, by virtue of which, the carrier is liable for any person servicing the goods; and Article 20, according to which such liability is of a joint nature.

All things considered, the only incidence derived from the presence of the goods in the port area, while they are kept as the object of the carrier's duties concerns the eventual application of Article 26. But, if the highly strict conditions for the applicability of that Article have not occurred, the carrier will be liable for the goods in the port as in any other portion of the transport.

C. *Kept by the Shipper or by the Consignee*

The provision that merchandise may remain in the port area under the custody of the shipper or the consignee¹⁵⁰ is provided by Article 13.2, limited by Article 12.3, and acknowledged in Article 17.3(i). Article 13.2 allows parties to agree in the transport contract that the "loading, handling, stowing or unloading of the goods" should be performed by a party other than the carrier. Article 12.3 keeps the carrier liable for whatever occurs from the beginning of loading until the unloading.

The coincidence of both propositions is understandable due to the efforts to prevent the Project from undoing the validity and effects of the Free-in-Free-out ("FIO") clauses.¹⁵¹ In fact, both mandates can be reconciled if the carrier is always liable for the loading or the unloading, while the shipper or consignee pay for those services.¹⁵²

150. See *id.* art. 1 (identifying the interested parties: "shipper" (art. 1.8), "documentary shipper" (art. 1.9), "holder" (art. 1.10), "consignee" (art. 1.11), and "controlling party" (art. 1.13)).

151. Free-in-Free-out ("FIO") clauses transfer the obligation to nominate and the duty to pay stevedores to load, stow, and discharge the cargo, they can also transfer the responsibility for proper performance of such operations. For a general discussion of FIO clauses see, Martin Davis, *Two views of Free In and Out, Stowed Clauses in Bills of Lading*, AUSTRALIAN BUS. L.R. 198 (1994).

152. This statement is common in the texts on which the Instrument is based. See, e.g., *Twenty-First Session Report*, *supra* note 123, ¶¶ 44-48. The unfolding of an apparently inappropriate discussion can also be seen. See *id.* Upon reading the conclusion contained in Paragraph 49, it seems appropriate to leave the provision intact. See *id.* ¶ 49.

This agreement, whereby the carrier is liable for the loading and unloading of the goods while the shipper or consignee pays for it, must be expressly stipulated in the contract.¹⁵³ This type of agreement does account for goods while they are on the pier—before loading or after unloading—implying that the carrier might not be liable for the goods during this period. This can be reconciled with liner transport by stating the possibility that the carrier is not liable for goods that are in its custody, this can be better understood if we consider, first, the demand of the express agreement and, second, if we keep in mind the case of special or not ordinary transport where it is advisable to dispense with the services of the carrier to rely on expert handling under custody of the consignee or the shipper.

Article 17.3(i) of the Rotterdam Rules deals expressly with this issue, absolving the carrier from liability for the port operations it does not complete, unless the carrier acts on behalf of another interested party concerned with the goods.¹⁵⁴

D. *Maritime Performing Party*

Another option includes a third party: the “maritime performing party,” responsible for all activities that take place at the port.

This is a performing party in the sense of the definition in Article 1.6,¹⁵⁵ which actions are restricted to the port area.¹⁵⁶ In that setting, the “maritime performing party” carries out the obligations that belong to the carrier. Otherwise, as a performing party it is an independent operator that agrees to carry out, on its own behalf, the duties of the carrier, under the carrier’s supervision or control, or at its request. The definition of “performing party” excludes any person acting on behalf of the other interested parties concerned with the cargo (shipper and con-

With regard to previous positions that were taken, see UNCITRAL, Working Group III (Transport Law): *Draft Convention on the Carriage of Goods [wholly or partly] [by sea]*, Sixteenth Session, (Vienna, 28 Nov.-9 Dec. 2005), art. 14 n.57, U.N. Doc. A/CN.9/WG.III/WP.56 (Sept. 8, 2005).

153. The final mention of Article 13.2 seems to demand an explicit statement that will avoid any oversight. See *Rotterdam Rules*, *supra* note 134, art. 13.2.

154. See *id.* art. 17.3(i).

155. See *id.* art. 1.6.

156. See *id.* art. 1.6(b).

signee) since in such cases the liability regime will be that of their principal.

The regulations of the liability of the carrier and of the maritime performing party have been specified in Article 19 of the Rotterdam Rules,¹⁵⁷ excluding the increased amount of the liability not expressly agreed to by the maritime performing party, as a consequence of increased liability amount agreed to by the carrier.¹⁵⁸ This provision also governs the liability regime for the servants and agents by excluding their personal liability.¹⁵⁹

E. Goods During the Port Phase that are out of the Control of the Maritime Performing Party, of the Shipper/Consignee and of the Carrier

An additional scenario is possible: the goods can be on the pier or, in a more general way, in the port phase, but outside of the control of the above-mentioned parties, because, in the words of Article 12.2(a): the applicable “law or regulations of the place of receipt require the goods to be handed over to an authority or to other third party,” and the more likely situation at the port of delivery where control by customs officers is likely.¹⁶⁰

In this case, that authority or third party’s liability will be the one enforced by the controlling regulations.

Normally, those entities are the above-called transport terminals controlled exclusively by public entities where the implementation of the tasks should be ruled by the OTT Convention if it were in force.¹⁶¹

The intervention of these public entities demonstrates a se-

157. *See id.* art. 19.1(a) (providing that liability attaches so long as the maritime performing party “received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State.”).

Alternatively, liability attaches if the occurrence that caused any loss, damage or delay took place during the period between the arrival of the goods at the port of loading and their departure; while the maritime performing party had custody of the goods; or at any other time that the maritime performing party was participating in the performance of any of the activities contemplated by the contract of carriage. *See id.* art. 19.1(b).

158. *See id.* art. 19.2.

159. *See id.* art. 19.4 (“Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.”).

160. *See id.* art. 12.2(b).

161. *See generally OTT Convention, supra* note 137.

rious void in the uniform regime described by the Rotterdam Rules, it might be necessary to consider ways to resolve that lack of sequence in an amendment after the new Treaty is in force. It may be possible to make use of the work performed by the OTT Convention, provided it is revised to align it with the Rotterdam Rules.¹⁶²

IV. CONCLUSIONS

It is necessary to study the process that produced the Rotterdam Rules and consider the failings of the current law. The situation is so unfortunate (as is well-known by the lawyers, judges, and arbitrators, operators involved in moving cargo, who look with disbelief when one tries to explain the existing situation of non-uniformity) that I can only say, "We had to try something to change it." Ratifications and coming into force must occur, before the adequacy of the new means can be tested.

On the previous pages attention was focused on the process from the current law to that of the possible future. Without doubt, as in any human effort, the text may create problems that we cannot now foresee. It would be imprudent to say that the cause of those defects is to be found in frivolous treatment, a lack of consideration of real problems, or in an absence of carefully drawn language.

The previous pages have given evidence of the hours devoted to these issues by experts in the CMI and in UNCITRAL together with the time invested in past contributions on transport law. It is not an easy task to show any aspect of the Rotterdam Rules that have not been tested through application of the current law, the decisions of the courts, the studies of experts, or the practices of the businesses dedicated to the transport of goods. Each precept of the Rotterdam Rules is explained by the present reality of the shipping industry and from the perspective of the laws that can best regulate that reality.

The current diversity of regulatory systems has facilitated the selection of the most adequate solution to resolve the ex-

162. Regarding the form of the hypothetical Instrument, a convention seems preferable, since it may be the best formula to ensure the absence of differences between the liability regimes of the parts involved in transport. It could alternatively be a Model Law; however, then the effects of the intended unification would be entrusted to the nations that adopted it and, to the extent that they did so, would probably be counter-productive.

isting difficulties. In this sense, it can be said that the Rotterdam Rules, follow well-known and useful provisions of the current law and, when this is not the case, in new provisions developed from practical experience.

In the Rotterdam Rules, thanks to the influence of HamR, Article 4, the justification for the Himalaya Clause in the port area will disappear, the strict limitation of the liability period of the carrier, from loading to unloading will no longer be effective (except if it responds to an operational reality expressly agreed-to by the parties).

In any case, the most important thing is that Professor Sweeney enjoys reading this Article. Likewise, if anyone is so blessed as to find these pages useful, they will thank our honoree, rather than the author: because the world would be a better place if someone else receives all of the things that make me happy.

APPENDIX

Article 12. Period of responsibility of the carrier

1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.

2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.

(b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.

3. For the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:

(a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or

(b) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage.

Article 13. Specific obligations

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.

2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and chapters 5 to 7, the carrier and the shipper may agree that the loading, han-

dling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

Article 18. Liability of the carrier for other persons

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

- (a) Any performing party;
- (b) The master or crew of the ship;
- (c) Employees of the carrier or a performing party; or

(d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

Article 19. Liability of maritime performing parties

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than

those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

Article 20. Joint and several liability

1. If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this Convention.

2. Without prejudice to article 61, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Convention.