

# The impact of the Rotterdam Rules on liability of carriers and shippers at sea

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By perseverance the snail reached the ark.

Charles Spurgeon

## **Keywords**

Carrier – Shipper – Liability – Rotterdam Rules – Hamburg Rules – Hague-Visby Rules – Hague Rules – Carriage of goods by sea – Limitation of liability – Exceptions and Immunities

## **Abstract**

A contract to carry goods by sea is almost inevitably part of all international sale agreements. These types of contracts may have numerous parties thereto. One of the contentious issues in this regard is the liability of the parties. International shipping law has undergone frequent changes in attempt to address the uncertainty regarding the extent of the liability of the parties to a contract of carriage.

Currently, there are three international conventions governing international carriage of goods by sea namely, the Hague Rules 1924, Hague-Visby Rules 1968 and Hamburg Rules 1978. These conventions are outdated and neither reflect the current international shipping industry practices nor address the problems caused by the absence of regulations. This resulted in states developing and promulgating domestic legislation which in turn leads to even greater legal uncertainty and conflict of law. The fundamental question that arises is how the Rotterdam Rules regulate, if at all, the liability of carriers and shippers at sea in comparison to its predecessors.

The Rotterdam Rules aim to harmonise and modernise the law with a view to attaining uniformity. The Rotterdam Rules therefore offer comprehensive solutions to problems encountered in modern shipping and maritime law. The purpose of this research is to ascertain how the Rotterdam Rules regulate the liability of carriers and shippers in comparison to the current liability systems and South African law on the carriage of goods by sea. A carrier liability system directly regulates the allocation of risks between the carrier and other parties to the contract of carriage.

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## LIST OF ABBREVIATIONS

Berkeley J Int'l Law	Berkeley Journal of International Law
BLR	Bond Law Review
CMI	Comitè Maritime International
COGSA	Carriage of Goods by Sea Act 1 of 1986
EJCCL	European Journal of Commercial Contract Law
ICC	International Chamber of Commerce
ICS	International Chamber of Shipping
ITBLR	International Trade and Business Law Review
JLIA	Penn State Journal of Law and International Affairs
J Mar L & Com	Journal of Maritime Law and Commerce
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
Loy Mar L J	Loyola Maritime Law Journal
Monash U L Rev	Monash University Law Review
MSC	Mediterranean Shipping Company
NITL	National Industrial Transportation League
NTHR	Nederlands Tijdschrift Voor Handelsrecht
NZBLQ	New Zealand Business Law Quarterly
SAMLA	South African Maritime Law Society
SA Merc LJ	South African Mercantile Law Journal
SSLR	Southampton Student Law Review
TILJ	Texas International Law Review
UNCITRAL	United Nations Commission on International Trade Law
Unif L Rev	Uniform Law Review
VUWLR	Victoria University of Wellington Law Review
WMU JoMA	World Maritime University of Journal of Maritime Affairs

## 1 Introduction

The origin of the law governing the carriage of goods dates back to the 19<sup>th</sup> century English Common Law.<sup>1</sup> Due to Britain's strong carrier interest, the English Common Law rapidly found its way into the international shipping industry and subsequently South Africa. This is evident from South African maritime law which essentially remains an English Common Law regime operating with an overlay of Roman-Dutch law.<sup>2</sup>

A contract to carry goods by sea is almost inevitably part of all international sale agreements in respect of the purchase and sale of goods, especially goods manufactured in one country needing to be exported to another.<sup>3</sup> These types of contracts may have numerous parties thereto, including, but not limited to, the carrier<sup>4</sup> and the shipper.<sup>5</sup> One of the contentious issues in this regard is the liability of the parties.<sup>6</sup> International shipping law has undergone frequent changes in attempt to

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- 1 Zhou *Carrier's Obligations and Liabilities* 10 "...(t)he predominance in seaborne trade and strong carrier interest held by Britain in the 19th century resulted in disputes, arising from carriage of goods by sea transactions, mainly being brought before English Courts...". According to Gordan *Rotterdam Rules* 1 the carrier had stronger bargaining powers when contracts of carriage were concluded because if the shipper did not like the terms of the carrier, the shipper would have to find another carrier. Consequently, general maritime law and practices were mainly derived from English Common Law.
  - 2 Van Niekerk and Schulze *South African Law* 133. 1985 1 SA 419 A 430G where the court held that, even though the South African Common Law foundation is found in Roman-Dutch law, maritime insurance law traces its origin back to the *lex mercatoria*. According to Hare *Shipping Law* 897 English law was introduced to South Africa when the English took over the governance of South Africa and "... (a)t the very least, such authority must still be persuasive to a South African court...".
  - 3 Igbokwe M 2001 <http://www.mikeigbokwe.com>.
  - 4 Van Niekerk and Schulze *South African Law* 119. According to these writers a carrier is defined as that party to the contract of carriage who has undertaken to perform the carriage of the goods on the terms and conditions as in the contract of carriage and for a charge. In most cases the carrier will be the shipowner or operator, but the term carrier can also be the freight forwarder or charterer. The carrier therefore is the shipping liner and not necessarily the shipowner. For example, Maersk is the carrier using the vessel Eleonora Maersk to transport containers by sea. The owner of the vessel is Maersk. In some instances, the shipowner and carrier are not the same person or entity. Mediterranean Shipping Company (MSC) is a carrier using the vessel MV Sandy Rickmers to transport goods by sea. The shipowner, however, is Rickmers Holding. In this instance Rickmers Holding chartered a vessel to MSC for the carriage of goods by sea. However, MSC is the carrier and shall be liable for any loss or damage to the goods being transported by sea.
  - 5 Van Niekerk and Schulze *South African Law* 119. According to the writers the shipper is defined as the party to a contract of carriage which places the goods on board the ship to be carried to another place during the voyage according to the terms and conditions of the contract of carriage and who pays freight for the carriage of the goods. The shipper is therefore either the seller of the goods or the agent who is responsible for the freight forwarding of the goods to the buyer.
  - 6 Van Niekerk and Schulze *South African Law* 133.

address the uncertainty regarding the extent of the liability of the parties to a contract of carriage.<sup>7</sup>

In terms of the Common Law<sup>8</sup> the carrier was virtually an insurer for the safe delivery of the goods carried. Originally, the responsibility of the carrier was absolute for the safety of the goods while they remained in his hands. The implied Common Law obligations of the carrier in a contract of carriage included the undertaking as to seaworthiness, the obligation of reasonable dispatch and the obligation to carry the goods to the appointed place of destination without deviating from the agreed route.<sup>9</sup>

At first glance, it may appear that the shipper is in a privileged position and that liability weighs very heavily on the carrier and in some instances, it does. To avoid the stringency of the Common Law position, carriers started to incorporate widely worded exceptions and exclusion clauses in their contract of carriage. It therefore became trade usage for parties and especially the carrier, to contract out of liability. As soon as the carrier incorporated exclusion of liability clauses in the contract of carriage, which was the order of the day, the pendulum swung in favour of the carrier.<sup>10</sup>

As international trade increased and a growing disquiet with the supremacy and monopolistic position that carriers held, it became of cardinal importance to develop an international legal instrument which benefited all parties to the carriage of goods by sea.<sup>11</sup> The need also arose for international uniformity and certainty as domestic legal systems greatly differed on the regulation of carriage contracts. Some legal systems left the Law of Carriage by Sea largely unregulated while others passed encompassing legislation to protect the shipper or severely limiting the carrier's right to contract out of

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7 Van Niekerk and Schulze *South African Law* 133.

8 Even though the Common Law was mainly based on English practices, it also contains traces of Rhodian sea usages and customs which were absorbed in Roman Law (Zhou *Carrier's Obligations and Liabilities* 10).

9 Chuah *Law of International Trade* 215; Wilson *Carriage of Goods by Sea* 9.

10 According to Baughen *Shipping Law* 75 the courts' reaction was to narrow down the apparent effect of these clauses. The courts did this by holding that an exception clause would not protect the carrier in respect of certain breaches of certain obligations that are implied into every contract of carriage. To protect itself against liability for breach of such an implied obligation, the carrier would have to word its exception clause so that it specifically covered loss due to breach of the implied obligation...; Chuah *Law of International Trade* 291 argues that, "(e)xcept for some judicial intervention to ensure that some fair play is maintained, the law leans in favour of contractual freedom...".

11 Hare *Shipping Law* 622; Reynolds "Hague Rules" 16; Carr *International Trade* 229.

liability.<sup>12</sup> Consequently a drastic change was needed to maintain some balance and to allocate risk and liability, in a more equitable fashion, between the carrier on the one side and the shipper on the other.<sup>13</sup>

With the English Common Law as starting point, the international maritime community attempted to develop a set of rules which would be favourable to both the carrier and the shipper. Finally in 1924 the International Maritime Law Association and the *Comité Maritime International* developed a set of rules which led to the signing of the *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* in Brussels (hereinafter the Hague Rules 1924).<sup>14</sup> The Hague Rules were not a complete restatement of carriage law but a scheme for uniformity of bills of lading which addressed the split risk between carriers' risks and shippers' risks, setting a minimum level of liability that could not be contracted out of by carriers.<sup>15</sup> The Hague Rules were a hybrid between civil and Common Law.<sup>16</sup> It would seem that the Hague Rules were well in favour of the shipper because the carrier was not allowed to exclude its liability beyond what the Hague Rules provided.<sup>17</sup> However, the list of immunities and defences the carrier could implement was extremely extensive and the carrier obtained the benefit of a one-year time bar within which claims should be brought.<sup>18</sup>

Subsequent instruments as well as international conventions have been introduced namely the *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* (Brussels 1968), now commonly known as the Hague-Visby Rules 1968; *United Nations International Convention on the Carriage of Goods by Sea*, known as the Hamburg Rules 1978; and the *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, known as the Rotterdam Rules 2008. Each of these conventions have attempted to address the issue with regard to the liability of the respective parties. Trading nations have reacted differently to each of the conventions by either incorporating the

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12 Van Niekerk and Schulze *South African Law* 133; Carr *International Trade* 229.

13 Van Niekerk and Schulze *South African Law* 133.

14 Myburgh 2002 *NZBLQ* 260.

15 Reynolds "The Hague Rules, the Hague-Visby Rules and the Hamburg Rules" 18; Carr *International Trade* 230; Van Niekerk and Schulze *South African Law* 134; Hoeks *Multimodal Transport Law* 297; Reynolds and Tsimplis *Shipowners' Limitation* 247.

16 Gordon *Rotterdam Rules* 2; Reynolds "The Hague Rules, the Hague-Visby Rules and the Hamburg Rules" 16.

17 Van Niekerk and Schulze *South African Law* 133.

18 Reynolds "The Hague Rules, the Hague-Visby Rules and the Hamburg Rules" 18.

conventions into domestic law, promulgating the conventions as domestic law or enacting domestic law which is modelled on the conventions.<sup>19</sup> South Africa is no exception as the Hague-Visby Rules were ratified as domestic law.<sup>20</sup> This contributes to legal uncertainty as there may be more than one legal source applicable which needs to be harmonised. These international conventions shall be discussed in more detail below. The primary focus shall be placed on the Rotterdam Rules as this is the newest convention attempting to unify the carriage of goods by sea system.

The Rotterdam Rules aim to harmonise and modernise the law with a view to attaining uniformity.<sup>21</sup> The Convention draws largely from the Hague-Visby Rules 1968 and Hamburg Rules 1978. The Rotterdam Rules incorporates significant elements from both to fill the perceived gaps in the existing systems which were uncovered over the years;<sup>22</sup> particularly in respect of liability.

However, the modern trading environment is fundamentally different to that of the era in which the abovementioned conventions came in to operation.<sup>23</sup> It has for example become customary to make use of electronic transport documents, which are either not regulated by the previous international legal instruments and/or are not up to date with the modern trade practices.<sup>24</sup> A lot has changed since the introduction of the Hague Rules 1924, a time identified by steamships. Modern carriage of goods by sea introduced deck cargo and containers. The Rotterdam Rules provide for electronic communication as well as the issue of electronic substitutes for the traditional paper documents, being bills of lading.<sup>25</sup> The most significant change that the Rotterdam

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19 Myburgh 2000 *VUWLR* 362.

20 Act 1 of 1968, hereinafter COGSA.

21 Hoeks *Multimodal Transport Law* 334. Article 2 of the Rotterdam Rules gives the lead as to its fundamental principle and provides that, in the interpretation of this Convention, regard is to be given to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. According to Nikaki and Soyer 2012 *Berkeley J Int'l Law* 307, the drafting expectations underpinning the Rotterdam Rules are that the adoption of the Rules will contribute to promotion of legal certainty, harmonisation and modernisation of rules governing contracts of carriage, promotion of the development of trade in an equal and mutually beneficiary manner, and the enhancement of efficiency..."

22 Hoeks *Multimodal Transport Law* 334; Reynolds and Tsimplis *Shipowners' Limitation of Liability* 287; Nikaki and Soyer 2012 *Berkeley J Int'l Law* 319.

23 Hare *Shipping Law* 630; Carr *International Trade* 285 argues that the Hague-, Hague-Visby- and Hamburg Rules have been overtaken by developments of modern carriage by sea which lead to gaps in the law and legal uncertainty.

24 Hare *Shipping Law* 631; Chuah *Law of International Trade* 353.

25 Livermore *et al* 1998 <http://www.elj.warwick.ac.uk>. According to the writers the traditional paper documents refer to the paper bill of lading and any other transportation documents related to the carriage of the goods. The bill of lading has a very important function in the carriage of goods by

Rules brought about was the introduction of a substantive liability system for carriers and shippers.<sup>26</sup> Clear provisions that guide carriers and shippers through their respective rights and obligations under the contract of carriage also promote legal certainty.<sup>27</sup> To that end, the Rotterdam Rules set forth the carrier's obligations and also introduces a comprehensive and detailed set of provisions outlying the shippers corresponding obligations to the carrier.

The fundamental question that arises is how the Rotterdam Rules regulate, if at all, the liability of carriers and shippers at sea in comparison to its predecessors, the Hague Rules 1924, Hague-Visby Rules 1968 and Hamburg Rules 1978. A comparative study was therefore conducted to determine the differences in the extent of liability under the various international conventions and the position in South African law and practice comparing it to the liability of carriers and shippers under the Rotterdam Rules.

In order to be able to answer this question, Chapter 2 addresses the current liability systems and determine the differences in the extent of liability for both carriers and shippers under the Hague Rules 1924, the Hague-Visby Rules 1968 and the Hamburg Rules 1978. In Chapter 3, the researcher critically analysed the sufficiency and extent of liability for carriers and shippers in terms of the Rotterdam Rules. Chapter 4 focuses on South African legislation regulating carriage of goods by sea and a comparison is made with the liability of carriers and shippers under the Rotterdam Rules. In Chapter 6, the researcher provides an evaluation of the efficiency and sufficiency of the Rotterdam Rules as the international liability system.

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sea as it contains the essential terms of the contract, it serves as *prima facie* evidence of the receipt issued by the carrier that the goods have been shipped or have been received for shipment and it is the document that passes the title in the goods.

26 Reynolds and Tsimplis *Shipowner's Limitation of Liability* 287; Güner-Özbek (ed) *United Nations Convention* 77; Clarke (ed) *Maritime Law Evolving* 133. The substantive liability system is not entirely new and comprises of a hybrid between the existing liability systems as well as new regulations with regard to the duties and responsibilities of the parties. This aspect is discussed in more detail in this research.

27 Güner-Özbek (ed) *United Nations Convention* 67. The writers argue that "... (t)he goals of achieving international uniformity is well-known, not only for maritime law but for any international private law convention." See also Clarke (ed) *Maritime Evolving* 132; Nikaki and Soyer 2012 *Berkeley J Int'l Law* 307.

## 2 The liability of carriers and shippers under the different international conventions

### 2.1. Introduction

In terms of the Common Law, where no express contractual terms have been provided for and subject to the exceptions discussed below, the duties of the carrier are generally strict.<sup>28</sup> The carrier was strictly liable for all risks associated with the safe transport of the cargo to its destination and delivery to the designated person.<sup>29</sup> The consequence hereof was that the carrier need not have acted with fault, either in the form of intent or negligence, for it to incur liability.<sup>30</sup> This liability commenced from the time that the goods were delivered to the carrier for the carriage thereof and continued until it had carried the goods to their destination and safely delivered them to the consignee.<sup>31</sup> There existed certain Common Law exceptions to the absolute liability of the carrier which were implied by law and formed part of the *naturalia* of the contract of carriage. The carrier was not liable if the loss or damage was caused by an event which was, as far as a reasonable carrier was concerned, unforeseen, unexpected, inevitable and unavoidable.<sup>32</sup> These exclusions were referred to as an act of God and included piracy, shipwreck, abnormal weather and fire. Theft was not regarded as an exclusion. However, if the goods were exposed to such unforeseen events due to the negligence of the carrier, the carrier was liable for the loss or damage to the goods. The carrier was also excluded from liability for the loss or damage to the goods where it was caused by inherent vice or latent defect or a condition in the goods themselves at the time of delivery.<sup>33</sup> The carrier would furthermore escape liability if the loss or damage was caused by the negligence of the owner of the goods or was the result of

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28 Van Niekerk and Schulze *South African Law* 125-126; Chuah *Law of International Trade* 214-215; Carr *International Trade* 229. According to the writers, the Common Law placed cumbersome duties and obligations on the carrier, making the carrier have absolute liability for loss or damage to the goods carried. Some of the essential duties of the carrier included the duty to provide a seaworthy ship, the duty to proceed with due dispatch, the duty to carry the goods to the appointed place of destination without deviation, the duty to take reasonable care of the cargo and the duty to deliver the goods to a specified or identifiable person at the port of discharge.

29 Carr *International Trade* 229; Chuah *Law of International Trade* 215.

30 Van Niekerk and Schulze *South African Law* 125. According to these writers the liability of the shipowner or carrier is a no-fault or absolute liability which is regulated by the principles originally contained in Roman-law edict *de nautis cauponibus et stabulariis*, in terms of which carriers by sea, innkeepers and stable keepers were strictly liable for goods in their custody, except for damage or loss caused by fatal damage or *vis maior*.

31 The consignee is defined as the intended receiver of a cargo shipment (Ramberg *et al Export-Import Basics* 280).

32 Chuah *Law of International Trade* 214; Van Niekerk and Schulze *South African Law* 126.

33 Van Niekerk and Schulze *South African Law* 127; Chuah *Law of International Trade* 238.

the shipper's fraudulent act or forgery of documents.<sup>34</sup> Due to the enormity of the carrier's legal liability and the frailty of the Common Law exceptions to the strict liability carriers faced, carriers resorted to the principles of contract law to incorporate exclusion or limitation liability clauses.<sup>35</sup>

The unrestricted freedom of contract allowed the parties with a dominant market position to impose their terms and conditions on parties in a weaker position. As the carrier was the strongest party to a contract of carriage, they tended to insert an all-embracing exclusion clause. In terms of this exclusion clause, carriers were exempted from liability for the loss or damage caused by perils of the sea, decay, strikes, deviation due to unseaworthy ships and their own negligence.<sup>36</sup> It is submitted that the principle of freedom of contract and the carrier being the stronger bargaining party<sup>37</sup> and subsequently contracting out of liability, operated in favour of the carrier and the goods were carried entirely at the shipper's risk.

After the First World War, it was decided by the international community that the Common Law rules were no longer adequate nor suitable to govern the needs of international trade.<sup>38</sup> The need to redress the imbalance and a formalised system whereby the rights of the carrier and shipper could effectively and equitably be regulated gave rise to the adoption of the Hague Rules 1924.<sup>39</sup>

## **2.2 The Hague Rules 1924**

The Hague Rules 1924 attempted to impose uniformity into contractual terms relating to the carriage of goods under bills of lading.<sup>40</sup> The object of the Hague Rules was to protect shippers from widespread exclusion of liability by sea carriers. This objective was achieved by requiring standard clauses to be included into bills of lading, defining

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34 Van Niekerk and Schulze *South African Law* 127; Chuah *Law of International Trade* 239.

35 Chuah *Law of International Trade* 239; Hasan and Ismail 2007 <http://www.ssm.com>; Van Niekerk and Schulze *South African Law* 129 "... (A)s opposed to excluding liability of carriers completely, the carrier may merely limit its liability to a specified amount, either generally or for certain types of goods, or to a specified proportion of the cargo owner's damage..."; See also Reynolds and Tsimplis *Shipowners' Limitation of Liability*. See also Drew *Limitation of Shipowners' Liability – The "New Law"*.

36 Carr *International Trade* 229; Reynolds and Tsimplis *Shipowners' Limitation of Liability* 247.

37 Gordan *Rotterdam Rules* 1.

38 Singh *Law of Carriage* 13; Baughen *Shipping Law* 95. Before the First World War, carriers occupied the position of dominance (Carr *International Trade* 230).

39 Myburgh 2002 *NZBLQ* 260.

40 Baughen *Shipping Law* 95; Singh *Law of Carriage* 13; Carr *International Trade* 230; Wilson *Carriage of Goods by Sea* 171; Hare *Shipping Law* 624.

the risks which must be borne by the carrier. The clauses also specified the maximum protection the carrier could claim from exclusion and limitation of liability clauses.<sup>41</sup> The rules accordingly envisage a basic mandatory framework of contractual clauses for incorporation in a contract of carriage outside of which the parties are free to negotiate additional terms of their own. Thus, the Hague Rules 1924 modified the scope and application of the Common Law implied obligations in an attempt to balance the liability of the carrier and shipper. The Hague Rules 1924 even acquired status of international customary shipping law thereby also becoming part of *lex mercatoria*.<sup>42</sup>

In terms of article 1(a) of the Hague Rules 1924 the carrier includes the owner or charterer who enters into a contract of carriage with a shipper.<sup>43</sup> A contract of carriage only applies to carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea.<sup>44</sup> The bill of lading is therefore the basis of the relationship between the carrier and shipper but, as discussed below, the carrier is obliged to provide the shipper with a bill of lading only on the demand of the shipper.<sup>45</sup> The Hague Rules, furthermore, did not differentiate between the person who concluded a contract of carriage with the shipper and the actual carrier<sup>46</sup> nor made provision for the identification of the carrier. The courts have not adopted a uniform approach to identifying the carrier<sup>47</sup> and, in addition, had to deal with the inclusion of a “demise clause” or “identity of the carrier clause” in the bill of lading.<sup>48</sup> It is the opinion of the writer that this caused some difficulty to the shipper

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41 Wilson *Carriage of Goods by Sea* 171; Singh *Law of Carriage* 13; Carr *International Trade* 230.

42 Lejnieks “Diverging Solutions” 304.

43 Article 1(a) of the Hague Rules 1924.

44 Article 1(b) of the Hague Rules 1924.

45 Article 3(3) of the Hague Rules 1924 provides that, after receiving the goods in his charge, the carrier, master or agent of the carrier must issue the shipper with a bill of lading on the demand of the shipper.

46 The actual carrier is the person to whom the actual carriage of the goods has been entrusted (Zunarelli 2009 *Unif L Rev* 1012).

47 According to Zunarelli 2009 *Unif L Rev* 1013, the factors taken into account by the courts usually related to the contents of the bill of lading and ranged from the signature of the bill of lading by/on behalf of the named carrier (in which case the person named as the carrier is considered the carrier), signature of bill of lading by/on behalf of the master of named ship (in which case the registered shipowner is considered – or at least presumed to be the carrier), charter party having been validly incorporated in the bill of lading (in which case the charter of the ship is conserved the carrier) and when the bill of lading lacked factors to consider, the heading of the bill of lading (in which case the person mentioned in the heading has been considered as the carrier).

48 A demise clause stipulates that, if the ship is not owned or chartered by demise to the company issuing the bill of lading, then the contract evidenced by the bill of lading is merely an agent and has no personal liability whatsoever in respect of the contract. An identity of the carrier clause provides that, under the contract evidenced by the bill of lading, the carrier is the shipowner and

when determining the party against whom an action for damage to or loss of the goods had to be instituted. This evidently placed a heavy burden on the shipper and negate from the purpose of the Hague Rules in that they were established to address the imbalance between the carrier and shipper.

The first duty of the carrier was to provide a seaworthy vessel. Tetley describes seaworthiness as follows:

Seaworthiness may be defined as the state of the vessel in such a condition, with such equipment, and manned by such a master and crew, that normally the cargo will be loaded, carried and cared for and discharged properly and safely on the contemplated journey.<sup>49</sup>

It is therefore safe to submit that the ship must not only have been seaworthy but also cargo worthy and voyage worthy. In terms of article 3(1) of the Hague Rules 1924, the obligation of the carrier was to exercise due diligence to ensure that the ship is seaworthy at the beginning of the voyage.<sup>50</sup> Absolute diligence was not required.<sup>51</sup> It is therefore submitted that there can be no presumption of unseaworthiness if for example the ship would, for no apparent reason, break down or even sink during the voyage. The *onus* of proof rests on the party who alleges unseaworthiness. The carrier could then rebut by either proving that the vessel was seaworthy or that the carrier exercised due diligence to ensure the ship was seaworthy. This may therefore be seen as the relaxation of the absolute obligation with regard to seaworthiness of the vessel required by the Common Law. This however, still proved to be a difficult obligation.

Article 3(8) of the Hague Rules 1924 provides that due diligence provision cannot be excluded by contract<sup>52</sup> and the obligation is a personal duty which cannot be delegated.<sup>53</sup> For instance, if the carrier made use of a dependable and expert contractor to replace storm valves and the latter failed to exercise due diligence in

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charterer who issued the bill of lading is only the agent, with no liability (Tetley 1999 *McGill Law Review* 809). It is the view of the writer that these clauses restrict the shipper's- or consignee's right to claim for damages to or loss of goods in limiting the party against whom action can be brought to the ship owner, even though it is not the ship owner with whom the contract of carriage has been concluded.

49 Tetley *Marine Cargo Claims* 877.

50 Article 3(1) of the Hague Rules 1924 provides that the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy; properly man, equip and supply the ship; and make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

51 Article 3(1) of the Hague Rules 1924.

52 Article 3(8) of the Hague Rules 1924; Tetley *Marine Cargo Claims* 869.

53 1961 1 Lloyd's Rep 57; Tetley *Marine Cargo Claims* 876; Wilson *Carriage of Goods by Sea* 10.

fastening the nuts, the carrier shall be responsible for damage to or loss of goods as a result thereof.<sup>54</sup> Tetley defines due diligence as a serious, competent and reasonable effort on the part of the carrier to fulfil the obligations under article 3(1) of the Hague Rules 1924.<sup>55</sup> The test of due diligence is an objective test and measured by the efforts of the prudent carrier at the time of exercising due diligence, taking into account the particular circumstances at hand.<sup>56</sup> Therefore, it is opined that the ship cannot be said to be unseaworthy if the carrier can prove that reasonable care and skill, in the light of the available knowledge and means at the time, were exercised by the carrier, its servants, agents and independent contractors, to ensure that the vessel was seaworthy at the commencement of its voyage.

The second duty imposed on the carrier relates to the care of the cargo. Article 3(2) provides that, subject to the exceptions and immunities of the carrier in article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods delivered. The courts have interpreted “properly and carefully” to have different meanings.<sup>57</sup> The writer is of the view that the test applied to determine if the carrier acted properly and carefully is an objective test measured against the degree of skill and care a reasonable carrier would have displayed in the light of shipping practices. However, when determining if the carrier properly cared for the goods, the court in *Albacorra SRL v Westcott and Laurance Line Ltd*<sup>58</sup> applied a subjective test.<sup>59</sup> Lord Reid argued as follows:

The obligation is to adopt a system which is sound in the light of all the knowledge which the carrier concerned has or ought to have about the nature of the goods.<sup>60</sup>

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54 1961 1 Lloyd’s Rep 57 where Lord Keith of Avoholm held that the duty to exercise due diligence is an inescapable personal obligation.

55 Tetley *Marine Cargo Claims* 876.

56 2000 2 Lloyd’s Rep 255. Lord Auld held that the vessel must have that degree of fitness which an ordinary owner would require his vessel to have at the commencement of the voyage having regard to all the probable circumstances. He further held that the lack of due diligence constitutes negligence.

57 1956 2 Lloyd’s Rep 579; According to Cullen *Ocean Carriage – Hague Visby Rules (better the devil you know...?)* 5 “...(C)arefully means exercising the degree of skill and care that a reasonable competent person in the trade ought to display in the particular circumstances involved in the task required. Properly means acting in accordance with a system that, in the light of the standards of practice in the shipping industry and the knowledge the carrier has or ought to have about the nature of the goods, is both appropriate and adequately maintained...”.

58 1966 2 Lloyd’s Rep 53. Lord Reid held that “... (t)he word ‘properly’ in article 3 means in accordance with a sound system...”.

59 1966 2 Lloyd’s Rep 53.

60 1966 2 Lloyd’s Rep 53.

It is opined that the court applied a subjective test as it relied on the carrier's knowledge of the goods in the specific circumstances and not the knowledge of the reasonable carrier. It is submitted that the obligation in terms of article 3(2) required carriers to care for the cargo according to a sound system operated with reasonable care. This may be considered as a proper objective test. The duty of care required to be exercised is expressly subject to the exceptions and the *onus* shifts to the carrier to prove that any loss or damage to goods in transit occurred without the actual fault or privity<sup>61</sup> of the carrier, or without the fault or neglect of the agents or servants of the carrier.<sup>62</sup> This obligation is therefore slightly less stringent than the absolute obligation of the Common Law. However, the writer is of view that the standard of care requires an element of skill in order for the carrier to properly and carefully care for the cargo.

The third obligation imposed on the carrier was the issuing of a bill of lading on the shipper's request.<sup>63</sup> Once a bill of lading is issued, it serves as documentary evidence that the goods were received in good order and condition. This obligation is subject to two provisions. Firstly, in terms of article 3(3)(c) of the Hague Rules 1924, the carrier is not obliged to acknowledge the required contents of a bill of lading if he has reasonable grounds to suspect that the information supplied by the shipper is inaccurate or the carrier has no reasonable means of confirming the contents thereof. The carrier is entitled to enter reservations on the bill of lading as protection against liability due to inaccurate or false particulars provided by the shipper.<sup>64</sup> Secondly, the shipper in return is deemed to have guaranteed the accuracy of the information

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61 In terms of the doctrine of privity a direct relationship is needed for a party to enforce a contract against another party. For example, A (the carrier) concludes a contract of carriage with B (the shipper) to carry goods and deliver it to C (the consignee). C cannot sue A on the contract of carriage as C is not a party to the contract. The only parties that can rely on the contract of carriage in claims against each other is A and B. Therefore, in terms of article 4(2)(q) of the Hague Rules 1924 the burden of proof rests on the carrier to prove that the damage to or loss of the goods in transit occurred without the actual fault or privity (somebody which is more than a servant for example, the vessel master) of the carrier.

62 Article 4(2) (q) of the Hague Rules 1924; Wilson *Carriage of Goods by Sea* 192. Should the carrier succeed with bringing the loss within an exception, the carrier will escape liability.

63 Article 3(3) of the Hague Rules 1924 provides that the bill of lading must contain among other things the leading marks necessary for the identification of the goods, the number of packages or pieces, the quantity or weight of the goods and the apparent order and condition of the goods.

64 Article 3(3)(c) of the Hague Rules 1924; Pejovic 2015 *JLIA* 132.

supplied on the bill of lading and is required to indemnify the carrier in the event of the shipper suffering loss or damage due to the inaccuracy of the information supplied.<sup>65</sup>

The last obligation is that the carrier is under a general duty to proceed on the contract voyage and not to deviate there from.<sup>66</sup> In terms of the Common Law deviation for saving human life was the only exception to the abovementioned obligation. However, article 4(4) of the Hague Rules 1924 allowed deviation when done for the purpose of saving property, during the course of saving lives and to save the voyage where it is necessary to deviate to repair the ship or any other action necessary for the safety of the ship.<sup>67</sup>

The Hague Rules 1924 were criticised for setting liability limits for carriers too low and for providing a multitude of exemptions and exclusions from liability.<sup>68</sup> These exceptions and immunities, as set out in article 4(2) of the Hague Rules 1924<sup>69</sup> generally follow the traditional pattern of the Common Law exceptions to liability but with a less stringent approach. The carrier would not be held liable for any damage or loss of goods unless caused by the actual fault or privity of the carrier.<sup>70</sup> It can therefore be argued that, if loss or damage to the cargo occurs while in the custody of the carrier, the carrier is presumed to be at fault and the carrier must prove absence of fault on the part of the carrier and his agents or servants to be exonerated from liability. The Hague Rules 1924 furthermore provided for a “catch-all” no-fault exception in terms of article 4(2) (q). The carrier can avoid liability for any damage or loss not falling within the

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65 Article 3(5) of the Hague Rules 1924; Wilson *Carriage of Goods by Sea* 192; Carr *International Trade Law* 242.

66 Article 3(4) of the Hague Rules 1924.

67 Article 4(4) of the Hague Rules 1924; Carr *International Trade Law* 244.

68 Ramberg *et al Guide to Export-Import* 228.

69 Article 4(2) of the Hague Rules 1924 sets out the list of exceptions and immunities which are available to the carrier. Neither the carrier nor the ship shall be responsible for loss or damage arising from act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation of or the management of the ship; fire, unless caused by actual fault or privity of the carrier; perils, dangers or accidents of the sea or navigable waters; act of God; act of war; act of public enemies; arrest or restraint or seizure under legal process; quarantine restrictions; act or omission of shipper or owner of the goods, his agent or representative; strikes or lockouts or stoppage or restraint of labour; riots and civil commotions; saving or attempting to save life or property at sea; wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods; insufficiency of packing; insufficiency or inadequacy of marks; latent defects not discoverable by due diligence; or any other cause arising without the actual fault or privity of the carrier, his agents or servants, but the burden of proof shall be on the claimant. The carrier can in terms of Art 5 waive the protection afforded by the exceptions in whole or partly, but the carrier is not allowed to add other exceptions to the list.

70 Article 4(2)(q) of the Hague Rules 1924; Wilson *Carriage of Goods by Sea* 263.

named exceptions provided that the carrier can establish that the loss or damage was not the fault or negligence of the carrier nor caused by the fault or negligence on the part of his servants or agents.<sup>71</sup> The writer is of view that this exception is very broad and can cover almost everything, but the burden of proof on the carrier is very stringent as the slightest carrier's- or agent's fault or negligence shall render the exception unsuitable. It is therefore submitted that, due to the heavy burden of proof and the many exceptions available, the carrier will normally choose to use the defined exceptions.

The Hague Rules 1924 have a few shortcomings which resulted in pitfalls being created with the development and evolvement of the carriage of goods by sea. Amongst these shortcomings is the application of the Rules. The Hague Rules 1924 only apply to bills of lading issued in a contracting state and therefore only apply to outward shipment of a contracting state.<sup>72</sup> Any shipment from a state which is not a signatory to the convention will be governed by the domestic law of the country from where the goods are shipped.<sup>73</sup> This still caused legal uncertainty, due to the different jurisdictions, conflict of laws and shipping practices.<sup>74</sup>

The Hague Rules 1924 do not mention loss or damage to goods due to delay. The carrier shall not be held liable if the voyage takes longer than agreed between the parties and the goods are consequently not delivered on time.<sup>75</sup> The absence of such a provision is favourable to the carrier as delay may cause financial loss to the shipper, if for example the goods deteriorate due to the delay or in the event of fluctuating market values.

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71 Article 4(2)(q) of the Hague Rules 1924: "...any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage...".

72 Article 1 of the Hague Rules 1924 provides that the provisions of this Convention shall apply to all bills of lading issued in any of the contracting States.

73 Myburgh 2000 *VUWLR* 376; Hasan and Ismail 2007 <http://www.ssm.com>.

74 Myburgh 2000 *VUWLR* 376; Hasan and Ismail 2007 <http://www.ssm.com>.

75 Hasan and Ismail 2007 <http://www.ssm.com>.

Deck cargo is entirely excluded and the carrier can claim exemption from liability.<sup>76</sup>

Article 1(3) of the Hague Rules 1924 provides that:

“Goods” includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.”<sup>77</sup>

The parties are free to insert contractual terms in relation to the carriage of specific goods, but to avoid the operations of the Rules, the cargo must be carried on deck and this fact must clearly be stated on the bill of lading.<sup>78</sup> This therefore renders the Hague Rules 1924 inappropriate for the modern-day shipping industry as it has become practice to carry certain cargo on deck.

The Hague Rules 1924 do not make provision for container shipment.<sup>79</sup> As container transport is an essential part of modern day carriage of goods by sea, this causes a loophole in the regulating of carriage by sea.

Furthermore, the carrier’s period of responsibility is limited to tackle-tackle<sup>80</sup> and the carrier cannot be held liable for the loss or damage to goods which occurred prior<sup>81</sup> to or after shipping<sup>82</sup> even though the carrier has taken charge of the goods.<sup>83</sup> The Hague Rules 1924 therefore define the responsibilities of the carrier from loading to discharge, however article 7 makes provision for the carrier and shipper to decide the

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76 It is the writer’s understanding that the risks associated with deck cargo and the obligation of the carrier to care for the cargo, as discussed above, were the determining factors in explicitly excluding deck cargo.

77 Article 1(3) of the Hague Rules 1924.

78 Wilson *Carriage of Goods by Sea* 176; Hasan and Ismail 2007 <http://www.ssm.com>.

79 Article 4(5) of the Hague Rules 1924 provides a limitation of liability of 100 pounds sterling per package or unit. Container shipment differ in that the container may hold numerous individual cargoes. It is unclear whether a container shall be regarded as a package or unit, or whether the contents of the container shall individually be regarded as a package or unit for the purposes of article 4(5), thus making the Hague Rules 1924 incompatible with container shipment.

80 Article 1(e) and article 2 of the Hague Rules 1924 provide that the carriage of goods covers the period from the time the goods are loaded on to the time they are discharged from the ship. This means, from the moment when the ship’s tackle is hooked for loading until the tackle is unhooked at discharge. In the instance where shore tackle is used, the period of responsibility shall commence when the goods pass the ship’s rail.

81 Article 1(e) read together with article 2 of the Hague Rules 1924 make it clear that the period of responsibility excludes periods where the carrier might be in charge of the goods, but the goods has not yet been loaded. This cause some concern as the carrier shall not be liable for loss or damage to the goods while the goods are in the carrier’s warehouse waiting to be loaded.

82 The carrier’s period of responsibility ends when the goods are unhooked from the ship’s tackle. The carrier shall not be liable for damage or loss to the goods during the period that it has been unhooked from the tackle and received by the consignee.

83 Hasan and Ismail 2007 <http://www.ssm.com>.

responsibilities of the carrier before loading and after discharge.<sup>84</sup> It is therefore submitted that the period of responsibility may be extended by agreement.

For decades the Hague Rules 1924 were the reigning convention. It was argued by some states that the rules are tried and tested and there was no need for amendments.<sup>85</sup> The Hague Rules 1924 is outdated and no longer relevant or appropriate to suit the modern shipping industry practice.<sup>86</sup>

### **2.3 The Hague-Visby Rules 1968**

The Hague Rules 1924 remained the dominant carriage system for nearly forty-four years and they remain the prime determined of liability in the United States.<sup>87</sup> In 1968, after almost half a century, the Hague Rules 1924 were amended by the *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* (Brussels 1968). The amended rules became known as the Hague-Visby Rules 1968 (hereinafter the Hague-Visby Rules 1968). The Hague-Visby Rules 1968 do not stand alone but are amendments to the Hague Rules 1924.<sup>88</sup> This was done so as to attempt to bring the international legal instrument up to date with developments in the shipping industry.<sup>89</sup> Recognition had to be given to the increasing use of containers to transport goods by sea. The extent of the limitation of carrier liability as well as the position of employees and agents of the carrier also required attention.<sup>90</sup> Although the Hague-Visby Rules 1968 made important changes, it did not radically alter the compromise between the interest of carriers and shippers which had been reached by the Hague Rules 1924.<sup>91</sup> The purpose of the Hague-Visby Rules

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84 Article 7 of the Hague Rules 1924.

85 Mbiah Date Unknown <http://www.comitemaritime.org>.

86 Hasan and Ismail 2007 <http://www.ssm.com>.

87 Hare *Shipping Law* 624; Mbiah Date Unknown <http://www.comitemaritime.org>; Lejniaks "Diverging Solutions" 304. The Hague Rules 1924, having the most signatories and, as mentioned above, being the first international liability system, is considered as international customary shipping law.

88 Reynolds "Hague Rules" 22; Hasan and Ismail 2007 <http://www.ssm.com>; Van Niekerk and Schulze *South African Law* 134. In 1979 further amendments were affected by the Protocol Amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Ladings of 1924 (the Hague Rules), as amended by the Protocol of 1968 (the Hague-Visby Rules). This amending Protocol, the so-called SDR Protocol, changed the basis of the limitation of carrier liability from gold francs to special drawing rights of the International Monetary Fund. See also Reynolds and Tsimplis *Shipowners' Limitation of Liability*; Drew *Limitation of Shipowners' Liability – The "New Law"*.

89 Hare *Shipping Law* 624; Dockray *Cases & Materials on Carriage* 152; Hoeks *Multimodal Transport Law* 297; Carr *International Trade* 230.

90 Van Niekerk and Schulze *South African Law* 134.

91 Dockray *Cases and Materials on Carriage* 152.

1968 was to keep workable principles, but to replace those principles of the Hague Rules 1924 which were deemed inadequate or incompatible; to keep the good and to discard the not so good. This was an unsuccessful attempt to better the liability system.

The amendments did, however, not turn out to be in the favour of the shipper nor address the imbalance, but instead introduced a different system of package limitation only.<sup>92</sup> In terms of Article 4(5) the maximum limitation of liability was increased and weight-based criteria was introduced. If the carrier is responsible for the loss or damage to the goods, then the carrier can limit his liability by application of the package limitation.<sup>93</sup>

The Hague-Visby Rules 1968 did address the problem with regard to the application of the Hague Rules 1924.<sup>94</sup> Article 10 of the Hague-Visby Rules 1968 extends the territorial application in order to address and resolve the conflict of laws created by the Hague Rules 1924.<sup>95</sup>

The Hague-Visby Rules 1968 also introduced provisions relating to the carriage of goods by means of containers. Article 4(5) (c) provides:

Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose

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92 In terms of article 4(5) of the Hague Rules 1924 the limitation of liability was determined by a monetary value of 100 pounds sterling per package or unit. Due to sterling being a fluctuating currency the Hague Rules' monetary limits weren't a stable basis for international uniformity. See also Reynolds and Tsimplis *Shipowners' Limitation of Liability*; Drew *Limitation of Shipowners' Liability – The "New Law"*; Tetley 1983 *J Mar L & Com* 334; Hare *Shipping Law* 625; Luddeke *et al Marine Claims* 62.

93 2008 1 *Lloyds' Rep* 50 in which the English Commercial Court explained the meaning of "goods lost or damaged" in connection with package limitation under the Hague-Visby Rules 1968. In this case the Court decided that the test for when and whether goods are damaged is at the time of discharge. The words "lost or damaged goods" refers to those goods that are lost in the sense of being destroyed and those goods that are damaged in the sense of not being lost but surviving in damaged form. The court found that loss or damage incurred after discharge fell into loss or damaged goods in terms of article 4(5)(a) provided that these were the goods that were damaged while in the carrier's custody. Furthermore, the Court found that the weight of the lost or damaged goods shall be the basis for the limitation of liability.

94 As discussed above, the Hague Rules 1924 only applied to bills of lading issued in a contracting state and therefore only applied to the outward shipment of a contracting state as provided in article 1 of the Hague Rules 1924.

95 Article 10 of the Hague-Visby Rules 1968 provides that the Rules shall be applicable where the bill of lading is issued in a contracting state, or where the carriage is from a port in a contracting state, or where the contract contained in or evidenced by a bill of lading provides that these Rules or legislation of any state giving effect to them are to govern the contract; Hasan and Ismail 2007 <http://www.ssm.com>.

of this paragraph as far as these packages or units are concerned. Except as aforesaid article of transport shall be considered the package or unit.<sup>96</sup>

The recent judgement in *Kyokuyo Co Ltd v AP Moller-Maersk A/S (The Maersk Tangier)*<sup>97</sup> considered the above as well as the application of the Hague-Visby Rules 1968 where no bill of lading was issued. The claim arose out of damage to large unpacked pieces of tuna stuffed in three refrigerated containers. The contracts of carriage initially contemplated the issue of bills of lading, but due to delays during the carriage the parties agreed that waybills would be issued instead, to prevent further delays at discharge.<sup>98</sup> Judge Baker held that the Hague-Visby Rules 1968 could apply where a waybill was issued in place of a bill of lading. In such case the contract was covered by a bill of lading for the purpose of article 1 (b).<sup>99</sup> With regard to a “unit” in terms of the Hague-Visby Rules 1968, Judge Baker held that the only relevant question is whether the individual physical items had been packaged together. If the individual items were packed together they would form part of a single package.<sup>100</sup> The individual pieces of tuna were therefore “units” in terms of the Hague-Visby Rules 1968.

In terms of article 3(6) the carrier cannot be held liable for the loss or damage to the goods unless the action is brought within one year from the delivery date of the goods.<sup>101</sup> Neither the Hague Rules 1924 nor the Hague-Visby Rules 1968 stipulates a time bar for action brought against the shipper. Therefore, it is opined that the absence of such provision widens the gap of imbalance between the carrier and shipper.

The carrier’s main obligations under the Hague-Visby Rules 1968 imitate the obligations and responsibilities provided for in the Hague Rules 1924.<sup>102</sup> Article 3(1) also makes the carrier responsible for the seaworthiness of its vessel, but only before and at the beginning of the voyage.<sup>103</sup> This was confirmed in *Maxine Footwear Co Ltd*

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96 Article 4(5) (c) of the Hague-Visby Rules 1968.

97 2017 1 CLC 253.

98 2017 1 CLC 255.

99 2017 1 CLC 261.

100 2017 1 CLC 289.

101 Article 3(6) of the Hague-Visby Rules 1968; Luddeke *et al Marine Claims* 63; Tetley *Marine Cargo Claims* 177.

102 In terms of article 3(1) and (2) of the Hague-Visby Rules 1968 the carrier must issue a bill of lading, exercise due diligence to keep the ship seaworthy, to properly and carefully care for the cargo and not to deviate from the agreed route.

103 Article 3(1) of the Hague-Visby Rules 1968 provides that the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy; Wilson *Carriage of Goods* 186. This phrase has been interpreted as covering the period from at least the beginning of the loading until the vessel starts her voyage.

*v Canadian Government Merchant*<sup>104</sup> where the House of Lords held that the Hague-Visby Rules only extend the responsibility to the period from at least the start of the loading until the vessel starts its voyage. The obligation is therefore not continuous and only applicable from before loading of the cargo has commenced and until the vessel weighs anchor.<sup>105</sup> This can be seen as an increase in regard of the burden of liability for the shipper due to the fact that the carrier shall not be liable for loss or damage if the vessel, for whatever reason, becomes unseaworthy during the voyage.<sup>106</sup> The only recourse the shipper will have is to institute a claim under the continuous obligation of the carrier to properly care for the cargo, which is subject to the exceptions and exclusions.<sup>107</sup>

As with the Hague Rules 1924, reasonable deviation is permitted under the exception listed in article 4(4).<sup>108</sup> In *Stag Line Ltd v Foscolo Mango & Co Ltd*<sup>109</sup> the court held that deviation to take on replacement crew is reasonable. In this case two engineers were landed to make sure that the ship engine works efficiently. A vessel which has voluntarily deviated from its agreed route<sup>110</sup> the carrier shall be liable for resulting loss or damages incurred during the deviation even if the loss or damage was caused by an exempted peril as in article 4(2) of the Hague-Visby Rules 1968. The Hague-Visby Rules 1968 does not provide for carrier liability due to delay. Where loss or damage to goods occurred due to delay caused by the deviation, the carrier shall be liable under the obligation to properly and carefully care for the goods. The shipper shall have no action against the carrier for delay, even if the deviation was potentially unreasonable.<sup>111</sup>

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104 1959 AC 589.

105 1959 2 Lloyd's Rep 105; Tetley *Marine Cargo Claims* 143.

106 However, if it is possible that faults that develop after the vessel has set sail are traceable to the unseaworthy state of the ship before she set sail, the carrier would be in breach of article 3(1) of the Hague-Visby Rules 1968 (Carr *International Trade* 237).

107 Hare *Shipping Law* 658.

108 The obligation of the carrier not to deviate from the agreed route is implied by the exception of reasonable deviation in article 4(4).

109 1932 AC 328.

110 1939 AC 562 HL in which Lord Porter found that "... (i)t is the duty of the ship when sailing from one port to another to take the usual route between those two ports. If no evidence for the usual route is available, then the route is presumed to be the direct geographical route."

111 1968 2 Lloyd's Rep 247; Basijokas 2015 *UCLJL* 128; Baughen 1991 *LMCLQ* 70.

As with the Hague Rules 1924, the basis for liability of the carrier remained a presumptive fault.<sup>112</sup> The burden of proof is on the carrier to prove the cause of the loss or damage, that due diligence was exercised to make the ship seaworthy and to prove the existence of any of the exceptions and immunities listed in article 4(2) of the Hague-Visby Rules 1968. A major complaint regarding the fairness of the Hague-Visby Rules 1968 concerns the extensive list of immunities which are afforded to the carrier.<sup>113</sup> These range from latent defects not discoverable by due diligence<sup>114</sup> to loss or damage caused by any act, neglect or default of a master, mariner, pilot or the servants of the carrier in the navigation or management of the ship.<sup>115</sup>

The Hague-Visby 1968 amendments were not universally embraced. They were criticised due to the fact that they did not fully address the needs of the consumer, but rather that of developing nations whose economies were more dependent upon the importation of consumer goods and who had few ship owning and operating enterprises.<sup>116</sup> Although the amendments introduced provisions that attempted to ensure compatibility with modern shipping practices, for instance containerisation, there were no fundamental changes in the liability of carriers and shippers respectively. The imbalance between the parties was neither eradicated nor reduced. The large number of exceptions to and immunities from liabilities which carriers are able to raise can be said to either defeat or considerably delay the settlement of cargo claims. The freedom of the carrier to limit its liability by agreement placed the Hague-Visby Rules 1968 in the same league as the Common Law liability system. It would seem as if the carrier remained the favoured party under the Hague Rules 1924 and the Hague-Visby Rules 1968.<sup>117</sup>

The Hague-Visby Rules 1968 were not adopted by all the signatories to the Hague Rules 1924, causing the Hague Rules 1924 and Hague-Visby Rules 1968 to exist side

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112 As discussed above under the Hague Rules 1924, if loss or damage occurs while the goods are in the custody of the carrier, the carrier is presumed at fault and the burden of disproving fault is on the carrier.

113 Hare *Shipping Law* 625; Reynolds "Hague Rules" 22.

114 Article 4(2) of the Hague-Visby Rules 1968; Carr *International Trade* 285; Wilson *Carriage of Goods* 193.

115 Article 4(2) (a) of the Hague-Visby Rules 1968, the so called "nautical fault exception".

116 Wilson *Carriage of Goods* 209; Hasan and Ismail 2007 <http://www.ssm.com>; Reynolds "Hague Rules" 27; Carr *International Trade* 285; Hoeks *Multimodal Transport Law* 298; Hare *Shipping Law* 625; Wilson *Carriage of Goods* 209.

117 "Reynolds "Hague Rules" 29; Chuah *Law of International Trade* 346; Ramberg *ea Export-Import Basics* 228; Hare *Shipping Law* 625.

by side. This contributes to legal uncertainty and conflict of laws with regard to the carriage of goods by sea and defeats the purpose of uniformity. South Africa incorporated and promulgated the Hague-Visby Rules 1968 as Schedule 1 to the domestic *Carriage of Goods by Sea Act*.<sup>118</sup>

## **2.4 The Hamburg Rules**

The Hague Rules 1924 and Hague-Visby Rules 1968 came under attack from developing countries due to the strong favour it presented to the carrier.<sup>119</sup> The objections to the existing conventions included, but is not limited to, the exceptions which operated exclusively in the favour of the carrier and the time limit within which a claim should be brought.<sup>120</sup> The Hague-Visby Rules 1968 in turn were fundamentally revised by the *United Nations International Convention on the Carriage of Goods by Sea* (1978) (hereinafter the Hamburg Rules).<sup>121</sup> The Hamburg Rules were specifically drafted with the intent to create a system that would replace the Hague Rules 1924 and the Hague-Visby Rules 1968.<sup>122</sup> It was an attempt to improve the position of developing countries which were perceived to be at a disadvantage as against traditional maritime and ship owning countries, thus the shipper.<sup>123</sup>

The Hamburg Rules did not receive the welcome that was expected by the drafters and has become no more than a mere alternative instead of a system unifying international sea carriage law.<sup>124</sup> The Hamburg Rules only came into effect in

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118 Act 1 of 1986, hereinafter "COGSA".

119 As against the rights of the shipper as the other party to the contract of carriage.

120 Carr *International Trade Law* 285; The time limitation under the Hague Rules 1924 and Hague-Visby Rules 1968 is one year from the date of delivery, or the last day when the goods should have been delivered (See par 2.2 and 2.3 above).

121 Hoeks *Multimodal Transport Law* 327; Carr *International Trade* 286; Hare *Shipping Law* 626.

122 Hoeks *Multimodal Transport Law* 327; Hasan and Ismail 2007 <http://www.ssm.com>; Luddeke *et al Marine Claims* 53; Van Niekerk and Schulze *South African Law* 135; This new system draws on other international transportation conventions but represents an essentially new compromise between the shipper and the carrier, the developing nations and the developed nations and the various mercantile interests, including the marine insurance industry (Donovan 1979 *Maritime Lawyer* 5).

123 Reynolds "Hague Rules" 27; Carr *International Trade* 285; The majority of carriers' hail from developed or industrialised countries. Carriers were thought by developing countries (where most shippers are from) to have garnered undue privileges by exercising their influence during the drafting processes of the Hague Rules 1924 and the Hague-Visby Rules 1968 (Hoeks *Multimodal Transport Law* 327).

124 The most active opponents of the Hamburg Rules were the cargo insurers. As carrier liability increased, cargo insurance premiums were bound to go down (Lejniaks "Diverging Solutions" 305); Carr *International Trade Law* 287; Reynolds "Hague Rules" 27-32; Honnold 1993 *J Mar L & Com* 106 argues that "... (I)nsurers see their interest in a wider context – the overall dimensions of the risk they are paid to insure. Reducing the cargo losses that shippers bear, reduces the scope of the

November 1992 and were mainly signed by developing countries.<sup>125</sup> The writer is of the view that the lack of support is due to the carrier still being the stronger party to a contract of carriage and developed countries are reluctant to become a party to a convention which places more responsibilities on the carrier.<sup>126</sup>

The Hamburg Rules, in contrast to the Hague Rules 1924 and Hague-Visby Rules 1968, specifically differentiate between the carrier and the actual carrier. In terms of article 1(1) the definition of a carrier has been extended to include other parties than merely the owner or charterer.<sup>127</sup> In terms of article 1(2) the actual carrier is defined as

any person to whom the performance of the carriage of the goods, or part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.<sup>128</sup>

This new element of the Hamburg Rules clearly attempted to address the shortcomings of the Hague Rules 1924 and Hague-Visby Rules 1968. In terms of Article 10 of the Hamburg Rules the actual carrier has the same responsibilities as the carrier and shall be liable for those parts of the carriage performed by him.<sup>129</sup> In the event of both the carrier and actual carrier being liable, the liability shall be joint and several.<sup>130</sup> It is opined that the identification of the carrier has been simplified by the inclusion of the of the actual carrier as an additional party liable for damage to or loss of goods carried under the contract of carriage.

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risks that cargo insurers carry and, in this competitive industry, reduces the level of premiums they can charge. Hamburg, in relieving shippers from losses resulting from carriers' negligence and lowering other barriers to recovery from carriers' negligence, transfers a portion of cargo losses from shippers to carriers...this would not concern cargo insurers if they could insure the carriers...". Maritime Cargo Insurance falls beyond the scope of this dissertation. See O'Hare 1997 *Monash U L Rev* 140-142 and Selvig 1981 *J Mar L & Com* 312-314.

125 Carr *International Trade* 287; Wilson *Carriage of Goods* 223; Hare *Shipping Law* 631; Ramberg *et al Export-Import Basics* 228; Dağlı *Obligations and Liability* 7. None of the world's major trading nations have acceded to the Convention, nor incorporated the provisions of such in their legislation only developing countries such as Brazil, Chile, Egypt, Finland, Mexico and Panama. South Africa is not a signatory to the Hamburg Rules. The Hamburg Rules were signed by 34 states (UNCITRAL 2018 <http://www.uncitral.org>); Lejnieks "Diverging Solutions" 305; Dağlı *Obligations and Liability* 7; Hoeks *Multimodal Transport Law* 328.

126 Seeing that most carriers hail from developed countries.

127 Article 1(1) of the Hamburg Rules defines a carrier as any person by whom or in whose name a contract of carriage of goods by sea has been concluded with the shipper. See par 2.2 above for the discussion on the identity of the carrier under the Hague Rules 1924 and Hague-Visby Rules 1968.

128 Article 1(2) of the Hamburg Rules.

129 Article 10 of the Hamburg Rules.

130 Article 10 of the Hamburg Rules; Zunarelli 2009 *Unif L Rev* 1020.

The Hamburg Rules apply to all types of contracts of carriage and not just to bills of lading or similar documents of title.<sup>131</sup> However, charter parties<sup>132</sup> are excluded from the application of the Rules. The inclusion of transport of live animals<sup>133</sup> and deck cargo<sup>134</sup> also contributed to the extension of application. The wider application of the Rules is welcomed as it attempted to resolve the application issues under the Hague Rules 1924 and the Hague-Visby Rules.<sup>135</sup>

Another welcomed feature is the duration of the coverage of the Hamburg Rules. In terms of the Hague Rules 1924 and the Hague-Visby Rules 1968, the carrier was only responsible for the goods from “tackle-to-tackle”. The Hamburg Rules is designed to operate throughout the entire period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.<sup>136</sup> This means that the carrier shall remain responsible for the entire period that the goods are in the carrier’s custody. It is the view of the writer that this limits the disputes with regard to the responsible party and when article 4(1) is read in conjunction with article 23,<sup>137</sup> it is evident that the carrier cannot contract out of this clause.

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131 Article 2 of the Hamburg Rules; Article 1(6) of the Hamburg Rules defines a contract of carriage by sea as any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another, however, a contract which involves carriage by sea and carriage by some other means is deemed to be a contract of carriage by sea for the purpose of this Convention for only so far as it relates to the carriage by sea.

132 Article 2(3) of the Hamburg Rules; A charter party is defined as a contract under which a charterer agrees to rent/hire the use of a vessel or part of a vessel from a shipowner for a given period of time (Ramberg *ea Export-Import Basics* 278).

133 Article 1(5) of the Hamburg Rules defines “goods” to include live animals; Article 5(5) of the Hamburg Rules; Wilson *Carriage of Goods by Sea* 209, 212. The Hague Rules 1924 and Hague-Visby Rules 1968 expressly excluded deck cargo and the carriage of live animals

134 Article 4(9) of the Hamburg Rules; Wilson *Carriage of Goods by Sea* 209.

135 Tetley 1977 <http://www.dutchcivillaw.com>; Thompson 1992 *BLR* 172; See par 2.2 and 2.3 above where the application of the Hague Rules 1924 and Hague-Visby Rules 1968 is discussed.

136 Article 4(1) and article (4(2) of the Hamburg Rules; Moore 1978 *J Mar L & Com* 9. This means from the time the carrier has taken over the goods from the sender/shipper until such times as the goods are regarded by the destination port as out of port and in storage or onward transit (Wilson *Carriage of Goods by Sea* 210).

137 Article 23(1) of the Hamburg Rules provides that any stipulation in a contract of carriage by sea, in a bill of lading, or any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention; Article 23(4) of the Hamburg Rules furthermore states that, where a claimant incurred loss as result of the inclusion of a clause in the contract which is deemed to be void, the carrier is liable to compensate the claimant (Carr *International Trade Law* 321).

While this system of carrier liability is far more stringent than that of its predecessors, the liability of the carrier is still based on the principle of a *presumed* fault or neglect.<sup>138</sup>

Article 5(1) of the Hamburg Rules provides as follows:

The carrier is liable for loss resulting from loss or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.<sup>139</sup>

It is submitted that the Hamburg Rules take a different approach to liability in that the carrier is responsible for loss or damage unless the carrier can prove that all reasonable steps to avoid the loss or damage have been taken. The Hamburg Rules do not specifically provide for obligations of the carrier on the ground that it is adequate for the purpose of forming liability of the carrier to accept the principle of presumed fault.<sup>140</sup> The *onus* of proof rests on the carrier.<sup>141</sup> However, an exception hereto is the liability of the carrier in the case of fire. In terms of article 5(4)(a) of the Hamburg Rules the carrier is liable for loss of, damage to or delay in the delivery of the goods caused by the fire itself<sup>142</sup> and loss of, damage to or delay in delivery of the goods caused by the failure to put out, avoid or mitigate the consequences of the fire.<sup>143</sup> The *onus* of proof shifts to the shipper to prove that the fire was caused by the carrier or its servants or agents; or that the carrier or its agents or servants did not take all reasonable measures to avert the loss.<sup>144</sup> It is opined that the shift of the burden of proof to the shipper is impractical. The shipper was not present at the time of the fire and will have to rely on the investigation reports and the carrier's version of the event and measures taken to avert the loss or damage.

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138 See par 2.2 and 2.3 above where the basis of liability of the carrier under the Hague Rules 1924 and Hague-Visby Rules 1968 is discussed.

139 Article 5(1) of the Hamburg Rules.

140 Von Ziegler, Schelin and Zunarelli (eds) *Rotterdam Rules* 86. The introduction of a standard basis of liability in Article 5(1) means that the level of responsibility that can be expected is not dependent on the kind of obligation undertaken (Carr *International Trade Law* 296).

141 See par 2.2 and 2.3 above where the *onus* of proof under the Hague Rules 1924 and Hague-Visby Rules 1968 is discussed.

142 Article 5(4) (a) (i) of the Hamburg Rules. Unlike the Hague Rules 1924 and the Hague-Visby Rules 1968 the carrier is liable for its servants and agents. See par 2.2 and par 2.3 above.

143 Article 5(4) (a) (ii) of the Hamburg Rules.

144 Article 5(4) (a) of the Hamburg Rules. Under the Hague Rules 1924 and the Hague-Visby Rules 1968 the *onus* of proof rests on the carrier to bring itself within the fire exception (Nicoll 1993 *J Mar L & Com* 167). See par 2.2 and 2.3 above.

Article 5 then proceeds to make special provision for certain eventualities.<sup>145</sup> Certain types of cargo is deemed to present problems during the carriage thereof. The carriage of live animals will be subject to the general obligation of care, but the carrier will not be liable for loss resulting from any special risk inherent in this kind of carriage. The shipper is to provide the carrier with special instructions regarding the carriage of the animals. If the carrier can prove that he complied with the instructions and the loss incurred can be attributed to the particular risks, it would be presumed that the loss was so caused.<sup>146</sup>

As said above and unlike its predecessors, the Hamburg Rules makes provision for the carriage of deck cargo. According to article 9, deck cargo will be treated as normal cargo. Where the goods are shipped on deck by agreement with the shipper, such agreement must be recorded on the bill of lading. Nevertheless, should the cargo be shipped on deck without the consent of the shipper, this will not be considered a fundamental breach in contract, but the carrier will be held liable solely from carriage on deck.<sup>147</sup>

As discussed under the Hague Rules 1924 and Hague-Visby Rules 1968 the carrier will not be held liable for loss resulting from deviation in saving a life or property or any reasonable deviation.<sup>148</sup> The Hamburg Rules provides that the carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.<sup>149</sup> It is therefore safe to submit that deviation is an exception to the liability of the carrier, however, the carrier will still be held liable for loss, damage or delay in the delivery of the goods in general average.<sup>150</sup>

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145 Article 5 of the Hamburg Rules; Wilson *Carriage of Goods by Sea* 212.

146 Article 5(5) of the Hamburg Rules; Wilson *Carriage of Goods by Sea* 213; Moore 1978 *J Mar L & Com* 9.

147 Article 9 and article 15(1) (m) of the Hamburg Rules; Moore *J Mar L & Com* 9; Wilson *Carriage of Goods by Sea* 213.

148 Article 4(4) of the Hague-Visby Rules 1968. See par 2.2 and 2.3 above where deviation under the Hague Rules 1924 and Hague-Visby Rules 1968 is discussed.

149 Article 5 (6) of the Hamburg Rules; Moore 1978 *J Mar L & Com* 9;

150 General average is a voluntary sacrifice or extraordinary expense incurred during carriage by sea to protect all interests from an impending peril. The main principle behind general average is that, when a sacrifice is made to save the interest of all parties involved in the transportation, the party who makes the sacrifice must be compensated by all other parties who stand to benefit from the sacrifice or expenditure. Ramberg uses the example of cargo being jettisoned to save a vessel from

According to the Hamburg Rules<sup>151</sup> the carrier will be held liable for loss resulting from delay in delivery, unless he can discharge the standard burden of proof.<sup>152</sup> Where no time was agreed upon the test will be that of the diligent carrier in the particular circumstances.<sup>153</sup> This is a step in the other direction in comparison to the provisions of the Hague Rules 1924 and Hague-Visby Rules 1968, which were both silent on the matter of delay.<sup>154</sup>

Furthermore, the carrier does not have the advantage of a long list of exceptions and immunities.<sup>155</sup> It would appear that the only exceptions to the liability of the carrier is that of deviation, carriage of live animals and fire.

Except for raising the bar in regard to the liability of the carrier the Hamburg Rules made several significant improvements, as discussed in the previous paragraphs, on the systems adopted by the Hague Rules 1924 and Hague-Visby Rules 1968. The Hamburg Rules did not receive the reception and acceptance as expected. Thus, instead of replacing the old systems, the Hamburg Rules now co-exists to the Hague Rules 1924 and Hague-Visby Rules 1968 as just another international set of rules dividing the parties to international carriage of goods.<sup>156</sup>

It is evident that neither the Hague Rules 1924, Hague-Visby Rules 1968 nor the Hamburg Rules proved to be flexible to adapt to the ever-changing carriage of goods by sea. Not only did the carriage systems fail to replace one another as time went by, but to it is opined that the balancing of interest of the different parties seemed to cause a greater separation. It is not wrong to conclude that this situation provided states with an option to choose the more beneficial system.

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sinking, all parties whose cargo was not thrown overboard must contribute to reimburse those parties whose cargo was (Ramsberg *ea Export-Import Basics* 290).

151 Article 5(1) of the Hamburg Rules.

152 In terms of the article 5(1) of the Hamburg Rules the burden of proof rests on the carrier to prove that he, his servants or agents took all measures that can reasonably be required to avoid the occurrences and its consequences.

153 Article 5(2) of the Hamburg Rules; Mbiah Date Unknown [www.comitemaritime.org](http://www.comitemaritime.org).

154 See the comments in par 2.2 and 2.3 above where delay in terms of the Hague Rules 1924 and Hague-Visby Rules 1968 is discussed.

155 Carr *International Trade Law* 287; Moore 1978 *J Mar L & Com* 11; Baughen *Shipping Law* 137.

156 Luddeke *et al Marine Cargo Claims* 58; Dağlı *Obligations and Liability* 9; Nikaki and Soyer 2012 *Berkeley J Int'l Law* 304.

### 3 The liability of carriers and shippers under the Rotterdam Rules

#### 3.1 Introduction

Once it became apparent that the Hamburg Rules failed to provide a uniform international carriage system, discussions and negotiations began afresh for the establishing of an alternative system. In an attempt to prevent further fragmentation among maritime nations, the *Comité Maritime International* (hereinafter CMI) drafted a new convention.<sup>157</sup> On 11 December 2008 the General Assembly of the United Nations adopted the *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008)* (hereinafter the Rotterdam Rules).<sup>158</sup> The Rotterdam Rules were promulgated to provide a legal framework which takes into account the many technological and commercial developments in the maritime transport industry. This included, but is not limited to, the increase in the demand for carriage of cargo in containers; the development of electronic transport documents and the need for “door to door” carriage that includes an international sea leg under one contract.<sup>159</sup> The Rules were expected by many to be a fusion between the Hague Rules 1924 and Hague-Visby Rules 1968 on the one hand and the Hamburg Rules on the other. It is opined that it is exactly what the Rules are, but it also introduced some new features.

The scope of application of the Hague Rules 1924 and Hague-Visby Rules 1968 were rather limited being only applicable to contracts evidenced by a bill of lading and outbound cargoes.<sup>160</sup> The Hamburg Rules improved this position by extending the application to any contract of carriage by sea.<sup>161</sup> The Rotterdam Rules take on a new approach in regard to the scope of application. The Rotterdam Rules apply to international contracts of carriage. A contract of carriage is defined in article 1(1) as

a contract in which the carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage of goods by

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157 Van Niekerk and Schulze *South African Law* 135; Carr *International Trade Law* 305; Hare *Shipping Law* 633.

158 Hoeks *Multimodal Transport Law* 334; Reynolds and Tsimplis *Shipowners' Limitation of Liability* 287.

159 Saad 2011 [www.financierworldwide.com](http://www.financierworldwide.com); Dağlı *Obligations and Liability* 10; Nikaki and Soyer 2012 *Berkeley J Int'l Law* 305; Baughen *Shipping Law* 138.

160 See par 2.2 and 2.3 above where the scope of application is discussed.

161 See par 2.4 above where the scope of application under the Hamburg Rules is discussed.

sea and may provide for carriage by other modes of transport in addition to sea carriage.<sup>162</sup>

The contract must, as mentioned, involve an international sea leg and, additionally, the contractual place of receipt, loading, discharge or delivery must be located in a contracting state.<sup>163</sup> The Rules do, thus, not only apply to contracts of carriage by sea, but also to contracts involving other modes of transport. Therefore, any multimodal contract of carriage involving an international sea leg will be covered by the Rules and can be seen as a “maritime plus” convention.<sup>164</sup> The Rotterdam Rules refer to transport documents or electronic transport records as basis of the contract of carriage.<sup>165</sup> The multimodal nature of the convention also results in the period of responsibility of the carrier being extended to cover a door-to-door carriage transaction upon agreement by the parties.<sup>166</sup> This obligation extends from the receipt of the goods from the shipper until delivery to the receiver. It is submitted that this increases the liability of the carrier considerably.

Provisions that regulate the foundation of liability are fundamental to any liability system as it determines the liable party, under what circumstances and with whom the *onus* of proof lays.<sup>167</sup> The writer is of the view that the most prominent feature of the Rotterdam Rules are the changes brought to the liability of both the carrier and the shipper. The purpose of the changes is to better allocate risks and responsibilities between the parties. However, as with any new liability system, the question remains whether these changes adequately address the concerns and shortcomings of its predecessors. It is submitted that the Rotterdam Rules prove to be heading in the right direction, but the complexity of the Rules tends to eradicate the original purpose. The

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162 Article 1(1) of the Rotterdam Rules.

163 Article 5 of the Rotterdam Rules.

164 Mbiah Date Unknown [www.comitemaritime.org](http://www.comitemaritime.org); Clarke (ed) *Maritime Law Evolving* 135; Hoeks *Multimodal Transport Law* 335.

165 The introduction of electronic transport documents established a legal framework for the development of electronic commerce in maritime law (Faria 2011 *Elon Law Review* 13). The ‘bill of lading’ is not referenced at all in the Rotterdam Rules. The Rules substitute the concept of a bill of lading with ‘transport document’ or ‘electronic transport record’ (Hamid “Rotterdam Rules or Hybrid” 2-3).

166 Article 12 of the Rotterdam Rules; Mbiah Date Unknown [www.comitemaritime.org](http://www.comitemaritime.org); Hamid “Rotterdam Rules or Hybrid” 3. As discussed above, in par 2.2-2.4, under the Hague Rules 1924 and Hague-Visby Rules 1968 the carrier’s period of responsibility was limited to tackle-to-tackle while the Hamburg Rules extended the period of responsibility to port-to-port.

167 Marin 2012 [www.bib.irb.hr](http://www.bib.irb.hr).

respective duties, responsibilities, obligations and liabilities of both the carrier and shipper are now analysed and compared to that of the previous conventions.

## **3.2 Carrier liability**

### *3.2.1 Identity of the carrier and performing parties*

A carrier is defined as a person that enters into a contract of carriage with a shipper.<sup>168</sup> The convention introduces a new concept to the carriage system namely, a performing party, which is defined as

a person other than the carrier that physically performs...any of the carrier's responsibilities under a contract of carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage.<sup>169</sup>

The definition therefore includes, in contrast to previous conventions,<sup>170</sup> any independent contractor engaged by the carrier to perform any of the carrier's responsibilities under its contract of carriage, to the extent that such independent contractor actually renders such services.<sup>171</sup> The carrier is responsible for the acts of performing parties,<sup>172</sup> widening the liability of the carrier. The performing party will only fall under the convention if it is a maritime performing party.<sup>173</sup> A practical example of a maritime performing party will include stevedores, trimmers, port pilots and terminal operators. This means that the carrier includes not only the sub-carrier who performs the actual carriage, but also other persons involved in the performance of the carriage. This inclusion in the convention entails an expansion in the scope of the Rotterdam

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168 Article 1(5) (a) of the Rotterdam Rules.

169 Article 1(6) (a) of the Rotterdam Rules.

170 See par 2.2 and 2.4 above for the discussion on the identity of the carrier under the Hague Rules 1924 and Hamburg Rules.

171 Zunarelli 2009 *Unif L Rev* 1020; Zhou *Carriers Obligations and Liabilities* 37.

172 Art 18 of the Rotterdam Rules; A performing party for purposes of the Rotterdam Rules is not only the road carrier that performs the last part of the door-to-door operation, which includes a sea leg, but also the company that operates the warehouse used while goods are in transit (Zunarelli 2009 *Unif L Rev* 1020).

173 Article 1(7)(a) of the Rotterdam Rules provides that a maritime performing party is regarded as 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; Baughen *Shipping Law* 139.

Rules over that of its predecessors.<sup>174</sup> In terms of article 19(1) the maritime performing parties are subject to the same obligations and liabilities as the carrier,<sup>175</sup> unless the carrier agrees to take on wider obligations than those imposed by the Rotterdam Rules.<sup>176</sup> At first glance, this may seem as though the carrier's liability is extended. However, the defences and limitation of liability available to the carrier are also available to these maritime performing parties.<sup>177</sup>

### 3.2.2 Basis of liability

Article 17 contains the basis of liability of the carrier. According to article 17(1) the carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility.<sup>178</sup> The Rotterdam Rules moves back to a fault-based liability system as determined in the Hague Rules 1924 and Hague-Visby Rules 1968,<sup>179</sup> but the fault is structured differently. This, in fact, created an entirely new liability system. The carrier's liability is presumed if the shipper can prove two facts. First of all, the carrier received the goods undamaged and in full. Secondly and just as important, that the goods were subsequently damaged in transit.<sup>180</sup> The carrier, on the other hand, is relieved of all or

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174 The Hague Rules 1924 only dealt with the carrier whereas the Hamburg Rules made provisions for the carrier and actual carrier. See par 2.2 and par 2.4 above for the discussion on the identity of the carrier under the Hague Rules 1924 and Hamburg Rules.

175 Article 19(1) of the Rotterdam Rules.

176 Article 19(2) of the Rotterdam Rules; Zunarelli *Unif L Rev* 1021; Fujita *Coverage of the Rotterdam Rules* 5.

177 Article 19(1) of the Rotterdam Rules; In terms of article 20(1) of the Rotterdam Rules the liability of the carrier and maritime performing party is joint and several up to the limits provided for in the Convention. Bäckdén 2011 *J Mar L & Com* 118; Zunarelli *Unif L Rev* 1021. It is submitted that the Rotterdam Rules expanded the parties that will be liable to the shipper for any damage of, loss to or delay in delivery of the goods. The maritime performing party need not have materially contributed to the damage to, loss of or delay in the delivery of the goods and steps in as the carrier during the period that the goods are in its custody or under its charge. The maritime performing party will only be liable for that part of the damage to, loss of or delay in delivery of the goods attributable to its fault. However, article 19(1) incorporated the "Himalaya Clause" extending the protection of the carrier to the maritime performing parties. The "Himalaya Clause" shall be discussed in detail below.

178 Article 17(1) of the Rotterdam Rules.

179 See par 2.2-2.3 where the basis of liability under the Hague Rules 1924 and Hague-Visby Rules 1968 is discussed.

180 Article 12(1) of the Rotterdam Rules provides that the period of responsibility of the carrier for the goods begins when the carrier or performing party receives the goods for carriage and ends when the goods are delivered; Von Ziegler, Schelin and Zunarelli (eds) *Rotterdam Rules* 99; Marin 2012 [www.bib.irb.hr](http://www.bib.irb.hr).

part of his liability if it proves that the cause or one of the causes<sup>181</sup> of the loss, damage or delay is not attributed to its fault or to the fault of any person deemed as a performing party.<sup>182</sup> The burden of proof then again rests on the shipper to rebut the carrier's defence and show that the loss of, damage to or delay in delivery was indeed caused by the carrier<sup>183</sup> or his employees in that the carrier did not meet his obligation in terms of the Rules.<sup>184</sup> Evidentially, if the claimant wants to establish the carrier's liability he must prove there is no contributing fault on his part or any of the parties mentioned in article 18 and that there is no exclusion or exception in terms of article 17(3).<sup>185</sup>

The European Shipper's Council is of opinion that article 17 is more burdensome on the shipper as it will be difficult to prove the fault of the carrier.<sup>186</sup> This is a valid argument as the carrier will be exempt from liability if he can show that one of the causes of the damage was not attributable to his fault or that of the people for whom he is responsible or that it was caused by an exception as provided for in the Rotterdam Rules.<sup>187</sup> It is opined that the cause should materially contribute to the damage or loss and therefore causation should play an important role. For example, if the carrier can show that rough seas was one of the causes which contributed to the damage or loss,

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181 The Rotterdam Rules makes provision for the apportionment of loss in that the carrier will only be liable for that part of the damage to, loss of or delay in delivery of the goods caused by the fault of the carrier or the persons for whom the carrier is vicarious liable as determined in article 18 of the Rotterdam Rules. This is quite different from the previous conventions. In terms of the Hague Rules 1924 and Hague-Visby Rules 1968, the carrier was liable for all the damage to or loss of the goods if it was caused by the fault or neglect of the carrier – an “all or nothing” consequence. The Hamburg Rules allowed the apportionment of loss, however the carrier had to successfully prove the proportion of the damage of or loss to the goods not caused by the fault of the carrier. The Rotterdam Rules did away with the requirement in regard to the carrier successfully proving the proportion. The writer is of the view that this provision should be interpreted that one of the causes of the damage or loss need to have materially contributed to the damage to, loss of or delay in the delivery of the goods.

182 Article 17(2) and article 17(3) of the Rotterdam Rules. Once the shipper establishes a *prima facie* case for loss to, damage of or delay in the delivery of the goods, the carrier has the opportunity to contest by refuting the claim or declaring that the loss to, damage of, or delay in delivery was caused by an unexpected peril (Marin 2012 [www.bib.irb.hr](http://www.bib.irb.hr)).

183 Again, the carrier's action of failure to act was one of the causes that materially contributed to the damage to, loss of or delay in the delivery of the goods.

184 Nikaki and Soyer 2012 *Berkeley J Int'l Law* 318 argues that “... (a)rticle 17 provides for the allocation of the burden of proof between the carrier and shipper and to a certain extent, codifies the burden shifting system of the widely accepted Hague regimes (colloquially described as a “ping-pong” game because of the potential for the burden to continually shift between the sides)”. Zhou *Carrier's Obligations and Liabilities* 49 is of opinion that “...(a)rticle 17 is another important evolution of the Rotterdam Rules since neither previous international convention in this field...provide such a clear step-by-step burden of proof mechanism”. The writer agrees.

185 The exceptions and exclusions shall be discussed in detail below.

186 European Shipper's Council <http://www.comitemaritime.org>.

187 Article 17 of the Rotterdam Rules.

the carrier will be exempted from liability. Therefore, the carrier need only show the presence of a contributing cause which is not attributable to his fault or that of the persons for whom he is responsible. to escape liability. The writer is of opinion that the provision must be interpreted with reference to causation. The carrier must show that the cause or one of the causes which materially contributed to the damage to, loss of or delay in delivery of the goods is not attributable to his fault or the fault of the persons for whom he is responsible. On the other hand, in order to escape liability, the carrier must first identify the cause of the damage to, loss of or delay in delivery of the goods. If the carrier fails to identify the cause, then it becomes impossible to prove that the damage to, loss of or delay in delivery was not attributable to the fault of the carrier or the people for whom the carrier is vicarious liable. The carrier cannot be exempted from liability for damage to, loss of or delay in the delivery of the goods resulting from a cause which remains unknown.<sup>188</sup> However, it is submitted that technology has made it easier to identify the cause of loss or damage and the occasions where the cause of the damage or loss cannot be identified will be slight.

### *3.2.3 Duties and obligations of the carrier related to the care of the cargo*

The carrier has certain obligations in terms of the Rotterdam Rules. Article 13(1)<sup>189</sup> contain the duties of the carrier related to the care of the cargo and sets the standard of care required from the carrier. This obligation is the same as found in the Hague Rules 1924 and Hague-Visby Rules 1968 except for the inclusion of receipt and delivery to the obligation.<sup>190</sup> The standard required from the carrier is roughly equivalent to that of reasonable care<sup>191</sup> and depends on the cargo, voyage and the vessel. This obligation applies throughout the period of responsibility which evidently places a heavier burden on the carrier compared to the Hague Rules 1924 and Hague-Visby Rules 1968. The carrier is, however, allowed to transfer its obligation to the

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188 Which, in the view of the writer, is strict liability as found under the Common Law.

189 Article 13(1) of the Rotterdam Rules provides that 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.

190 Article 3(2) of the Hague-Visby Rules 1968. The Hague-Visby Rules 1968 provide guidance on the term 'properly' and 'carefully' whereby, the carrier would be discharged of his duty of care of the cargo under article 13(1) if he adopts a system that is 'sound' in light of the knowledge that he has about the nature of the goods and exercises reasonable care in its operation (Von Ziegler, Schelin and Zunarelli (eds) *Rotterdam Rules* 83-84).

191 Reasonable care is the degree of caution and concern an ordinary prudent and rational person would use in similar circumstances. An objective test is applied to determine whether reasonable care was exercised.

shipper by means of agreement.<sup>192</sup> Such a clause makes the shipper liable for any loss resulting from its failure to effectively fulfil those obligations but does not reduce the carrier's period of responsibility for the goods.<sup>193</sup> For example, A (being the carrier) and B (being the shipper) enters into a contract of carriage including the clause *under ship's tackle unloading*. In terms of the Rotterdam Rules A is responsible for the safe unloading of the goods at the port of discharge. In terms of the abovementioned clause, A will unstow the goods and place them on the deck of the vessel. B will be responsible for the lowering of the goods to the quay and sorting them. B is obliged to exercise the same standard of care as required from A when unloading the goods. If the goods are damaged during the unloading, B will be liable for the damage to or loss of the goods. However, this does not mean that A is no longer responsible for the goods or that the period of responsibility ended after A unstowed the goods. In terms of the Rotterdam Rules, A will be responsible for the goods until the goods have been delivered to the consignee.<sup>194</sup> This means that, even though the carrier cannot reduce the period of responsibility, the carrier is allowed to transfer its obligations by agreement. This is not a new feature introduced by the Rotterdam Rules but merely a codification of maritime practices.<sup>195</sup> The only new feature is the extension of the period of responsibility of the carrier to "door-to-door" resulting in a heavier burden on the carrier.

#### 3.2.4 Duties and obligations of the carrier applicable to the voyage by sea

The Rotterdam Rules refer to the obligations contained in article 14 as special obligations of the carrier applicable to the voyage by sea. Article 14 deals with the duty to exercise due diligence in providing a seaworthy vessel.<sup>196</sup> This provision is almost the same as that in the Hague Rules 1924 and Hague-Visby Rules 1968, however, the period of responsibility is extended to include the voyage. The carrier will therefore be

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192 Article 13(2) of the Rotterdam Rules provides that the carrier and shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

193 Von Ziegler, Schelin and Zunarelli (eds) *Rotterdam Rules* 85.

194 The period of responsibility under the Rotterdam Rules is from "door-to-door" and the carrier cannot reduce the period by agreement.

195 It has become practice for carriers and shippers to insert liner terms in the contract of carriage. Liner terms govern the loading and unloading of the goods included in the freight. According to Ramberg *ea Export-Import Basics* 295 "... (l)iner terms is not yet a standard designation and varies according to the custom and practices of the respective ports...".

196 The provision is almost the same as that in the Hague Rules 1924 and Hague-Visby Rules 1968. See par 2.2-2.3 above where the obligation of the carrier to provide a seaworthy vessel is discussed.

liable for the effects of the unseaworthiness of the vessel throughout the entire voyage. It is submitted that this may impose a weighty additional liability on the carrier as the due diligence test implies that the carrier must show that his efforts were that of the prudent carrier in taking all reasonable measures, in light of the available knowledge and means at the relevant time, to fulfil the duty of providing a seaworthy ship. The scope of article 14 is specific as it explicitly states that it only governs carriage by sea.<sup>197</sup> The carrier's obligation is further extended to not only make the ship seaworthy but to keep it seaworthy throughout the voyage. The carrier would therefore be under a continuous duty to exercise due diligence. According to Tetley<sup>198</sup> the obligation to make the ship seaworthy is a personal one which cannot be delegated, even when the carrier employs another person to exercise due diligence. The carrier will be liable if such person is not diligent.<sup>199</sup> It is the view of the writer that the period of responsibility of the carrier in terms of the Rotterdam Rules places a heavier responsibility on the carrier with regard to the seaworthiness of the ship and the exercising of due diligence.

One of the features that was adopted from the Hamburg Rules is the liability for delay. Under the Hamburg Rules the carrier was liable for delay where the carrier does not honour the time of delivery as agreed upon in the contract of carriage unless the carrier can prove that the delay was not caused by the fault of the carrier or its agents or servants.<sup>200</sup> In terms of the Rotterdam Rules delay occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed.<sup>201</sup> Again, the carrier is presumed to be at fault. The initial *onus* of proof rests with the shipper, however the shipper only needs to prove that the delay was caused while the goods were in the charge of the carrier.<sup>202</sup> It will be up to the interpretation of the contract to establish whether the parties agreed on a time for

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197 Taking into account that the Rotterdam Rules is a multimodal transport convention and the period of responsibility of the carrier has been extended to "door-to-door", the obligation in article 14 is only applicable to carriage by sea.

198 Tetley *Marine Cargo Claims* 391; Bäckdén 2011 *J Mar L & Com* 119.

199 This is completely opposite than provided under the Hamburg Rules where art 5(1) requires the carrier to show that he took all measures that could reasonably be required to avoid the occurrence and its consequences. The duty of care is not personal to the carrier and he can escape liability for the negligent workmanship of a contractor as long as he has exercised reasonable care in choosing the contractor (*Carr International Trade Law* 296).

200 The carrier is presumed to be at fault in causing the delay. Article 5(2) of the Hamburg Rules. See par 2.4 above where delay under the Hamburg Rules is discussed.

201 Article 21 of the Rotterdam Rules.

202 Article 17(1) of the Rotterdam Rules.

delivery.<sup>203</sup> The Rotterdam Rules further provide for an additional claim under the heading of delay. In the event of an agreed time of delivery and the carrier's failure to deliver on time, the carrier will be held liable for the financial loss resulting from not meeting the time for delivery.<sup>204</sup> The economical implication of such a claim can be quite severe and the parties might have to bear the cost themselves as traditional maritime insurance policies only provide cover for physical loss due to delay.<sup>205</sup> It is opined that this is a heavy burden on the carrier and might contribute to higher freight costs. Alternatively, carriers may include estimated time of delivery and indemnity clauses in the contract of carriage.

### 3.2.5 *Special liability provisions*

Finally, the Rotterdam Rules contain a few requirements that establish special liability provisions which are separated from the general liability rule of article 17. Each of these are dealt with in either the Hague Rules 1924, the Hague-Visby Rules 1968 or the Hamburg Rules and are therefore not completely new provisions.<sup>206</sup> The Rotterdam Rules build on the provision of the Hamburg Rules relating to deck cargo<sup>207</sup> and set down circumstances which are necessary for the carriage on deck. Article 25(1) provides that carriage on deck is only allowed first, where such carriage is required by law.<sup>208</sup> Secondly, where the goods are carried in or on containers or vehicles that are fit for deck carriage and the decks are specially fitted to carry such containers or vehicles.<sup>209</sup> A third instance is where the carriage on deck is in accordance with the contract of carriage, or lastly where customs usages or practices of the trade in question.<sup>210</sup> Article 14(c) lay down requirements for the carriage of containers. The containers must be fit for deck carriage and if the containers are supplied by the carrier,

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203 Von Ziegler 2010 *EJCL* 59. Contrary to the provisions of the Hamburg Rules, the Rotterdam Rules is silent on a test of a diligent carrier in particular circumstances where the parties did not agree on a time of delivery (Von Ziegler 2009 *Unif L Rev* 999-1001); Diamond 2008 [www.i-law.com](http://www.i-law.com) argues that "... (t)his omission will not have any practical impact as the courts will simply imply a reasonable time element into the Rotterdam Rules".

204 Article 6, 11, 17 and 21 of the Rotterdam Rules; Von Ziegler, Schelin and Zunarelli (eds) *Rotterdam Rules* 122; Von Ziegler 2009 *Unif L Rev* 998-999.

205 Diamond 2008 [www.i-law.com](http://www.i-law.com); Von Ziegler, Schelin and Zunarelli (eds) *Rotterdam Rules* 122; Von Ziegler 2009 *Unif L Rev* 1003.

206 See par 2.2-2.4 above for discussion on the provisions.

207 Article 9 of the Hamburg Rules. See par 2.4 above for the discussion on deck cargo under the Hamburg Rules.

208 Article 25(1) (a) of the Rotterdam Rules.

209 Article 25(1) (b) of the Rotterdam Rules.

210 Article 25(1) (c) of the Rotterdam Rules.

the carrier is liable to provide cargo worthy containers.<sup>211</sup> As with seaworthiness, due diligence is required from the carrier to ensure that the container is cargo worthy. Where by agreement the carrier is not supposed to carry on deck and damage results of carrying on deck, the carrier will not be entitled to limit its liability.<sup>212</sup> The provisions relating to containers and deck cargo do not increase the liability of the carrier. Once again it is only a codification of maritime practices and usages.

The Rotterdam Rules also allow for the carriage of live animals.<sup>213</sup> The carrier or performing party may limit or exclude its obligations or liability in regard to the loss, damage or delay in the contract of carriage.<sup>214</sup> Any such exclusion or limitation will be ineffective and void if the claimant can prove that the loss, damage or delay was caused by an act or omission of the carrier, done with intent to cause the loss, damage or delay, or caused by the recklessness and with knowledge that the loss, damage or delay may result by the carrier or any person he is responsible for.<sup>215</sup> This is coherent with trade practice and domestic law in regard to the carriage of live animals.

### 3.2.6 *Exceptions and immunities of the carrier*

As with the Hague Rules 1924 and Hague-Visby Rules 1968, the Rotterdam Rules include a catalogue of exceptions.<sup>216</sup> Article 17(3) lists the exceptions and the immunities of the carrier which will relieve the carrier of its liability or part thereof.<sup>217</sup>

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211 Article 14 of the Rotterdam Rules deals with the carrier's obligation to provide a seaworthy vessel and cargo worthy containers is part of that obligation as the container is considered to be part of the structure of the vessel. In the event of the container not being cargo worthy, the ship will be deemed unseaworthy as Article 14(c) provides that "... (t)he carrier is bound before, at the beginning, and during the voyage by sea to exercise due diligence to make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.". The carrier will also be liable for the damage to, loss of or delay in delivery caused by a container, not supplied by the carrier, which is not cargo worthy. The obligation to make the ship seaworthy is a personal duty which cannot be delegated by the carrier and due diligence is required even when inspecting the container before loading.

212 Article 25(5) of the Rotterdam Rules; Thomas 2010 *NTVH* 201; Mbiah Date Unknown [www.comitemaritime.org](http://www.comitemaritime.org). This is similar to the position under the Hamburg Rules. See par 2.4 above.

213 Article 81 of the Rotterdam Rules.

214 Article 81(a) of the Rotterdam Rules. The provision relating to the carriage of live animals is under the heading "special rules for live animals and certain other goods" due to the nature of and the risk associated with the carriage of live animals.

215 Article 81(b) of the Rotterdam Rules; Thomas 2010 *NTVH* 198.

216 Article 4(1) and 4(2) of the Hague Rules 1924 and Hague-Visby Rules 1968; Carr *International Trade Law* 320.

217 In terms of article 17(3) of the Rotterdam Rules the carrier will be exempt from liability for the loss, damage or delay caused by act of God; perils, dangers and accidents of the sea or navigable

The exceptions and immunities draw mainly from the Hague Rules 1924 and the Hague-Visby Rules 1968, but also contain some new exceptions. These include the exemption in relation to environmental damage measures;<sup>218</sup> an exemption for acts of the carriers relating to goods that may become a danger;<sup>219</sup> and the exemption which limits the flexibility of the obligation of the carrier to care for the cargo.<sup>220</sup> It is the view of the writer that the long list of exceptions and immunities places the carrier in a superior position, yet again. However, the reasoning for keeping the list of exceptions and immunities as under the Hague Rules 1924 and Hague-Visby Rules 1968 was to preserve the case law developed under these conventions. It is submitted that this justifies the catalogue of exceptions and immunities available to the carrier as the application and restrictions have already been determined by the courts. This is an example of compromise between carrier and shipper interests.

One of the significant changes brought about by the Rotterdam Rules is the subsequent doing away with the infamous error in navigation exception.<sup>221</sup> The writer is of the view that the abolishment of the so-called *nautical fault exception* was necessary as the exemption permitted a great deal of protection to the carrier. The only recourse the shipper had in the event of loss or damage caused by nautical fault, was to bring a claim under the duty to care for the cargo.<sup>222</sup> During the drafting of the

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waters; wars, hostilities, armed conflict, piracy, terrorisms, riots, civil commotions; quarantine restrictions; interference or impediments created by governments, public authorities, rulers or people including detention, arrest or seizure; strikes; lockouts; fire on the ship; latent defects not discoverable by due diligence; act or omission of the shipper; loading, handling, stowing or unloading performed by the shipper; wastage in bulk or weight; inherent defect, vice of the goods; insufficient, defective packaging by the shipper; saving or attempting to save life at sea; reasonable measures to avoid or attempt to avoid damage to the environment; sacrifice of goods for preserving human life or other property; and measures taken in respect of dangerous goods.

218 Article 17(3) (n) of the Rotterdam Rules. For example, where an oil leak arise during the voyage and the carrier decides to dock at the nearest port for the oil leak to be repaired, the carrier will be exempted from liability for the damage to, loss of or delay in the delivery of the goods.

219 Article 17(3) (o) of the Rotterdam Rules. For example, if the carrier declines to load a tank container with a flammable substance due to the fact that rough seas have been forecasted and the cargo may leak and become a danger, the carrier will be exempted from liability if it can be shown that the carrier's action was reasonable.

220 Article 17(3) (i) of the Rotterdam Rules. For example, where the carrier and shipper included a clause in the contract of carriage transferring the obligation of loading to the shipper and during the loading the goods are damaged, the carrier will be exempted from liability for the damage to, loss of or delay in the delivery of the goods concerned.

221 In terms of article 4(2)(a) of the Hague Rules 1924 and Hague-Visby Rules 1968 the carrier will be exempted from liability for the loss or damage resulting from the act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship.

222 See par 2.2-2.3 above where the nautical fault exception is discussed.

Rotterdam Rules, it was argued that the existence of this exception is inconsistent with other modes of transport. It increases the insurance costs of the shipper; and the advancement in technology and the introduction of global positioning satellites, reduced the risks associated with nautical navigation as communication with carriers at sea is no longer a problem.<sup>223</sup>

The fire exception, as found in the Hague Rules 1924 and Hague-Visby Rules 1968,<sup>224</sup> has been modified. Article 17(3) provides as follows:

A carrier is relieved of all or part of its liability pursuant to article 17(1) if, alternatively to proving the absence of fault as provided in article 17(2), it proves that one or more of the following events or circumstances caused or contributed to the loss, damage or delay...(f) fire on the ship...<sup>225</sup>

In the case of fire on the ship, the presumption of fault is reversed and is considered as a non-fault of the carrier.<sup>226</sup> It is thus safe to conclude that the carrier will be entitled to partial or total immunity if he is able to show that the fire was the cause of loss to, damage of or delay in the delivery of the goods. The shipper will then have to prove fault or neglect of the carrier or the parties for whom the carrier is responsible. Alternatively, the shipper will have to prove that the total or partial cause of damage was another circumstance listed in article 17(3).<sup>227</sup> It is clear that the carrier will be exempted from liability when the fire is caused by an unexplained event or circumstance. However, the fire exception is less “carrier protective” due to the significant change in the persons for whom the carrier is responsible.<sup>228</sup>

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223 Katsivela 2010 [www.erudit.org](http://www.erudit.org); Von Ziegler, Schelin and Zunarelli (eds) *Rotterdam Rules* 103 where the writers argue that “...(a) modern liability system for international transportation cannot exempt the carrier for the negligence in areas of performance that constitute the carrier’s core business, such as transportation and navigation, thanks to modern telecommunication techniques.”; Adamsson *Rotterdam Rules* 60.

224 Under article 4(2) (b) of the Hague Rules 1924 and Hague-Visby Rules 1968 the carrier is exempt from liability in the case of fire unless caused by the actual fault or privity of the carrier; Katsivela 2010 [www.erudit.org](http://www.erudit.org); Anderson 2015 *SSLR* 26.

225 Article 17(3) (f) of the Rotterdam Rules.

226 Von Ziegler, Schelin & Zunarelli (eds) *Rotterdam Rules* 146.

227 Article 17(3) (o) *Rotterdam Rules*; Von Ziegler, Schelin and Zunarelli (eds) *Rotterdam Rules* 152.

228 Katsivela 2010 [www.erudit.org](http://www.erudit.org); Zhou *Carrier’s Obligations and Liabilities* 50; Anderson 2015 *SSLR* 26.

### 3.2.7 Limitation of liability

The general approach to limitation of liability is the same as in the previous conventions. However, the Rotterdam Rules have a broader scope of liability in that it not only covers the loss of or damage to the goods but rather refer to the breach of an obligation provided for in the Rotterdam Rules.<sup>229</sup> According to Berlingieri<sup>230</sup> the Rotterdam Rules refers to financial loss and not the loss of the actual goods. This is evident from the provision for the economic loss due to delay in delivery of the goods.<sup>231</sup> The Rotterdam Rules increased the maximum amounts to which a carrier or performing party can limit its liability.<sup>232</sup> In terms of article 59(1) of the Rotterdam Rules the carrier will be able to limit its liability, except where the value of the goods have been declared by the shipper and included in the contract particulars<sup>233</sup> or where a higher amount has been agreed upon in writing between the carrier and shipper.<sup>234</sup>

The European Shipper's Council raised the concern regarding the limitation on liability and the compensation a shipper may claim for loss or damage to goods which are containerised.<sup>235</sup> Article 59(2) of the Rotterdam Rules provides that, if goods are carried in a container or pallet or similar article of transport used to consolidate goods, the packages or shipping units enumerated in the contract of particulars as packed in or on such article of transport are deemed packages or shipping units. If not so enumerated the goods in or on such articles of transport are deemed one shipping unit.<sup>236</sup> It is opined that this is an invalid argument as the Hague Rules and Hague-

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229 Gordan *Rotterdam Rules* 61; Berlingieri 2008 <http://www.cmi2008athens.gr>.

230 Berlingieri 2008 <http://www.cmi2008athens.gr>.

231 Article 60 of the Rotterdam Rules.

232 Article 59(1) provides that the limit of liability is established at 875 SDR per package or 3 SDR per kg of the gross weight of the lost or damaged goods. Article 60 provides that the liability for economic loss due to delay in delivery of the goods is limited to the amount equivalent to 2.5 times the freight payable on the goods. Lannan 2009 *Unif L Rev* 908; Gordan *Rotterdam Rules* 61; Marin 2012 <http://www.bib.irb.hr>.

233 The Hague Rules 1924 and Hague-Visby Rules 1968 required that the nature and value of the goods be declared and inserted in the bill of lading. The Rotterdam Rules only refer to the value of the goods due to the fact that the description of the goods was already required in the contract particulars in terms of article 36(1)(a) of the Rotterdam Rules (Lannan 2009 *Unif L Rev* 308).

234 See par 2.2 and 2.3 above. In terms of the Hague Rules 1924 and Hague-Visby Rules 1968 the carrier and shipper were allowed to agree to lower the liability of the carrier. The Rotterdam Rules changed this position. In terms of article 80 any terms which directly or indirectly exclude, or limit obligations or liabilities of the carrier shall be void.

235 European Shipper's Council 2009 <http://www.comitemaritime.org> is of opinion that, if the shipper omits to itemise packages on the transport documents, it might leave the shipper unable to claim for damages from the carrier.

236 Article 59(2) of the Rotterdam Rules.

Visby Rules also referred to what was stated on the bill of lading when determining the per package amount when goods have been consolidated.<sup>237</sup> This is therefore not a new provision. The same with the concern raised that the Rotterdam Rules does not make provision for the limitation of the shipper's liability.<sup>238</sup> Neither of the previous conventions provided for limitation of the shipper's liability and the writer is therefore of the opinion that the Rotterdam Rules cannot be labelled as unfair towards the shipper in this regard.

### 3.2.8 Conclusion

It is evident from the discussion above that the Rotterdam Rules do provide a more balanced approach to establishing the liability of the carrier. Although the Rotterdam Rules appear to maintain certain ideas of its predecessors, the Rotterdam Rules have significantly departed from the old systems and initiated some new ideas. It is submitted that the continuous responsibility with regard to the carrier's obligation to provide a seaworthy vessel is a positive change. Nikaki and Soyer indicate that, although it places a significant additional liability upon carriers, the development of new technological aids allows for a greater level of control over the vessel after the commencement of the voyage.<sup>239</sup> The writer agrees. The carrier's liability will still be subjected to the assessment of due diligence and an objective test for reasonability. The removal of the nautical fault exception is necessary to effectively modernise carriage of goods by sea. Technological development of navigational systems justifies the removal of the exception and does not necessarily raise the liability of carriers. The amendment of the fire on the ship exception<sup>240</sup> may cause additional liability on carriers due to the extension of the carrier's liability to include the liability of the persons mentioned in article 18 of the Rotterdam Rules. The exclusion of liability for delay in the previous conventions caused problems to shippers in relation to pure economical loss.<sup>241</sup> It is opined that the addition of liability for delay is also a positive change brought by the Rotterdam Rules. It imposes a more stringent liability on the carrier. However, the writer submits that this is necessary as it provides shippers with better protection in relation to financial losses due to delay.

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237 Article 4(5) of the Hague Rules 1924 and Hague-Visby Rules 1968. See par 2.2 and 2.3 above.

238 European Shipper's Council 2009 <http://www.comitemaritime.org>.

239 Nikaki and Soyer 2012 *Berkeley J Int'l Law* 303; Anderson 2015 *SSLR* 23.

240 Article 17(3)(f) of the Rotterdam Rules.

241 Anderson 2015 *SSLR* 27.

### **3.3 Shipper liability**

#### *3.3.1 Introduction*

Previous maritime transport conventions did not pay much attention to the shipper's obligations and liabilities. As explained above, the Hague Rules 1924 were at the time of their adoption very focused on the carrier's liability due to the imbalance caused by the Common Law principle of freedom of contract. It consequently contained only a few provisions with regard to the shipper's obligations and liability.<sup>242</sup> Due to the change in trade patterns the Hamburg Rules expanded the liability of the shipper by adding a provision to the shipper's liability.<sup>243</sup> It is evident that, throughout the years, the regulation of the shipper's liability was not a priority. However, this position took about a change during the drafting of the Rotterdam Rules. The whole of Chapter 7 of the Rules is devoted to the obligations and liabilities of the shipper. The Rotterdam Rules do not make any substantial changes to the existing obligations and liability of shippers but provides more certainty to the regulation thereof.

#### *3.3.2 Shipper in terms of the Rotterdam Rules*

As with the previous conventions, a shipper is defined in the Rotterdam Rules as "a person that enters into a contract of carriage with a carrier".<sup>244</sup> A new feature of the Rotterdam Rules is the inclusion of a "documentary shipper" as party to the carriage of goods by sea. It is submitted that the purpose of the inclusion is to avert and eradicate disputes relating to the identity of the shipper where a person other than the shipper is identified as the shipper in the contract of carriage. To efficiently regulate the obligations and liabilities of the shipper, the Rotterdam Rules take on a contractual approach in distinguishing between the shipper and the documentary shipper.<sup>245</sup> A documentary shipper is defined as "a person, other than the shipper, that accepts to be named as the shipper in the transport document or electronic transport

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242 Article 3(5) and 4(3) of the Hague Rules 1924. See par 2.2-2.3 above for discussion of the Hague Rules 1924 and Hague-Visby Rules 1968. Von Ziegler, Schelin and Zunarelli (eds) *Rotterdam Rules* 152

243 Article 13 of the Hamburg Rules. See par 2.4 above for discussion of the Hamburg Rules.

244 Article 1(8) of the Rotterdam Rules.

245 The distinction is necessary as there are certain trade situations where the shipper is not directly linked to the carrier. An example of this is where the goods are bought under a "free on board" (FOB) sale, whereby the goods are delivered to the carrier by another person than the shipper and at the same time this person cannot be considered a sub-contractor for whom the shipper is responsible under article 34 of the Rotterdam Rules.

document".<sup>246</sup> In terms of article 33(1) the documentary shipper is subject to the same duties, obligations and liabilities as the shipper, except were the documentary shipper can plausibly argue that he has not agreed to be the named shipper. This provision does not affect the obligations and liabilities of the shipper.<sup>247</sup> This, however, does not mean that the shipper and documentary shipper are jointly liable. According to Schelin,<sup>248</sup> the provision must be interpreted in such a manner that the shipper will still keep some of its obligations and liabilities in addition to the those of the documentary shipper.

### 3.3.3 *Basis of liability*

Article 30(1) provides for the general basis of liability of the shipper to the carrier and states as follows:

The shipper is liable for the loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.<sup>249</sup>

The shipper is however relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to the fault of the shipper or to the fault of any person to whom the shipper has entrusted the performance of any of its obligations.<sup>250</sup> The liability is also based on fault, but unlike article 17 the *onus* of proof rests on the carrier to prove that there was fault on the shipper's side.<sup>251</sup> It is evident that the liability of the shipper does not mirror that of the carrier. It is opined that this is due to the fact that, in practice, it seldom happens that goods actually cause damage to the ship. A reversed *onus* of proof might put the shipper in a difficult position as the carrier has direct access to the goods during the voyage. The shipper would therefore have to rely on the cooperation of the carrier to show that the loss or damage was caused by the fault of the shipper or the fault of any person whom the shipper has entrusted the performance of its duties.<sup>252</sup>

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246 Article 1(9) of the Rotterdam Rules; According to Baughen *Shipping Law 139* this will include a consignor who has no express contractual relations with the carrier.

247 Article 33(2) of the Rotterdam Rules; Schelin 2013 [www.maritimelawlibrary.se](http://www.maritimelawlibrary.se).

248 Schelin 2013 [www.maritimelawlibrary.se](http://www.maritimelawlibrary.se).

249 Article 30(1) of the Rotterdam Rules.

250 Article 30(2) of the Rotterdam Rules.

251 Schelin 2013 [www.maritimelawlibrary.se](http://www.maritimelawlibrary.se); Fujita *Shipper's Obligations* 19; Von Ziegler, Schelin and Zunarelli (eds) *Rotterdam Rules* 156.

252 For example, in terms of article 27(1) of the Rotterdam Rules, the shipper is required to deliver the goods to the carrier ready for carriage and in such condition that the goods will withstand the

A breach of obligation under the Rotterdam Rules are a prerequisite of a shipper's liability and it is submitted that the parties cannot increase the shipper's obligations and liabilities by contract.<sup>253</sup> Article 30(3) provides that the shipper is only responsible to the extent of its own fault or the fault of a person for which it is responsible.<sup>254</sup> Article 30(2) impose strict liability<sup>255</sup> on the shipper in the event of a breach of the obligation to provide accurate information for the compilation of the contract of carriage,<sup>256</sup> and in the case of loss or damage caused by improper information or inappropriate marking and labelling with respect to dangerous goods.<sup>257</sup> Therefore, the provisions of article 30(2) places a more stringent liability on the shipper in relation to the *onus* of proof as the obligations mentioned above is excluded from apportionment of losses.

As mentioned above, the shipper and documentary shipper have the same obligations and liabilities. Other than the shipper's obligation to pay freight, the shipper's obligations furthermore include the delivery of goods ready for carriage;<sup>258</sup> to provide

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intended carriage. During the voyage the goods are damaged due to insufficient packaging. The carrier claims that the goods were not delivered in a condition to withstand the intended carrier. If the *onus* of proof was on the shipper, the shipper would only be able to lead evidence with regard to the goods before the carrier took charge thereof. The shipper does not have insight on any event that might have caused the damage during the voyage. He will have to rely on the account of the carrier. This situation would be detrimental to the shipper and difficult for the shipper to prove that the damage was not caused due to a breach of his obligation or the fault of the shipper or the parties for whom he is responsible.

253 Article 79(2) of the Rotterdam Rules.

254 Article 30(3) of the Rotterdam Rules provides that "...when the shipper is relieved of part of its liability pursuant to this article the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 34". Article 34 of the Rotterdam Rules states that the shipper shall be liable for the breach of its obligations under the Convention caused by the fault or neglect of any person to which the shipper has entrusted the performance of its obligations. The shipper shall however, not be liable for the fault or neglect of the carrier or performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.

255 The liability for the obligations of the shipper in terms of the Rotterdam Rules depends on the seriousness of the consequences should the shipper breach the obligation. There is a combination of fault liability and strict liability. For the obligations under a fault liability, the shipper can escape liability if he can prove absence of fault. With regard to strict liability, the shipper shall be liable if the carrier can prove that the shipper is in breach of the obligation and that damage to, loss of or delay in delivery of the goods resulted due to the breach. The absence of fault will not exempt the shipper from liability.

256 Article 31(2) of the Rotterdam Rules.

257 Article 32 of the Rotterdam Rules; Fujita *Shipper's Obligations* 19.

258 Article 27 of the Rotterdam Rules.

information, instructions and documents;<sup>259</sup> to provide information for the drafting of the contract particulars;<sup>260</sup> and to inform the carrier of the dangerous nature of the goods.<sup>261</sup>

### 3.3.4 *Delivery of the goods*

In terms of the Rotterdam Rules the shipper has the obligation to deliver the goods ready for carriage unless otherwise agreed in the contract of carriage.<sup>262</sup> The carrier and shipper may therefore specify what “ready for carriage” means. For example, the parties may agree that the shipper shall deliver the goods in containers. In that case, the container will also be regarded as part of the goods.<sup>263</sup> In the absence of a specification on how the goods are to be delivered, there is a presumption that the goods shall withstand the intended carriage,<sup>264</sup> including the loading, handling, stowing, lashing, securing and unloading of the goods.<sup>265</sup> It is important to note that this obligation is only applicable during the intended carriage.<sup>266</sup> The shipper also has the obligation to ensure that the goods are delivered in such a condition that they will not cause any harm to persons and property.<sup>267</sup> This includes the containers and other equipment used for consolidation cargo.<sup>268</sup> When a container is packed or a vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container and vehicle and in such a way that they will not

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259 Article 28 and art 29 of the Rotterdam Rules.

260 Article 31 of the Rotterdam Rules.

261 Article 32 of the Rotterdam Rules; Schelin 2013 [www.maritimelawlibrary.se](http://www.maritimelawlibrary.se).

262 Article 27(1) of the Rotterdam Rules; Fujita *Shipper's Obligations* 6; Adamsson *Rotterdam Rules* 64.

263 Article 1(24) of the Rotterdam Rules goods mean “...(w)ares, merchandise, and articles of every kind whatsoever that the carrier undertakes to carry under a contract of carriage and includes packing and any equipment and containers not supplied by or on behalf of the carrier...”.

264 The goods must be capable of being carried by sea and must be properly packed having regard to the circumstances of the voyage, the duration of the voyage, the weather expected, the size of the ship and the type of cargo (Fujita *Shipper's Obligations* 6). For example, if the goods need to be kept frozen during the voyage, the shipper must deliver the goods in packaging that will keep the goods frozen throughout the voyage.

265 Article 27(3) of the Rotterdam Rules; Hooper 2009 *Unif L Rev* 886; Von Ziegler, Schelin and Zunarelli (eds) *Rotterdam Rules* 153.

266 In the event of the carrier deciding to use a route not agreed upon or a transport mode which he has not informed the shipper of, the shipper cannot be held liable for not fulfilling its obligation in this regard.

267 The requirement does not only apply to dangerous goods but to all goods (Fujita *Shipper's Obligations* 6). For example, if the shipper is shipping liquids it is required to ensure that the goods are packed in the proper packing or container suitable for the goods. If the liquids leak during the voyage and cause damage to the ship, the shipper will be held liable.

268 Article 27(1) and article 27(3) of the Rotterdam Rules. The container and equipment used for consolidation is regarded as part of the goods. Schelin 2013 [www.maritimelawlibrary.se](http://www.maritimelawlibrary.se); Von Ziegler, Schelin and Zunarelli (eds) *Rotterdam Rules* 153; Fujita *Shipper's Obligations* 6.

cause harm to any persons or property.<sup>269</sup> This obligation will remain on the shipper throughout the carriage and is not just applicable during the sea leg of the carriage.<sup>270</sup> Article 27 does not deal with delay in delivery to the carrier. The necessary implication is that, if the shipper fails to deliver the goods in due time, it would still in principle be liable to pay the freight.

### 3.3.5 *Obligations relating to information and instructions*

It is common understanding that, in order for the contract of carriage to be executed effectively, the parties thereto need to communicate properly. Article 28 deals with the cooperation of the shipper and the carrier in providing information and instruction.<sup>271</sup> This provision sets the principle that the carrier shall cooperate so that the shipper is able to deliver the goods ready for carriage and to submit correct documentation of the cargo.<sup>272</sup> The carrier and the shipper must therefore provide the information that they possess and the instructions they can reasonably<sup>273</sup> give. According to Fujita<sup>274</sup> the reasonability requirement ensures that the obligation does not impose an unreasonable burden on the parties as the parties do not need to give information which is already reasonably available to the requesting party. It is submitted that the purpose of this obligation is merely for the proper implementation of the contract of carriage on both sides.

The Rotterdam Rules place another obligation with regard to the information and instructions on the shipper. In terms of article 29 the shipper has an obligation to

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269 Article 27(3) *Rotterdam Rules*; Schelin 2013 [www.maritimelawlibrary.se](http://www.maritimelawlibrary.se); According to Fujita *Shipper's Obligations* 6, article 27(3) focus on the proper stowage of the goods with specific reference to containerised cargo whereas article 27(1) is concerned with the condition of the goods themselves and their packaging.

270 Von Ziegler, Schelin and Zunarelli (eds) *Rotterdam Rules* 153; Schelin 2013 [www.maritimelawlibrary.se](http://www.maritimelawlibrary.se); Fujita *Shipper's Obligations* 7.

271 In terms of Article 28 of the Rotterdam Rules "... (T)he carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party".

272 Article 28 of the Rotterdam Rules; Von Ziegler, Schelin and Zunarelli (eds) *Rotterdam Rules* 154; Fujita *Shipper's Obligations* 10.

273 It is the view of the writer that the reasonability as referred to in Article 28 of the Rotterdam Rules is measured to the traditional reasonable person. The purpose of this article is to promote cooperation and communication between the parties. The provision does not require the shipper to undergo costly investigations to obtain information needed or requested by the carrier. The shipper does not need to give the information or instruction it possess if the information is already available to the carrier (Fujita *Shipper's Obligations* 9).

274 Fujita *Shipper's Obligations* 11.

provide information, instructions and documents to the carrier.<sup>275</sup> This is a new addition to the obligations of the shipper.<sup>276</sup> The purpose of the provision is to enable the carrier to handle the goods properly in order to avoid damages to the goods, ship and other property. The shipper only has to provide information, instructions and documents which is not reasonably available to the carrier and that is reasonable necessary as the carrier is normally considered an expert in the handling of the goods.<sup>277</sup> In addition to the information, instructions and documents relating to the goods, the shipper shall also provide information for the compilation of the contract particulars and issuance of transport documents or electronic transport records.<sup>278</sup> This obligation is secondary to the obligation of delivering the goods for carriage and the shipper is deemed to have guaranteed the accuracy of this information.<sup>279</sup> It is the view of the writer that this is a necessary provision as the carrier must perform his obligations based on the information provided by the shipper for the contract particulars. If, for example, the inaccuracy causes the carrier to mishandle the cargo, resulting in an accident, the shipper will be liable for the consequent damage.<sup>280</sup> The relevant point of time for determination of the accuracy of the information is the time of receipt by the carrier. If something happens after this that affects the accuracy, the shipper is not liable.<sup>281</sup> If the shipper fails to provide information it will only be liable if it acted with fault according to the basic fault liability rule in article 30.<sup>282</sup>

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275 Article 29(1) of the Rotterdam Rules provides that the shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier and that are reasonably necessary...(a) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and (b) For the carrier to comply with law, regulations and other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.

276 The Hague Rules 1924, the Hague-Visby Rules 1968 and the Hamburg Rules do not contain corresponding provisions and is silent on the shipper's obligation to provide the carrier with information regarding the cargo.

277 Article 28 deals with mutual cooperation between the parties, whereas article 29 relates to the information needed by the carrier to properly handle and care for the goods on the one hand and comply with law, regulations and other requirements of public authorities for the intended carriage on the other hand (Fujita *Shipper's Obligations* 9-10). Von Ziegler, Schelin and Zunarelli (eds) *Rotterdam Rules* 155; Fujita *Shipper's Obligations* 10; Schelin 2013 [www.maritimelawlibrary.se](http://www.maritimelawlibrary.se).

278 Article 31(1) of the Rotterdam Rules; Fujita *Shipper's Obligations* 18.

279 Article 29 of the Rotterdam Rules is essentially the same as article 3(5) of the Hague Rules 1924 and Hague-Visby Rules 1968 and article 17(1) of the Hamburg Rules. See par 2.2-2.4 above for a discussion on the abovementioned.

280 Schelin 2013 [www.maritimelawlibrary.se](http://www.maritimelawlibrary.se); Fujita *Shipper's Obligations* 18.

281 Schelin 2013 [www.maritimelawlibrary.se](http://www.maritimelawlibrary.se); Fujita *Shipper's Obligations* 18.

282 Article 30(1) of the Rotterdam Rules; Von Ziegler, Schelin and Zunarelli (eds) *Rotterdam Rules* 157; Schelin 2013 [www.maritimelawlibrary.se](http://www.maritimelawlibrary.se).

### 3.3.6 *Dangerous goods*

The Rotterdam Rules makes provision for special rules on dangerous goods and confers more obligations on the shipper than the previous conventions.<sup>283</sup> Article 32 provides as follows:

When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:

(a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and

(b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.<sup>284</sup>

In essence there are two obligations on the carrier. The first obligation is to inform the carrier of the dangerous goods. Secondly, the shipper has to mark and label the goods. It is the view of the writer that the shipper's obligation is extended in that the period and the scope of the obligation to inform the carrier of the dangerous nature of the goods has been expanded. The shipper does not only have to inform the carrier before the loading of the goods, but throughout the carriage at the request of the carrier.<sup>285</sup> The purpose of this provision is of course to avoid accidents with loss of life, injuries and damage to the ship and other property.<sup>286</sup> The Rules do not define the term "dangerous goods" and only provide that, if the goods by their nature or character are, or reasonably appear to become a danger to persons, property or the environment, the obligation applies.<sup>287</sup> It is safe to submit that the shipper should not only inform the carrier about goods that is dangerous by itself, but also about goods which reasonably appear to likely become dangerous.<sup>288</sup> This places a more stringent obligation on the shipper and may be problematic in practice as the provision might require the shipper

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283 See par 2.2-2.4 above for a discussion of the Hague Rules 1924, the Hague-Visby Rules 1968 and the Hamburg Rules.

284 Article 32 of the Rotterdam Rules.

285 Fujita *Shipper's Obligations* 13; Schelin 2013 [www.maritimelawlibrary.se](http://www.maritimelawlibrary.se).

286 Schelin 2013 [www.maritimelawlibrary.se](http://www.maritimelawlibrary.se); Fujita *Shipper's Obligations* 23.

287 Article 32 of the Rotterdam Rules; Schelin 2013 [www.maritimelawlibrary.se](http://www.maritimelawlibrary.se); Fujita *Shipper's Obligations* 23.

288 For example, should the goods be loaded together with certain other types of cargo which might cause the goods to become dangerous.

to be informed about other cargo on the vessel. The marking and labelling of goods shall be in accordance with any law or regulation and requirements of the intended carriage.<sup>289</sup> Due to the sensitive nature of dangerous goods the regulations with regard to the carriage of the goods have become complex and stringent for carriers.<sup>290</sup> Article 32(b) enables the carrier to hold the shipper liable for non-compliance as the shipper is actually the party who is supposed to comply with the regulations with regard to dangerous goods. If the carrier chooses to use a different route, it is self-evident that the shipper will not be obliged to remark or relabel the goods, as this will be impossible.<sup>291</sup>

### 3.3.7 Conclusion

Schelin<sup>292</sup> promotes that the shipper has never been free from obligations and liabilities even in such areas where the previous conventions are silent. He is of the opinion that the bargaining powers of shippers have dramatically changed since the adoption of the Hague Rules in 1924 and that the time has come for shippers to also take responsibility.<sup>293</sup> The obligations and liabilities of shippers were generally regulated by domestic legislation.<sup>294</sup> However, it is opined that, due to the international character of the Rotterdam Rules, it became necessary to make provisions for the shipper's obligations and liabilities in order to promote uniformity. Various stakeholders<sup>295</sup> criticised the Rotterdam Rules on the inclusion. The Europeans Shipper's Council criticised the Rotterdam Rules' obligations on the shipper,<sup>296</sup> labelling the obligations

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289 Article 32(b) of the Rotterdam Rules. As with article 27(1) the intended carriage is the carriage expected at the time of delivery of the goods. If the carrier chooses to use a different route, it is self-evident that the shipper will not be obliged to remark or relabel the goods, as this will be impossible (Fujita *Shipper's Obligations* 23).

290 Fujita *Shipper's Obligations* 23; Schelin 2013 [www.maritimelawlibrary.se](http://www.maritimelawlibrary.se).

291 Fujita *Shipper's Obligations* 24.

292 Schelin 2013 [www.maritimelawlibrary.se](http://www.maritimelawlibrary.se).

293 Schelin 2013 [www.maritimelawlibrary.se](http://www.maritimelawlibrary.se).

294 Berlingieri *et al* 2009 <http://www.comitemaritime.org> where the writers argue that the shipper's obligations and liabilities in the Rotterdam Rules do not have the effect of the shipper having more obligations and liabilities. In previous conventions it was covered under national laws or dealt with in the bill of lading.

295 Amongst the stakeholders are the parties that are considered documentary shippers, for example freight forwarders. The International Federation of Freight Forwarders Association and the European Association for Forwarding Transport Logistics and Customs Services have also criticised the Rotterdam Rules as being strenuous on the shipper.

296 Chapter 7 of the Rotterdam Rules. See par 3.2 above for the discussion on the obligations of shippers under the Rotterdam Rules.

as “more onerous than under previous maritime conventions”.<sup>297</sup> According to Fujita<sup>298</sup> the Rotterdam Rules only consist of more provisions relating to the obligations and liabilities of the shipper, but in essence do not imply or place a heavier burden on shippers. The writer agrees and is of the view that it is necessary to articulate the basis of liability and the obligations of the shipper.

## **4 The South African position with regard to carriage of goods by sea**

### **4.1 Introduction**

Prior to the enactment of domestic legislation in South Africa, maritime law was governed by the English system of maritime law. As mentioned earlier and according to Ramsden<sup>299</sup> the English system of maritime law, at that time, approached the closest ideal of a single uniform law of universal application, embodying the customs and practices of merchants everywhere. As already briefly mentioned, English law did not lay down a set of rules regulating maritime matters, but rather relied on what was conceived to already be law by the customs of the sea.<sup>300</sup> Consequently and as referred to earlier, the law regulating liability of the parties to a contract of carriage was a mostly English Common Law with a hint of Roman law principals regarding maritime matters and contractual freedom of the parties.<sup>301</sup> In South Africa the situation was no different. This is how the English Common Law entered current South African maritime law through the backdoor.<sup>302</sup> The *Merchant Shipping Act*<sup>303</sup> was the first South African legislation which gave effect to an international convention - the Hague Rules 1924.<sup>304</sup>

### **4.2 Carriage of Goods by Sea Act 1 of 1986**

In 1986 the COGSA updated the carriage by sea system and incorporated the Hague-Visby Rules 1968 as Schedule 1 to the Act, thereby substantially amending the English

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297 European Shipper’s Council 2009 <http://www.comitemaritime.org>; Gordan *Rotterdam Rules* 88.

298 Fujita *Shipper’s Obligations* 3.

299 Ramsden 1989 *J Mar L & Com* 192.

300 Ramsden 1989 *J Mar L & Com* 194.

301 See par 2.1 above for the discussion on the Common Law.

302 Shipping law in South Africa remains essentially an English Common Law system operating with a rich overlay of Roman Dutch civilian law (Hare *Shipping Law* 639).

303 Act 57 of 1951, hereinafter “the *Merchant Shipping Act*”.

304 Myburgh 2002 *NZBLQ* 250; Van Niekerk and Schulze *South African Law* 133. As mentioned earlier, the Hague Rules 1924 kept many of the English Common Law principles and applied to bills of lading as the contract of carriage between the carrier and shipper. See par 2.2 above for the discussion on the Hague Rules 1924.

Common Law relating to the carriage of goods by sea.<sup>305</sup> This measure brought South African maritime law in line with international shipping law.<sup>306</sup> While largely derived from the English maritime law, South African maritime law enjoyed its own distinguishing development.<sup>307</sup>

#### 4.2.1 Application of COGSA

A very important aspect of COGSA is the voyages to which the Hague-Visby Rules apply. In terms of the COGSA the Hague-Visby Rules 1968 are applied in six types of voyages.<sup>308</sup> The Hague-Visby Rules shall be applicable to all outward voyages;<sup>309</sup> all coastal voyages within the Republic of South Africa; any voyage from a port in a state which is a party to the convention; to a port in another state, even if the latter is not a contracting state; any voyage between ports in different states where the bill of lading is issued in a contracting state; or where legislation of any state giving effect to the Hague-Visby Rules, are to govern the contract.<sup>310</sup> The Hague-Visby Rules shall therefore be applicable irrespective of whether or not the carriage is between ports in two different states within the meaning of Article 10.<sup>311</sup> The effect of this section is that the Hague-Visby Rules will be applicable to voyages not initially covered by the Hague-Visby Rules.<sup>312</sup> It is therefore safe to submit that COGSA extends the application of the Hague-Visby Rules.

Section 1(1) (b) provides that COGSA shall be applicable to any bill of lading if the contract contained in or evidenced by it expressly provides that the Hague-Visby Rules 1968 shall govern the contract. This means that the Hague-Visby Rules shall apply under South African law in these instances, irrespective of the nationality of the

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305 Van Niekerk *SA Merc LJ* 89. COGSA has eight sections which are required to be read in conjunction with the Hague-Visby Rules 1968, of which four of these sections contain formalities, that the state is bound by the Act, that sections 307 – 311 of the *Merchant Shipping Act* are repealed by COGSA and lastly, giving the short title and date of commencement of the Act.

306 Van Niekerk *SA Merc LJ* 89

307 Hare *Shipping Law* 824.

308 See Chapter 5 below where the effect of section 1 of COGSA is compared to the application of the Rotterdam Rules.

309 Thus, where the port of shipment is a South African port.

310 S 1(1) (a) COGSA in conjunction with Article 10 of the Hague-Visby Rules. The application to the different voyages is referred to as the territorial application (Hare *Shipping Law* 652).

311 S 1(1) (a) COGSA; Van Niekerk 1993 *SA Merc LJ* 89; Hare *Shipping Law* 653.

312 As South Africa is not a signatory to the convention, in terms of Article 10 of the Hague-Visby Rules the Rules would not have applied to any shipments from South Africa. Section 1(1)(a) overrides the provision of the Hague-Visby Rules and makes the Hague-Visby Rules compulsory to all shipments from South Africa.

carrying ship or the parties involved. COGSA further extends the application of the Hague-Visby Rules 1968 by providing the following in section 1(1)(c):

The Rules will be applicable to any receipt which is a non-negotiable document marked as such if the contract evidenced by it is a contract for the carriage of goods by sea and which expressly provides that the Hague-Visby Rules are to govern the contract as if the receipt were a bill of lading, but subject to any necessary modifications.<sup>313</sup>

The South African application of the Hague-Visby Rules therefore extend to sea waybills and non-negotiable receipts<sup>314</sup> which contains a clause paramount.<sup>315</sup> In the instances where the Hague-Visby Rules are voluntarily incorporated in the bill of lading by means of the clause paramount, the Hague-Visby Rules apply as a matter of South African statute and not as a matter of contract.<sup>316</sup> Therefore, any provision in the contract evidenced by the bill of lading inconsistent with the Rules will accordingly be in conflict with a statute.<sup>317</sup> It is the view of the writer that COGSA filled the shortcomings and eliminated the anomalies resulting from the geographical coverage limitations of the Hague-Visby Rules 1968.<sup>318</sup>

Lastly, section (1) (1) (d) of COGSA extends the definition of goods<sup>319</sup> to include a voyage shipping live animals and deck cargo where the bill of lading contains a clause paramount.<sup>320</sup> It is the understanding of the writer that the Hague-Visby Rules shall apply to carriage of live animals and deck cargo subject to two requirements. First, the contract of carriage must state that cargo is carried on deck or live animals are carried and the goods are in fact carried so. Secondly, the contract of carriage must contain a clause paramount extending the application of the Hague-Visby Rules to carriage of

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313 S 1(1) (c) COGSA; Van Niekerk 1993 *SA Merc LJ* 90.

314 Non-negotiable receipts, for example data freight receipts and shipping certificates, are in particular used in the carriage of goods in containers.

315 A clause paramount primarily purports to bring about the effective application of the Hague-Visby Rules 1968 by providing that the Rules shall apply even to carriage possibly falling outside the actual scope of application. (Hare *Shipping Law* 654; Gordon *Rotterdam Rules* 193). For example, in terms of article 10 of the Hague-Visby Rules the Rules will not apply to the contract of carriage if the port of shipment is not a contracting state of the Hague-Visby Rules. This would have the case with shipments from South Africa if COGSA did not extend the application of the Hague-Visby Rules to outbound voyages.

316 Staniland 1987 *LMCLQ* 309; Hare *Shipping Law* 655.

317 Van Niekerk 1993 *SA Merc LJ* 90; Hare *Shipping Law* 507.

318 See par 2.3 above where the scope of application of the Hague-Visby Rules 1968 is discussed.

319 In terms of Article 1(3) of the Hague-Visby Rules 1968 goods includes "...(g)oods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried..." See par 2.3 above where the Hague-Visby Rules 1968 is discussed.

320 See par 2.3 above where the Hague-Visby Rules 1968 is discussed.

deck cargo and live animals.<sup>321</sup> Therefore, if cargo is stated on the bill of lading as being carried on deck and is so carried and the bill of lading includes a clause paramount, the Hague-Visby Rules shall apply in South Africa to deck cargo and live animals as if the Hague-Visby Rules 1968 did not exclude it.

According to Van Niekerk<sup>322</sup> in the instances where the Hague-Visby Rules do not apply to a voyage, the rights and obligations of the parties involved shall be governed by their contractual terms. In the absence of terms and conditions, the English Common Law shall prevail.<sup>323</sup> However, it is the view of the writer that the extension of the application of the Hague-Visby Rules in terms of COGSA thoroughly covers the application shortcomings that the Hague-Visby Rules, on its own, have.

#### 4.2.2 Jurisdiction of South African Courts

One of the most important features is section 3 of COGSA which makes provision for the right of a local consignee to institute a claim for damage to cargo in South Africa. Section 3 reads as follows:

Notwithstanding any purported ouster of jurisdiction, exclusive jurisdiction clause or agreement to refer any dispute to arbitration, any person carrying on business in South Africa and the consignee under, or holder of, any bill of lading, waybill or similar document for the carriage of goods to a destination in South Africa or to any port in South Africa, whether for final discharge or for discharge for further carriage, may bring any action relating to the carriage of the goods or the bill of lading, waybill or document in a competent court in South Africa.<sup>324</sup>

This section therefore takes precedence over an exclusive arbitration or jurisdiction clause in a contract of carriage and enables a local consignee to litigate before a competent South African court.<sup>325</sup> In terms of section 2 of the *Admiralty Jurisdiction Regulation Act*<sup>326</sup> only the High Court<sup>327</sup> of South Africa exercise admiralty jurisdiction

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321 Hare *Shipping Law* 653-654; Gordon *Rotterdam Rules* 192; Van Niekerk 1993 *SA Merc LJ* 91.

322 Van Niekerk 1993 *SA Merc LJ* 91

323 For example, where a shipment is carried into South Africa from a state in which neither the one of the conventions applies by a bill of lading without a clause paramount, the Common Law shall govern the contract of carriage (Hare *Shipping Law* 639). As mentioned in par 2.1, in terms of the Common Law the liability of the carrier was strict.

324 S 3 COGSA; Hare *Shipping Law* 504.

325 Hare *Shipping Law* 649; Van Niekerk *SA Merc LJ* 82; Ramsden 1989 *J Mar L & Com* 196.

326 Act 105 of 1983, hereinafter "the *Admiralty Jurisdiction Regulation Act*".

327 Section 2 of the *Admiralty Jurisdiction Act* states that each of the divisions of the Supreme Court shall have admiralty jurisdiction. However, section 166 of the *Constitution of the Republic of South Africa 1996* sets out the new hierarchy of the courts and the former Supreme Court is regarded as the High Court.

and to hear and determine any maritime claim, irrespective where it arose, or the place of registration of the ship concerned, or of the residence *domicile* or nationality of its owner.<sup>328</sup> However, an inland division of the High Court shall only exercise admiralty jurisdiction in respect of certain maritime claims.<sup>329</sup> The Act also defines a maritime claim as any claim for, arising out of or relating to loss or damage of goods carried or which ought to have been carried in a ship, whether such claim arises out of any agreement or otherwise; and the carriage of goods in a ship, or any agreement for or relating to such carriage.<sup>330</sup> Section 3 of COGSA is to the benefit of a local consignee and makes it easier for a local consignee to institute a claim for loss of or damage to goods.

#### 4.2.3 *Obligations, liabilities, exceptions and immunities*

Due to the Hague-Visby Rules having force of law in South Africa, the obligations of the carrier as well as the exemptions and exclusions of liability in the Hague-Visby Rules 1968 shall also be applicable in South Africa.

As mentioned above, in terms of article 3 of the Hague-Visby Rules the carrier has the obligation to exercise due diligence in providing a seaworthy vessel.<sup>331</sup> In terms of section 2 of COGSA parties may not include a provision in the contract of carriage to which the Hague-Visby Rules apply, for any absolute undertaking to provide a seaworthy vessel by the carrier.<sup>332</sup> Secondly, article 3(2) of the Hague-Visby Rules is the obligation to care for the cargo. The carrier must treat the goods properly and

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328 S 2(1) of the *Admiralty Jurisdiction Regulation Act*. Section 2(2) provides that the jurisdiction area of the High Court includes the portion of the territorial water of South Africa adjacent to the coastline of its area of jurisdiction. The territorial waters of South Africa are within 12 nautical miles from the coastline.

329 S 3(3) of the *Admiralty Jurisdiction Regulation Act*. The maritime claims which the inland division of the High Court may hear and determine are agreements concluded within its territorial jurisdiction; where goods are shipped under a bill of lading to or from a place within its territorial jurisdiction; or where the maritime claim relates to a fund within or freight payable in its territorial jurisdiction.

330 Ss 1(1) (1) (ii) (g) - 1(1) (1) (ii) (h) of the *Admiralty Jurisdiction Regulation Act*; Van Niekerk 1993 *SA Merc LJ* 83.

331 Article 3(1) of the Hague-Visby Rules 1968. See par 2.2 and 2.3 above for the discussion on due diligence and seaworthiness.

332 S 2 COGSA; Hare *Shipping Law* 656.

carefully<sup>333</sup> from loading until discharge.<sup>334</sup> The third obligation of the carrier is the issuing of a bill of lading on the request of the shipper.<sup>335</sup> Lastly, article 4(4) of the Hague-Visby Rules provides that a carrier may only deviate from the contract voyage in an attempt to save life or property at sea or any other reasonable deviation.<sup>336</sup> The parties to a contract of carriage<sup>337</sup> may not contract out of the Hague-Visby Rules. Any clause or agreement relieving the carrier from its liability for loss or damage caused by its negligence, or not fulfilling an obligation as set out in the Rules, is void and of no effect.<sup>338</sup>

In terms of article 4(2) of the Hague-Visby Rules 1968, the privileges of the exclusions and limitation of liability are extended to the agents and servants of the carrier, but not if the agent or servant is an independent contractor. The carrier may, however, extend the cover of article 4(1) and (2) to independent contractors by expressly including them in the bill of lading by means of the “Himalaya clause”.<sup>339</sup> The Himalaya clause arose as a result of a decision in the English Court of Appeal in *Adler v Dickson*<sup>340</sup> where the court held that, in the carriage of passengers and goods, the law permitted a carrier to stipulate not only for himself, but also for those whom he engaged, to carry out the contract. It was further held that the stipulation might be expressed or implied.<sup>341</sup> The main purpose of such a clause is to prevent shippers from avoiding the contractual

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333 As mentioned in par 2.3, the standard of care required from the carrier is in accordance with a sound system and operated with reasonable care in light of standard industry practices and the knowledge the carrier has or ought to have about the nature of the goods. According to Hare *Shipping Law* 650,659 the word “properly” has not been interpreted by South African Courts, however English Court decisions on the Hague-Visby Rules would probably take precedent in South Africa if international sources were needed as guidance.

334 Article 3(2) of the Hague-Visby Rules 1968. See par 2.2 and 2.3 above for the discussion of the care of the cargo.

335 Article 3(3) of the Hague-Visby Rules 1968. See par 2.2 and 2.3 above for the discussion on the issuing of a bill of lading by the carrier.

336 Article 4(4) of the Hague-Visby Rules 1968. See par 2.2 and 2.3 above for the discussion on deviation.

337 That is a contract of carriage to which the Hague-Visby Rules 1968 apply.

338 Article 3(8) of the Hague-Visby Rules 1968; Van Niekerk 1993 *SA Merc LJ* 91.

339 Staniland 1992 *LMLCLQ* 317.

340 1954 2 Lloyd’s Rep 267, in which case Mrs Adler was a passenger onboard the P & O Passenger ship, the *Himalaya*. The primary question arose as whether the master of the vessel might also be exempted from liability under this clause. In this case the court held that the ticket did not expressly or by implication benefit servants or agents and thus the master could not take advantage of the exception clause.

341 1954 2 Lloyd’s Rep 267; In *New Zealand Shipping Co Ltd v AM Satterthwaite and Co Ltd (The Eurymedon)* 1975 AC 169, Lord Wilberforce held that such a clause shall be effective with regard to independent contractors to include; exemptions, limitations, defences and immunities contained in the bill of lading.

defences<sup>342</sup> available to the carrier by suing in delict persons who perform contractual services on the carrier's behalf. The Himalaya clause furthermore protects servants, agents and independent contractors of the carrier from being sued outside the system of the Hague-Visby Rules.<sup>343</sup> It is therefore submitted that, in terms of the English law, the Himalaya clause is accepted under the doctrine of agency.

In *Santam Insurance Co Ltd v SA Stevedores Ltd*<sup>344</sup> the court found that the Himalaya clause was valid according to the South African principles of contract made for the benefit of a third party. The clause was upheld under Roman-Dutch law and parted somewhat from the position in English law<sup>345</sup> by relying on the principle of *stipulatio alteri*.<sup>346</sup> The Himalaya clause was again addressed in *Bouygues Offshore and Other v The Owner of the M/T Tigr and Another*,<sup>347</sup> where unlike in *SA Stevedores*,<sup>348</sup> the court had to decide on the effectiveness of the Himalaya clause under English law.<sup>349</sup> The court held that the same result of the principle *stipulatio alteri* can be achieved according to the principles of agency.<sup>350</sup> The significance of this case was that the court found that a third party, to the contract of carriage, wishing to rely on the benefit of the clause could not acquire rights or defences beyond those acquired by the principal party who concluded contract on behalf of the third party.<sup>351</sup> It is submitted that South African courts have accepted a wider application of the Himalaya clause. Whether the Himalaya clause is considered under the principle of *stipulatio alteri* or the principle of agency shall depend on the type of maritime claim and the subsequent provisions of

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342 That is to say the exceptions and immunities provided for in the Hague-Visby Rules 1968 (Hare *Shipping Law* 510).

343 Girvin 1997 *SA Merc LJ* 119; Anon 2010 [www.steamshipmutual.com](http://www.steamshipmutual.com); Hare *Shipping Law* 510.

344 1989 1 SA 182 (D).

345 In terms of the English Law contracts for the benefit of a third party is not recognised (Girvin 1997 *SA Merc LJ* 12).

346 A *stipulatio alteri* is a contract for the benefit of a third party, a principle in Roman-Dutch law recognises in South Africa; Staniland 1992 *LMCLQ* 322; Girvin 1997 *SA Merc LJ* 120.

347 1995 4 SA 49 (C); Girvin 1997 *SA Merc LJ* 121.

348 1989 1 SA 182 (D).

349 In terms of section 6(1) of the *Admiralty Jurisdiction Regulation Act* English Admiralty law as it existed on 01 November 1983 is to be applied to maritime claims in the nature of towage.

350 1995 4 SA 49 (C) 72H-I where the court held that "...the whole history of the Himalaya clause makes it clear that the mischief the clause was designed to combat was the exposure of the servant, agent or subcontractor of a carrier or other such party from liability from which the carrier himself was exempted. It was not intended (nor can the other contracting party such as the shipper) reasonably have anticipated that there was an intention) to create an exemption which would endure for the benefit of the servant, agent or subcontractor even where the carrier's exemption was lost..."

351 Zeller 2017 *ITBLR* 150; Girvin 1997 *SA Merc LJ* 120; Van Niekerk 1993 *SA Merc LJ* 93; Staniland 1992 *LMCLQ* 317.

section 6 of the *Admiralty Jurisdiction Regulation Act*. This creates some legal uncertainty as there is no uniform approach to determining whether the Himalaya clause shall be enforceable in a specific instance due to both English law and Roman-Dutch law being applied.

#### 4.2.4 Limitation of liability

Although South Africa is not a party to any international convention regarding the limitation of liability, the Hague-Visby Rules and South African maritime legislation<sup>352</sup> makes provision for the limitation of a carrier's liability.<sup>353</sup> In terms of the Hague-Visby Rules, if loss or damage to cargo has occurred and a carrier is unable to avail himself under one of the defences in the Hague-Visby Rules, the carrier's liability will be limited.<sup>354</sup> The limitation occurs with reference either to the number of packages or units,<sup>355</sup> or the weight of the goods, whichever of these imposes the smaller limitation on the carrier's liability.<sup>356</sup> The maximum limit imposed upon the carrier's limitation may be increased.<sup>357</sup> However, the maximum limit may not be reduced below that provided for by the Rules.<sup>358</sup> A carrier loses the right to limit its liability where it is proved that the loss or damage was due to an act or omission of the carrier committed with intent, or recklessly and with the knowledge that damage would probably result.<sup>359</sup>

The limitation of liability in South Africa is provided for in section 261 of the *Merchant Shipping Act* which make provision for tonnage limitation of liability for all damage

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352 *Merchant Shipping Act* 57 of 1951, hereinafter "the *Merchant Shipping Act*".

353 Chuah *International Trade* 339; Carr *International Trade Law* 259; Metuge *Hague to Rotterdam* 57.

354 Article 4(5) of the Hague-Visby Rules 1968.

355 Package and unit limitation is applicable to containerised cargo. In *Kyokuyo Co Ltd v AP Moller-Maersk A/S (The Maersk Tangier)* 2017 1 CLC 253 Judge Baker held that, if physical items are packed together, they would form part of a single package whereas individual items shall be units in terms of the Hague-Visby Rules 1968. For example, a crate of bottled cooldrinks shall be considered as a package whilst if the cooldrinks were not bundled together in a crate, each individual bottle shall be regarded as a unit. See par 2.3 above for discussion of limitation of liability under the Hague-Visby Rules 1968.

356 Article 4(5) (a) of the Hague-Visby Rules 1968; Zondo *Limitation of Liability for Maritime Claims* 18; Van Niekerk 1993 *SA Merc LJ* 96. According to Dyason 2001 *J Mar L & Com* 491 "... (t)he amounts recoverable is determined according to the value of the goods at the time or place of discharge under the contract of carriage and the market value or commodity exchange price of the goods...".

357 Where there has been an agreement to that effect between the parties or where the value of the goods has been declared and inserted in the bill of lading (Zondo *Limitation of Liability for Maritime Claims* 18.)

358 Van Niekerk 1993 *SA Merc LJ* 96; Dyason 2001 *J Mar L & Com* 493.

359 Article 4(5) (e) of the Hague-Visby Rules 1968; Van Niekerk 1993 *SA Merc LJ* 97. See par 2.3 above for the discussion on the limitation of liability under the Hague-Visby Rules 1968.

claims brought against a carrier according to the ship's tonnage.<sup>360</sup> Prior to September 1997,<sup>361</sup> the amounts to which a carrier or other party was entitled to limit its liability were considerably lower in South Africa than in countries where the *Convention on the Limitation of Liability for Maritime Claims 1976*<sup>362</sup> applies. Writers<sup>363</sup> are of opinion that this made South Africa a favourable jurisdiction to carriers who can discharge the *onus* of proving absence of fault.

The *Shipping General Amendment Act*<sup>364</sup> amended the limitation of liability in South Africa. This act changed the calculation of package limitation and tonnage limitation to a calculation expressed in Special Drawing Rights,<sup>365</sup> reflecting the international limitation of liability system.<sup>366</sup> In South Africa the carrier is allowed to plead both the package limitation, as provided by section 5 of COGSA,<sup>367</sup> and the tonnage limitation as per section 261 the *Merchant Shipping Act*.<sup>368</sup> Despite the amendment to the limitation of liability, there still seems to be uncertainty as to the concept of limitation of liability in South Africa.<sup>369</sup> Domestic courts are largely untested when it comes to limitation of liability and still relies heavily on English law and decisions in this regard.<sup>370</sup>

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360 Tonnage limitation is calculated with reference to the ship's carrying capacity (Zondo *Limitation of Liability for Maritime Claims* 18). Hare *Shipping Law* 526.

361 Before the enactment of the *Shipping General Amendment Act* 23 of 1997.

362 *The Convention on the Limitation of Liability for Maritime Claims* 1976.

363 Van Niekerk 1993 *SA Merc LJ* 97; Dyason 2001 *J Mar L & Com* 494; Hare *Shipping Law* 536; Zondo *Limitation of Liability for Maritime Claims* 26.

364 Act 23 of 1997, hereinafter "the *Shipping General Amendment Act*".

365 S 5(d) of the *Shipping General Amendment Act* provides that the unit of account mentioned in article 4(5) of the Hague-Visby Rules 1968 are the Special Drawing Rights as defined by the International Monetary Fund. The amounts mentioned in sub-paragraph (a) of this paragraph shall be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the Court seized of the case.

366 Dyason 2001 *J Mar L & Com* 495; Zondo *Limitation of Liability for Maritime Claims* 32.

367 In terms of s 5 of COGSA a carrier may limit its liability for damage to or loss of goods to the maximum of 666.67 SDR per package or 2 SDR per kg of the gross weight of the goods.

368 Section 261 of the *Merchant Shipping Act* provides for the limitation of liability of claims for personal injury, loss of life and damage to or loss of goods. In terms of s 261(a) where there is no claim for damage to or loss of property the carrier shall be liable for damage for loss of life or personal injury to the amount not exceeding 206.67 SDR per ton of ship's tonnage. In terms of s 261(b) where there is no claim for loss of life or personal injury the carrier shall be liable for the damage to or loss of property to the maximum amount of 66.67 SDR per ton of ship's tonnage. S 261(c) provides that, where there is a claim for damages for loss of life, personal injury and damage to or loss of property, the carrier shall be liable for the maximum amount of 206.67 SDR per ton of ship's tonnage, subject to the amount of 140 SDR per ton of ship's tonnage being allocated for the damage due to loss of life or personal injury.

369 Van Niekerk 1993 *SA Merc LJ* 96; Dyason 2001 *J Mar L & Com* 492.

370 Van Niekerk 1993 *SA Merc LJ* 96; Dyason 2001 *J Mar L & Com* 492.

### **4.3 Conclusion**

South African legislation regarding the carriage of goods by sea has been around for quite some time. It is the view of the writer that it is in need of some attention to align it with modern practices and the development of the shipping industry, as discussed in the next chapter. The Maritime Law Association of South Africa have been and remain pro-active with regard to the country's maritime law and has voiced its concerns with regard to ratifying a new international convention, alternatively amend existing legislation to keep up with the international shipping industry.<sup>371</sup> As for now, COGSA and the Hague-Visby Rules remain the liability system applicable in South Africa.

## **5 Legal comparison between South African legislation with regard to carriage of goods by sea and the Rotterdam Rules**

As mentioned earlier, the Rotterdam Rules are a codification of industry practice and jurisprudence which have developed since the first international carriage convention came into existence. The Rotterdam Rules therefore offer comprehensive solutions to problems encountered in modern shipping and maritime law. Notwithstanding the above, it is submitted that a convention of this magnitude, attempting to alter the current international carriage of goods by sea regime<sup>372</sup> is bound to have provisions that will be less beneficial to the various stakeholders. As evident from the below, the Rotterdam Rules do, however, bring significant change to the current carriage law and system in South Africa.

As mentioned earlier, the Hague-Visby Rules 1968 has force of law in South Africa. COGSA extended the application of the original Hague-Visby Rules in such a manner that it already contains some of the features of the Rotterdam Rules.<sup>373</sup> The most significant difference between the Rotterdam Rules and COGSA is that the Rotterdam Rules relate to multimodal transport<sup>374</sup> and the COGSA refers only to carriage of goods by sea. In fact, COGSA limits the application of the Hague-Visby Rules to sea carriage in ships.<sup>375</sup> The Rotterdam Rules are described as a maritime-plus system and

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371 Hare *Shipping Law* 525.

372 Hoeks *Multimodal Transport Law* 334; Nikaki and Soyer 2012 *Berkeley Int'l Law* 307.

373 See par 4 above for the discussion on the South African position in regard to carriage of goods by sea.

374 Gordan *Rotterdam Rules* 30; Lannan 2009 [www.shhsfy.gov.cn](http://www.shhsfy.gov.cn);

375 S 1(1)(a) COGSA; In article 1(b) of the Hague-Visby Rules 1968 it is explicitly stated that the Rules only apply to sea carriage; Gordan *Rotterdam Rules* 6.

provides that contract of carriage must include an international sea-leg in order for the Rules to apply.<sup>376</sup> Furthermore, the scope of application and period of responsibility in terms of South African Law is only from tackle to tackle,<sup>377</sup> whereas the Rotterdam Rules extends the scope of application and period of responsibility to door to door.<sup>378</sup> The carrier is therefore responsible for the goods from the time the goods are received until they are delivered to the consignee. It is the view of the writer that this significantly increases the carrier's period of responsibility when compared to other systems and the South African law. However, the demand for international door-to-door transport drastically increased with the container revolution.<sup>379</sup> It is opined that the Rotterdam Rules will limit the legal uncertainty caused by the different domestic legislation currently governing the different modes of transport.

The Hague-Visby Rules do not define a contract of carriage, but rather follow a more documentary approach.<sup>380</sup> The Hague-Visby Rules shall be applicable if a bill of lading or similar document of title is issued to regulate the contract of carriage. The Rotterdam Rules expressly defines a contract of carriage and states that these Rules apply to the carriage of goods from one place to another location and may include other modes of transport, if the parties to the contract of carriage agrees.<sup>381</sup> As discussed in above, COGSA<sup>382</sup> extended the application of the Hague-Visby Rules<sup>383</sup> to cover more than only those instances where a bill of lading has been issued, for example waybills and non-negotiable receipts which contains a clause paramount.<sup>384</sup> Another prominent feature of the Rotterdam Rules is the type of shipping documents to which these Rules apply. The Rotterdam Rules do not include the phrase bill of lading. Instead it resorts

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376 Gordan *Rotterdam Rules* 30; Lannan 2009 [www.shhsfy.gov.cn](http://www.shhsfy.gov.cn).

377 Article 1(e) of the Hague-Visby Rules 1968. The tackle to tackle period is the period from loading to discharge of the cargo.

378 Article 12 of the Rotterdam Rules; Hare *Shipping Law* 634.

379 Faghfour 2006 *WMU JoMA* 95.

380 Article 1(b) of the Hague-Visby Rules 1968; Berlingieri 2009 [www.uncitral.org](http://www.uncitral.org); Gordan *Rotterdam Rules* 40.

381 Article 1 of the Rotterdam Rules; Gordan *Rotterdam Rules* 41.

382 S 1(1) (c) COGSA. See par 4 above for the discussion on COGSA.

383 Article 3(4) of the Hague-Visby Rules 1968 refers to the conclusiveness of a bill of lading which has been transferred to a third party acting in good faith. Article 3(7) relates to the functions of a bill of lading as a document of title.

384 S 1(1) (c) COGSA; Gordan *Rotterdam Rules* 6; Hare *Shipping Law* 654.

to transport documents<sup>385</sup> and electronic transport record.<sup>386</sup> States have not all uniformly ratified the various international conventions. Some have not adopted any international measures but have retained their domestic legislation while others have passed their own legislation incorporating aspects of the different international conventions. Therefore, there is a disproportionately large number of different systems governing carriage of goods by sea.<sup>387</sup> The wider scope of application of the Rotterdam Rules places COGSA and the Rotterdam Rules in the same league. This is a furtherance from previous conventions as it promotes legal certainty.

Due to the fact that the Hague-Visby Rules were developed and promulgated long before it became practice to use electronic documents, there is no provision governing the status of electronic documents. South Africa promulgated domestic legislation, the *Sea Transport Documents Act*,<sup>388</sup> which makes provision for the use of electronic data interchange and empowers the Minister of Transport to prescribe circumstances and conditions in which electronic records and documents may be regarded as transport documents.<sup>389</sup> Article 5 of the Rotterdam Rules relates to electronic documents and in effect allows electronic documents to be considered much the same as paper bills of lading and sea transport documents.<sup>390</sup> It is therefore safe to submit that the South African position with regard to electronic transport documentation is already in line with the Rotterdam Rules.

Under South African law the carrier is identified as the shipowner or a charterer who concludes a contract of carriage with the shipper.<sup>391</sup> In terms of Article 1 of the Rotterdam Rules a carrier is a person who or which enters into a contract of carriage with a shipper and the obligations of the carrier extends to performing parties acting at the carrier's request or under the carrier's supervision or control.<sup>392</sup> Thus, the

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385 The purpose of a transport document is evidence that the goods have been received and is used as *prima facie* evidence that a contract of carriage has been concluded. The bill of lading is therefore not recognised as document of title.

386 For example, electronic bills of lading. See par 3 above where the Rotterdam Rules are discussed.

387 Marin 2012 <http://www.bib.irb.hr>.

388 Act 65 of 2000, hereinafter "the *Sea Transport Documents Act*".

389 Ss 8-9 of the *Sea Transport Documents Act*; Gordan *Rotterdam Rules* 10; Girvin *Carriage of Goods* 348.

390 Gordan *Rotterdam Rules* 198.

391 Article 1(a) of the Hague-Visby Rules 1968. The identity of the carrier is determined by a factual enquiry by examining the bill of lading (Hare *Shipping Law* 708); Gordan *Rotterdam Rules* 46. See par 2.3 above for the discussion of the carrier in terms of the Hague-Visby Rules 1968.

392 Article 1 of the Rotterdam Rules; Chalos *Cargo Conventions* 5; Gordan *Rotterdam Rules* 46.

Rotterdam Rules contains a broader definition of the carrier in comparison with South African law. South Africa may benefit from this provision as it will potentially solve the current problem with regard to the identity of the carrier. Furthermore, the shipper will be able to institute action against a person who is not a party of the initial contract of carriage if the damage to, loss of or delay in delivery of the goods was due to the fault of that person.

The Rotterdam Rules has also added to the obligations of the carrier. The carrier now has the obligations to deliver the goods in terms of article 11:

The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.<sup>393</sup>

According to Berlingieri<sup>394</sup> the nature of the Hague-Visby Rules, regarding standard bills of lading, which include on the face of the bill of lading that the goods should be delivered to the consignee, may be the reason why the basic obligation of delivery is not mentioned in the Hague-Visby Rules. It is opined that this provision is superfluous with regard to the current carriage of goods system in South Africa. However, taking into account the international character of the Rotterdam Rules and the attempt to establish uniformity, the purpose of the provision offers a comprehensive solution to a possible problem in the shipping industry.

The obligation of the carrier to exercise due diligence in making the ship seaworthy before the commencement of the journey<sup>395</sup> has also been amended by the Rotterdam Rules. The obligation of the carrier to exercise due diligence<sup>396</sup> in making the ship seaworthy now spans throughout the entire voyage and not just at the commencement of the voyage.<sup>397</sup>

The Rotterdam Rules entirely removes the defence of error in navigation, unless the carrier and other performing parties can show that they were not at fault in any way.<sup>398</sup>

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393 Article 11 of the Rotterdam Rules.

394 Berlingieri 2009 [www.uncitral.org](http://www.uncitral.org); Gordan *Rotterdam Rules* 46.

395 Article 2-3 of the Hague-Visby Rules 1968.

396 See par 2.2-2.3 and par 3.2.3 above for the discussion on due diligence and seaworthiness of the vessel under the different conventions.

397 Article 13(1) of the Rotterdam Rules; Hare *Shipping Law* 641; Berlingieri 2009 [www.uncitral.org](http://www.uncitral.org); Gordan *Rotterdam Rules* 47.

398 Article 17(3) of the Rotterdam Rules; Gordan *Rotterdam Rules* 48.

It is submitted that South Africa, being a developing country relying on imports, will benefit from the heavier burden the abovementioned provisions place on the carrier. As discussed earlier, development of navigation technology justifies the abolishment of the nautical fault exception.<sup>399</sup> However, in the view of the writer, the cost of freight might increase due to the heavier burden on the carrier which consequently will lead to a price increase of goods.

COGSA makes specific provision for the carriage of live animals,<sup>400</sup> while under the Rotterdam Rules no specific rules are given regulating the carriage of live animals.<sup>401</sup> However, article 81(a) of the Rotterdam Rules allows for freedom of contract. The carrier will therefore not be liable for the loss or damage to live animals which were being transported, unless where the loss or damage or delay was due the fault of the carrier or other person mentioned in article 18.<sup>402</sup> Due to the risks associated with the carriage of live animals the writer is inclined lean to the side of the Rotterdam Rules provision of freedom of contract between the parties. The Rotterdam Rules on live animals therefore is a betterment from the current South African position.

In terms of South African law, if deviation is unreasonable or not for the purpose of saving life or property at sea, a carrier may lose its right to rely on the defences in the Hague-Visby Rules and its right to limit its liability.<sup>403</sup> The Rotterdam Rules, however, do not deprive the carrier of any defence or limitation for deviation. Under the Rotterdam Rules a carrier may deviate for any reason and not just for attempting to save life or property.<sup>404</sup> The deviation is subject to reasonability and courts will have to decide on the proper objective test. It is the view of the writer that deviation under the Rotterdam Rules may cause legal uncertainty and that it will take a long time before the courts have laid down the instances where the deviation is reasonable.

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399 See par 3.2.3 above for the discussion on the nautical fault exception.

400 Unlike the Hague-Visby Rules 1968 which explicitly excludes the carriage of live animals. However, in terms of COGSA the Hague-Visby Rules shall only be applicable to the carriage of live animals where it is stated on the bill of lading and in fact carried as such and where a clause paramount is included in the contract of carriage. See par 2.3 and 4 above for a discussion of the Hague-Visby Rules 1968.

401 S 1(1) (d) COGSA; Gordan *Rotterdam Rules* 49.

402 Article 81 of the Rotterdam Rules; Gordan *Rotterdam Rules* 49.

403 Article 4 of the Hague-Visby Rules 1968.

404 Art 24 of the Rotterdam Rules; Hare *Shipping Law* 788; Gordon *Rotterdam Rules* 50.

As mentioned above,<sup>405</sup> the Rotterdam Rules conveys a whole chapter to the obligations and liability of the shipper.<sup>406</sup> In terms of South African law, the shipper is deemed to have guaranteed to the carrier the correctness of the marks, number, quantity and weights of the goods at the time of the shipment as given in the bill of lading;<sup>407</sup> the shipper is not responsible for loss or damage to the carrier or the vessel which may result from any cause, except where the cause was the result of the shipper's act, fault or neglect;<sup>408</sup> and the shipper is liable for all damages and expenses which directly or indirectly result from the carriage of dangerous good where the shipper did not inform the carrier of the dangerous nature of the goods or the carrier did not consent to the carriage thereof.<sup>409</sup> The Rotterdam Rules, on the other hand, provides a range of obligations and liabilities relating to the delivery condition of the goods;<sup>410</sup> provision of information, instructions and documents of the goods to the carrier and information in order to compile the contract of carriage;<sup>411</sup> and the requirements for the carriage of dangerous goods.<sup>412</sup> Thus, the clear articulation of the shipper's obligations and responsibilities will be a positive change for South African law.

Section 2 of the *Admiralty and Jurisdiction Regulation Act* gives the High Court jurisdiction to hear and determine maritime claims.<sup>413</sup> In terms of the Rotterdam Rules contracting states are allowed to "opt-in" to jurisdiction provisions.<sup>414</sup> Article 66 provides that the domicile of the carrier; the place of receipt of the goods under the contract of carriage; the place of delivery of the goods under the contract of carriage; the port of loading or of discharge; or where the parties have agreed to, applies when selecting a place to institute a claim. Furthermore, in terms of the Rotterdam Rules the arrest of a vessel does not convey substantive jurisdiction.<sup>415</sup> According to Hare<sup>416</sup> the

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405 See par 3.3 above for the discussion on the obligations of the shipper under the Rotterdam Rules.

406 Chapter 7 of the Rotterdam Rules.

407 Article 3(5) of the Hague-Visby Rules 1968; Tetley *Marine Cargo Claims* 1104; Gordon *Rotterdam Rules* 55.

408 Article 4(4) of the Hague-Visby Rules 1968; Berlingieri 2008 <http://www.cmi.org>.

409 Article 4(6) of the Hague-Visby Rules 1968.

410 Article 27 of the Rotterdam Rules.

411 Article 29 and 31 of the Rotterdam Rules.

412 Article 32 of the Rotterdam Rules.

413 See par 4.2.2 above.

414 Article 74 of the Rotterdam Rules. Chapter 14 of the Rotterdam Rules deals with jurisdiction; Gordon *Rotterdam Rules* 69.

415 Article 70 of the Rotterdam Rules.

416 Hare *Shipping Law* 639; Gordon *Rotterdam Rules* 69.

provision in the Rotterdam Rules regarding jurisdiction will not be beneficial to South Africa as it "...does not allow the merits of the claim to be heard in the arresting jurisdiction unless an international convention applies in that state which makes provision for such jurisdiction..."<sup>417</sup> The writer agrees with Hare. The current jurisdiction provision of South Africa is more beneficial. Furthermore, the choice of the state with regard to the jurisdiction provision is directly in contravention with the purpose and aim of the Rotterdam Rules to create uniformity and legal certainty.

The carriage of goods by sea in South Africa is regulated by COGSA, the Hague-Visby Rules 1968 and other domestic legislation. Given the changing face of carriage of goods by sea and in the light of the above difficulties, the current regulatory legislation may be deemed as insufficient, undesirable and outdated.<sup>418</sup> It is important to mention that, prior to 2000, the South African Maritime Law Society (SAMLA) called to the CMI for the revision of the Hague-Visby Rules. SAMLA requested that, among other things, that the Hague-Visby Rules should be updated to include provisions dealing with electronic documentation, stricter and higher standards of seaworthiness and clearer identification of the carrier. Hare<sup>419</sup> comments that the Rotterdam Rules appear to be in line with the requests that SAMLA made. However, ratification of the Rotterdam Rules will mean that South Africa will have to denounce the Hague-Visby Rules.<sup>420</sup> It is opined that it will not be possible to merely replace the Hague-Visby Rules as a schedule to COGSA, but it would be necessary for South Africa to implement a new act and the other relevant legislation will need to be revised. The writer furthermore agrees with Hare<sup>421</sup> and Gordan<sup>422</sup> that acceding to the Rotterdam Rules will be beneficial to South Africa and will bring South African maritime law in line with modern day shipping industry.

## **6 Conclusion and recommendations**

The purpose of this research is to ascertain how the Rotterdam Rules regulate the liability of carriers and shippers in comparison to the current liability systems and South

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417 Article 73 of the Rotterdam Rules; Hare *Shipping Law* 639; Gordan *Rotterdam Rules* 69.

418 Gordan *Rotterdam Rules* 10.

419 Hare *Shipping Law* 634; Gordan *Rotterdam Rules* 198.

420 Article 89 of the Rotterdam Rules; Gordon *Rotterdam Rules* 198.

421 Hare *Shipping Law* 639 is of opinion that "...(t)he Rotterdam Rules would appear to serve South African shipping interest better than the current COGSA and Hague-Visby regime...".

422 Gordan *Rotterdam Rules* 171 states that "...(i)t is past time that South Africa become more involved in the maritime sector...".

African law on the carriage of goods by sea. A carrier liability system directly regulates the allocation of risks between the carrier and other parties to the contract of carriage. The scope of the carrier and shipper's liability has always been one of the key issues in maritime practice. It is in the interest of the international shipping industry, including South Africa, to adopt a uniform and modern liability system which address the shortcomings and problem areas which arose over time.

At first the English Common Law imposed a strict liability on the carrier for the loss or damage to goods. The only exemptions to its liability being loss or damage resulting from an act of God, public enemies, inherent vice or fault of the shipper. For decades carriers took advantage of their greater bargaining position by including clauses in the contract of carriage which exempt them from even their Common Law liabilities.<sup>423</sup> A liability system has a close impact on the development of the international shipping industry and international trade. For international trade to flourish it became necessary and essential to establish an international liability system that could accommodate two purposes. Firstly, there was a need for flexibility to allocate risks between the shippers in line with commercial needs and practices. Secondly, there is a need for the prevention of misuse and protection of the parties in a weaker bargaining position.<sup>424</sup>

Currently, there are three international conventions governing international carriage of goods by sea. The Hague Rules 1924 were the first international convention to establish a liability system for the carriage of goods by sea and institute a minimum protection for the shippers. According to Force<sup>425</sup> the Hague Rules are not a comprehensive regulation of carriage of goods by sea. These Rules lay down certain basic responsibilities of the carrier and shipper, set forth exemptions from carrier liability and provide for limitation of carrier liability.<sup>426</sup> However, after almost half a century, the provisions of the Hague Rules were deemed inconsistent with the development of the shipping industry and the limits of liability became commercially unrealistic.<sup>427</sup> The Hague Rules were outdated and it is opined that the Hague Rules are no longer suitable to regulate international carriage of goods by sea.

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423 See par 2.1 above for the discussion on the position under the Common Law.

424 See par 2.1 above. Nikaki and Soyer 2012 *Berkeley J Int'l L* 303.

425 Force 1996 *Tulane Law Review* 2052.

426 See par 2.2 above for the discussion on the Hague Rules 1924.

427 Metuge *Hague to Rotterdam* 3; Force 1996 *Tulane Law Review* 2052.

In 1968 The Hague-Visby Amendments were promulgated and is presently the most prominent system that governs a large majority of international carriage of goods.<sup>428</sup> Many countries have incorporated the Hague-Visby Rules in their domestic legislation, including South Africa.<sup>429</sup> A variety of international bodies criticised the Hague-Visby Rules as strongly favouring the carrier and “out of step with modern shipping and international trade practices”.<sup>430</sup>

The Hamburg Rules, which were later developed as an alternative to the Hague Rules and Hague-Visby Rules liability system, did not fill entirely the shortcomings of its predecessors.<sup>431</sup> This is evidenced by the absence of widespread adoption thereof.<sup>432</sup>

Each of these international conventions in turn aimed to broaden its application and to rectify the voids of its predecessors regarding the principle of liability.<sup>433</sup> Despite these admirable attempts at uniformity and harmonisation, there is a substantive measure of international divergence.<sup>434</sup> States have not all uniformly ratified the various international conventions. Some have not adopted any international measures but have retained their domestic legislation. Other states have passed their own legislation incorporating aspects of the different international conventions.<sup>435</sup> Therefore, there is an unduly large number of different systems governing carriage of goods by sea.<sup>436</sup> It is submitted that this poses a problem with regard to the applicability of the different international conventions and legal uncertainty.

In an attempt to repair the conflicts caused by the current maritime conventions, the Rotterdam Rules incorporate provisions from both the Hague-Visby Rules 1968 and Hamburg Rules. The Rotterdam Rules also contain new provisions in order to promote harmonisation, to update the present shipping practices and the everchanging technological innovations and developments.<sup>437</sup> It is the view of the writer that the key

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428 See par 2.3 above for the discussion on the Hague-Visby Rules 1968. Force 1996 *Tulane Law Review* 2052.

429 See par 4 above for the discussion on the South African position with regard to carriage of goods by sea.

430 Nikaki and Soyer 2012 *Berkeley J Int'l Law* 303.

431 See par 2.3 above for the discussion on the Hamburg Rules.

432 See par 2.4 above for the discussion on the Hamburg Rules.

433 Tetley *Marine Cargo Claims* 6.

434 See par 1 and 5 above. Van Niekerk and Schulze *South African Law* 135; Hare *Shipping Law* 630.

435 For example, South Africa incorporated the Hague-Visby Rules in the COGSA.

436 Marin 2012 <http://www.bib.irb.hr>.

437 Metuge *Hague to Rotterdam* 82; Pallarés 2011 *J Mar L & Com* 458.

is to adapt to the everchanging developments. It is well-accepted that the core of the convention is the carrier liability.<sup>438</sup> The question, however, is if the regulation of the liability of carriers and shippers under the Rotterdam Rules is, in essence, different than under the current liability systems.

South Africa currently uses a hybrid system of the Hague-Visby Rules. COGSA extended the application of the original Hague-Visby Rules and added provisions to fill the shortcomings of the convention.<sup>439</sup> In 2008 the Department of Transport released the Draft South African Maritime Transport Policy 2008<sup>440</sup> which stated that efficient transport services and ensuring the safe and timely arrival of cargo are prerequisite to competitive trading. One of the aims and objectives of the policy is to ensure the efficient, visible and reliable transportation of cargo which is flexible to allow for new technologies and changing market conditions.<sup>441</sup> The writer agrees with Gordan<sup>442</sup> that the multimodal and modern nature of the Rotterdam Rules may help to realise the objectives in the Draft South African Maritime Transport Policy. Acceding to and ratifying the Rotterdam Rules may be beneficial to South Africa's international trade image as it may be seen as a step towards bringing South Africa in line and up to date with modern shipping practices.<sup>443</sup> It is however important to note that the signing and ratification of the Rotterdam Rules will have legislative implications.<sup>444</sup> It is submitted that it may be worth the effort as the Rotterdam Rules is a much more modern liability system, compared to its predecessors, which serves the interest of all parties equally. Both Hare<sup>445</sup> and Gordon<sup>446</sup> are of opinion that the Rotterdam Rules will serve the South African shipping industry better than the current legislative system as well as allow South Africa to enjoy the many benefits of offered by the Rotterdam Rules. It is the view of the writer that the Rotterdam Rules will better promote international trade.

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438 See par 3 above. Berlingieri 2008 <http://www.cmi2008athens.gr>.

439 See par 4 above for the discussion on South African law with regard to carriage of goods by sea is discussed.

440 South Africa Department of Transport 2008 <http://www.gov.za>.

441 South Africa Department of Transport 2008 <http://www.gov.za>; Gordan *Rotterdam Rules* 171.

442 Gordan *Rotterdam Rules* 171.

443 See par 5 above.

444 Existing legislation will become obsolete and unnecessary and amendments will be needed (Gordan *Rotterdam Rules* 175; Hare *Shipping Law* 208). See par 5 above for a discussion on the comparison of South African legislation and the Rotterdam Rules.

445 Hare *Shipping Law* 206.

446 Gordan *Rotterdam Rules* 205.

There are, however, certain reservations, referred to below. Whether South Africa accede to the Rotterdam Rules is to be seen.

The Rotterdam Rules have received criticism from various stakeholders. Among the critique were submissions that the Rotterdam Rules may put some shippers in a worse position as than before the Hague Rules were introduced.<sup>447</sup> This submission is based on the opinion that the Rotterdam Rules present unequal obligations and liabilities for carriers and shippers and that, under the Rotterdam Rules, it will be more onerous for a shipper to prove fault than under other maritime systems.<sup>448</sup> Article 17 sets out the basis of the carrier's liability. The carrier will be liable for all or part of the loss, damage or delay to the goods during the period of the carrier's responsibility as proved by the claimant.<sup>449</sup> The first part of the article confirms the carrier's presumed fault. The shipper merely has to prove that the loss to, damage of or delay in delivery of the goods was caused during the period that the carrier was in possession of the goods.<sup>450</sup> The second part of the article shifts the *onus* of proof to the carrier to show that the cause or one of the causes is not attributable to his fault or that of his contractors<sup>451</sup> or the loss or damage or delay falls under the exceptions.<sup>452</sup> The significant importance of this provision is the apportionment of damage. The writer is of the view that causation should play an important role when determining "one of the causes". The carrier must show that the cause or one of the causes which *materially* contributed to the damage to, loss of or delay in delivery of the goods is not attributable to his fault or the fault of the persons for whom he is responsible. The cause should have materially contributed to the loss or damage.<sup>453</sup> If the carrier elects to use the list of exceptions from the two defences available to it, the shipper has the obligation of proving that the loss was or was most probably caused by or contributed by the ship being either unseaworthy or due to inadequate holds or containers, or improper crewing of the vessel.<sup>454</sup> This places a heavy burden of proof on the shipper and furthermore, the carrier shall be liable only for that part of the loss which the shipper may be proves as being the

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447 European Shipper's Council 2009 <http://www.comitemaritime.org>.

448 See par 3.2.2 above.

449 Article 17(1) of the Rotterdam Rules.

450 See par 3.2.2 above

451 Article 17(2) of the Rotterdam Rules.

452 Article 17(3) of the Rotterdam Rules.

453 See par 3.2.1.

454 See par 3.2.2 above. Article 17(4) of the Rotterdam Rules; De Aguirre 2009 *Unif L Rev* 882; European Shipper's Council 2009 <http://www.comitemaritime.org>; Gordan *Rotterdam Rules* 86.

carrier's fault.<sup>455</sup> The writer agrees with this criticism of the Rotterdam Rules in that the constant shift of the burden of proof and the extensive list of exceptions available to the carrier places a rigorous burden on the shipper.

The European Shipper's Council further raised the concern regarding the limitation on liability and the compensation a shipper may claim for loss or damage to goods which are containerised.<sup>456</sup> In terms of the Rotterdam Rules, package limitations may be invoked only if the packages are itemised in the transport documents,<sup>457</sup> and an oversight in this regard may leave a shipper unable to claim damages from the carrier.<sup>458</sup> It is the view of the writer that, calculating the per package amount where goods have been consolidated by referring to the transport documents, has been a familiar feature since the Hague-Visby Rules. The Rotterdam Rules therefore do not place a heavier burden on the shipper.<sup>459</sup>

The European Shipper's Council also criticised the Rotterdam Rules' obligations on the shipper,<sup>460</sup> labelling the obligations as "more onerous than under previous maritime conventions".<sup>461</sup> In terms of the Rotterdam Rules, the shipper must ensure the goods it delivers are in such a condition as to withstand the carriage and that the goods are suitable for loading, handling, stowing, lashing, securing and unloading and that the goods will not cause harm to persons and property.<sup>462</sup> The European Shipper's Council is of opinion that the carrier should have some responsibility in this regard. It is submitted that these obligations do increase the shipper's liability, however it is justified. The carrier does in fact have responsibility in this regard as the carrier is required to care for the cargo throughout the period of responsibility.<sup>463</sup>

Furthermore, the provision regarding deck cargo and the carriage of live animals were also scrutinised. Cargo carried on deck may not incur the same rights for the shipper

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455 See par 3.2.2 above.

456 European Shipper's Council 2009 <http://www.comitemaritime.org>.

457 See par 3.2.7 above. Article 59(2) of the Rotterdam Rules.

458 European Shipper's Council 2009 <http://www.comitemaritime.org>.

459 See par 3.2.7 above for the discussion on the limitation of liability in terms of the Rotterdam Rules.

460 Chapter 7 of the Rotterdam Rules. See par 3.2 above for the discussion on the obligations of shippers under the Rotterdam Rules.

461 European Shipper's Council 2009 <http://www.comitemaritime.org>; Gordan *Rotterdam Rules* 88.

462 Article 27(1) of the Rotterdam Rules.

463 See par 3.2.3 above. The period of responsibility has been extended to door-to-door which places a heavier burden on the carrier.

as what a shipper would have had the cargo been stowed below.<sup>464</sup> These provisions may allow the carrier to limit its liability as there is no requirement that the carrier inform the shipper where the goods will be stowed.<sup>465</sup> However, it is the view of the writer that the shipper has the option to special instructions with regard to the stowing of the goods.<sup>466</sup>

It is clear from the above that the majority of the European Shipper's Council's criticism is related to the obligations of the shipper. There seems to be an oversight of the extension of the scope of application and the period for responsibility under the Rotterdam Rules, which is quite burdensome on the carrier, in comparison with the previous liability systems. Furthermore, the purpose of the Rotterdam Rules is to balance the liabilities of the carrier and shipper and it is opined that the Rotterdam Rules took a step in the right direction.

The International Federation of Freight Forwarders Association and the European Association for Forwarding Transport Logistics and Customs Services<sup>467</sup> have also criticised the Rotterdam Rules as being strenuous on the shipper.<sup>468</sup> Under the Rotterdam Rules the freight forwarder will be subjected to the obligations and liabilities imposed on the shipper, as the documentary shipper.<sup>469</sup> This will inevitably make the freight forwarder directly responsible to the carrier. It is therefore understandable that these stakeholders find the provision in the Rotterdam Rules regarding the obligations and liabilities of the shipper as unfair and favouring the carrier. The Rotterdam Rules will however not an impact have on the contractual relationship between the shipper and the freight forwarder. The parties are free to agree to terms and conditions which will regulate their legal relationship in the event of the freight forwarder being held liable by the carrier.

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464 European Shipper's Council 2009 <http://www.comitemaritime.org>.

465 Article 25 of the Rotterdam Rules; De Aguirre 2009 *Unif L Rev* 883; European Shipper's Council 2009 <http://www.comitemaritime.org>.

466 See par 3.3.5 above.

467 It should be noted that it is current practice for the freight forwarder to be named the "shipper" in the transport document or electronic record. Under the Rotterdam Rules this will mean the freight forwarder is the documentary shipper (Nikaki and Soyer 2012 *Berkeley J Int'l Law* 345). In its most straightforward form, the relationship between the freight forwarder and its customer is one of agency (Gordan *Rotterdam Rules* 95, 99).

468 International Federation of Freight Forwarders Association 2009 <http://www.uncitral.org>; European Association for Forwarding, Transport, Logistics and Customs Services 2009 <http://www.clecat.org>; Gordan *Rotterdam Rules* 95, 99.

469 See par 3.3.2 above. Article 27-29 of the Rotterdam Rules; Gordan *Rotterdam Rules* 95, 99.

A significant amount of the criticism against the Rotterdam Rules relate to the codification of the obligations and liabilities of the shipper's corresponding obligations to the carrier. The current liability systems do not directly address these obligations and it has traditionally been governed by the applicable domestic law or contract.<sup>470</sup> If the purpose and aim of the Rotterdam Rules are taken into account, it is clear that, to establish international uniformity and legal certainty, both the carrier and shipper must have legal obligations and rights derived from the same instrument. As mentioned earlier the writer is of the view that it is therefore necessary to clearly articulate the obligations of the shipper.

The attitude from carrier stakeholders mainly reflect that the Rotterdam Rules changed the basis of liability of the carrier from an incomplete fault system to a complete fault system.<sup>471</sup> It would appear that the main concern from carrier stakeholders is the abolishment of the nautical fault exception and circumscription of the fire exception.<sup>472</sup> This is quite a setback for the Rotterdam Rules as these are strong stakeholders in the shipping industry. The Rotterdam Rules has also been criticised by the Belgian Maritime Law Association and the Australian Delegation as being "bias towards carriers".<sup>473</sup>

The Rotterdam Rules has also been the source of intense academic debate.<sup>474</sup> According to Karan<sup>475</sup> a new convention should introduce a new scope or major amendment into law that has not been dealt with in any other similar convention. It should not just enlarge the scope with minor amendments, which could be done through an amendment protocol. Furthermore, the Rotterdam Rules has been labelled as complexed, unclear and even unpractical.<sup>476</sup> It is submitted that the Rotterdam Rules are quite longer and more complex than the previous conventions. However, the industry itself has become more complicated and the Rotterdam Rules addresses its issues more comprehensively that its predecessors.

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470 Nikaki and Soyer 2012 *Berkeley J Int'l Law* 307; Gordan *Rotterdam Rules* 95.

471 See par 3.2.2 above. Yuzhuo and Jinlei 2012 [www.comitemaritime.org](http://www.comitemaritime.org);

472 See par 3.2.6 above.

473 Gordan *Rotterdam Rules* 105.

474 Nikaki and Soyer 2012 *Berkeley J Int'l Law* 305.

475 Karan 2011 *J Mar L & Com* 443.

476 Tetley 2008 <http://www.fd.unl.pt>; Karan 2011 *J Mar L & Com* 443; Johansson *et al* 2009 <http://www.mcgill.ca/filesmaritimelaw>.

Not all is lost, as there are also those who welcome the Rotterdam Rules as a new international liability system. The Rotterdam Rules have received strong support, not only from the signatory states, but also from various stakeholders and associations.<sup>477</sup>

The International Chamber of Shipping (hereinafter referred to as ICS) is of opinion that the development of the shipping industry and practices have created liability and documentary challenges which previous liability systems were unable to meet.<sup>478</sup> The ICS is of view that the Rotterdam Rules will be advantageous to shippers as they apply to all transport documents connected to sea carriage and aid in creating certainty and uniformity; that the Rules are an improved system for deviation in that the Rotterdam Rules does not dispossess a carrier of its right to limitations and defences; and that the Rotterdam Rules may “constitute the only international solution” to international maritime liability systems.<sup>479</sup> The European Community Shipowners’ Association tends to agree with the ICS in stating that the Rotterdam Rules enable the necessary modernisation of cargo liability rules and address the gaps which are ubiquitous in current maritime conventions.<sup>480</sup> The National Industrial Transportation League (hereinafter NITL)<sup>481</sup> is of view that the current liability systems are outdated and applied inconsistently worldwide. The NITL supports the adoption of the Rotterdam Rules as it believes that the Rules take into account modern shipping and commercial practices and will update and replace the “decades old patchwork liability regimes” which are still in force.<sup>482</sup>

The International Chamber of Commerce (hereinafter ICC) is strongly in favour of the Rotterdam Rules. The ICC holds that the Rotterdam Rules not only clarifies the *onus* of proof for all parties involved in a contract of carriage but also the defences and immunities available to carriers and intermediaries when a maritime claim is made.<sup>483</sup>

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477 Gordan *Rotterdam Rules* 127; Metuge *Hague-Rotterdam* 83; Nikaki and Soyer 2012 *Berkeley J Int’l Law* 303.

478 International Chamber of Shipping 2011 <http://www.uncitral.org>.

479 International Chamber of Shipping 2011 <http://www.uncitral.org>.

480 European Community Shipowners’ Association 2009 <http://www.ecsa.eu>; Hughes 2009 <http://www.mgn.com>; Gordan *Rotterdam Rules* 138.

481 The greater part of the members of the NITL are shippers.

482 National Industrial Transport League 2009 <http://www.nitl.org>.

483 International Chamber of Commerce 2009 <http://www.uncitral.org>; Gordan *Rotterdam Rules* 137; Nikaki and Soyer 2012 *Berkeley J Int’l Law* 346. The Rotterdam Rules does not introduce a significant change to the current method regulating burden of proof as contained in the Hague Rules 1924 and Hague-Visby Rules 1968. The only novelty is that the Rotterdam Rules spell out each of the aspects relating to this which provides clarity to all parties (Berlingieri *et al* 2009 <http://www.comitemaritime.org>).

The ICC is also of opinion that the “precision and intelligibility” of the Rotterdam Rules will minimise litigation in the maritime transport industry.<sup>484</sup>

It is safe to submit that the general comment of stakeholders and associations which are in favour of the Rotterdam Rules relate to the balance which the Rotterdam Rules provide between the interests of the carrier and the shipper.<sup>485</sup> The writer is of the view that the Rotterdam Rules do in fact clarify the roles, rights, responsibilities and duties of all parties in the carriage of goods. Both the carrier and shipper are liable for the acts of any and all of their respective performing parties.<sup>486</sup> This is a mutual obligation and imposes an equal burden on both parties. It is safe to submit that the Rotterdam Rules do indeed attempt to rectify the imbalance between the carrier and shipper found in the previous liability regimes.

In conclusion, the Rotterdam Rules brought about important changes to the international liability system which is both to the advantage and disadvantage of the carrier and shipper. Furthermore, the previous conventions are outdated and neither reflect the current international shipping industry practices nor address the problems caused by the absence of regulations. This resulted in states developing and promulgating domestic legislation which in turn leads to even greater legal uncertainty and conflict of law. It is opined that the Rotterdam Rules mirror modern day shipping practices and adequately address the shortcomings of its predecessors.

The Rotterdam Rules were opened for signing in 2009 and since then 25 countries have signed the Rotterdam Rules. The convention does not enter into force until one

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484 International Chamber of Commerce 2009 <http://www.uncitral.org>; According to Gordan *Rotterdam Rules* 138 the ICC does not take into account the average carrier and shipper as the Rotterdam Rules are rather complex.

485 Sturley 2009 *TILJ* 454-455; International Chamber of Shipping 2009 <http://www.uncitral.org>; Comité Maritime International 2008 [www.uncitral.org](http://www.uncitral.org); International Chamber of Commerce 2009 <http://www.uncitral.org>; National Industrial Transportation League 2009 <http://www.nitl.org>. The World Shipping Council, Baltic and International Maritime Council, ICS and European Community Shipowners' Association made a joint press release at the signing ceremony of the Rotterdam Rules wherein the parties proclaimed their support for the Rotterdam Rules and stated that the Rotterdam Rules provide a balance between the interest of carriers and shippers with regard to liability and the allocation of risk between these parties (World Shipping Council, Baltic & International Maritime Association, International Chamber of Shipping and European Community Shipowners' Association 2009 <http://www.uncitral.org>).

486 Article 18 and article 34 of the Rotterdam Rules.

year after ratified by the twentieth state.<sup>487</sup> Whether the Rotterdam Rules will receive the necessary ratification to replace the current liability system remains to be seen.

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487 To date only Congo, Spain and Togo have ratified the Rotterdam Rules (United Nations Information Services 2018 <http://www.unic.unvienna.org>).

## **Bibliography**

### **Literature**

Adamsson *Rotterdam Rules*

Adamsson J *The Rotterdam Rules: A Transport Convention for the Future?*  
(Thesis Lund University 2011)

Anderson 2015 *SSLR*

Anderson V "A Critical Assessment of the Rotterdam Rules' Potential to be Ratified, in Light of the Proposed Multimodal Transportation System and the Proposed Changes to the Obligations and Liability of the Carrier" 2015 *Southampton Student Law Review* 19-32

Bäckdén 2011 *J Mar L & Com*

Bäckdén P "Will the Himalaya Bring Class Down from Mount Olympus? – Impact of the Rotterdam Rules" 2011 *Journal of Maritime Law and Commerce* 115-123

Basijokas 2015 *UCLJLJ*

Basijokas S "Is the Doctrine of Deviation Only a Historical Record Today?" 2015 *UCL Journal of Law and Jurisprudence* 114-141

Baughen 1991 *LMCLQ*

Baughen S "Does Deviation Still Matter?" 1991 *Lloyd's Maritime and Commercial Law Quarterly* 70-96

Baughen *Shipping Law*

Baughen S *Shipping Law* 5<sup>th</sup> ed (Routledge Oxon 2012)

Carr *International Trade*

Carr I *International Trade Law* 4<sup>th</sup> ed (Routledge-Cavendish Oxon 2010)

Chalos *Cargo Conventions*

Chalos M *Shipping at a Glance: Cargo Conventions* 7<sup>th</sup> ed (Hill Taylor Dickinson London 2003)

Chuah *Law of International Trade*

Chuah JCT *Law of International Trade: Cross-Border Commercial Transactions* 5<sup>th</sup> ed (Sweet & Maxwell London 2009)

Clarke *Maritime Law Evolving*

Clarke M (ed) *Maritime Law Evolving* (Hart Publishing Oregon 2013)

Cullen *Ocean Carriage – Hague Visby Rules (better the devil you know...?)*

Cullen PJ “Ocean Carriage – Hague Visby Rules (better the devil you know...?)” in Canadian Maritime Law Association Conference on Carriage of Goods and Passengers in the 21<sup>st</sup> Century 9 June 2008 Vancouver 1-24

Dağlı *Obligations and Liability*

Dağlı OB *Analyse Obligations and Liability of the Carrier under the Rotterdam Rules with Comparison between Visby Protocol and Hamburg Rules* (Dissertation ITU 2013)

De Aguirre 2009 *Unif L Rev*

De Aguirre CF “The Rotterdam Rules Seen by a Country that is a Consumer of Shipping Services” 2009 *Uniform Law Review* 869-884

Dockray *Cases & Material on Carriage*

Dockray M *Cases & Materials on the Carriage of Goods by Sea* 3<sup>rd</sup> ed (Cavendish Publishing London 2004)

Donovan 1979 *Maritime Lawyer*

Donovan JJ “The Hamburg Rules: Why a New Convention on Carriage of Goods by Sea” 1979 *Maritime Layer* 1-16

Drew *Limitation of Shipowner’s Liability*

Drew D *Limitation of Shipowners' Liability – The “New Law”* (Dissertation UCT 1992)

Dyason 2001 *J Mar L & Com*

Dyason J “South African Maritime Law – An Overview of Some Developments” 2001 *Journal of Maritime Law and Commerce* 475-500

Faghfour 2006 *WMU JoMA*

Faghfour M “International Regulation of Liability for Multimodal Transport – Search for Uniformity” 2006 *World Maritime University Journal of Maritime Affairs* 95-114

Faria 2011 *Elon Law Review*

Faria JAE “Uniform Law and Functional Equivalence: Diverting Paths or Stops along the Same Road – Thoughts on a New International Regime for Transport Documents” 2011 *Elon Law Review* 1-28

Fujita *Coverage of the Rotterdam Rules*

Fujita T “The Coverage of the Rotterdam Rules” in CMI Colloquium and Assembly 24-27 October 2010 Buenos Aires 1-6

Fujita *Shipper's Obligations and Liabilities*

Fujita T *Shipper's Obligations and Liabilities under the Rotterdam Rules* (Dissertation University of Tokyo 2011)

Force 1996 *Tulane Law Review*

Force R “A Comparison of the Hague, Hague-Visby, and Hamburg Rules: Much Ado About (?)” 1996 *Tulane Law Review* 2051-2089

Girvin 1997 *SA Merc LJ*

Girvin SD “Third Party Rights Under Shipping Contracts in English and South African Law” 1997 *South African Mercantile Law Journal* 97-122.

Girvin *Carriage of Goods by Sea*

Girvin SD *Carriage of Goods by Sea 2<sup>nd</sup> ed* (Oxford University Press New York 2011)

Gordan *Rotterdam Rules*

Gordon G *The Rotterdam Rules: A South African Perspective* (Thesis Rhodes University 2012)

Günter-Özbek *United Nations Convention*

Günter-Özbek MD (ed) *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Springer-Verlag Berlin 2011)

Hamid "Rotterdam Rules or Hybrid"

Hamid AG "Rotterdam Rules or Hybrid: The Likelihood for Harmonisation" in MIMA Seminar *The UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) and its Implication to Malaysian Shippers, Carriers and Consignees* 29 September 2010 Kuala Lumpur 1-9

Hare *Shipping Law*

Hare J *Shipping Law & Admiralty Jurisdiction in South Africa 2<sup>nd</sup> ed* (Juta Law Kenwyn 2009)

Hashmi 2012 *Loy Mar L J*

Hashmi D "The Rotterdam Rules: A Blessing?" 2012 *Loyola Maritime Law Journal* 227-268

Hoeks *Multimodal Transport*

Hoeks M *Multimodal Transport Law* (Kluwer Law International Netherlands 2010)

Honnold 1993 *J Mar L & Com*

Honnold JO "Ocean Carriers and Cargo, Clarity and Fairness – Hague or Hamburg" 1993 *Journal of Maritime Law and Commerce* 75-109

Hooper 2009 *Unif L Rev*

Hooper CD "Obligations of the Shipper to the Carrier under the Rotterdam Rules (Chapter 7)" 2009 *Uniform Law Review* 885-892

Karan 2011 *J Mar L & Com*

Karan H "Any Need for a New International Instrument on the Carriage of Goods by Sea: The Rotterdam Rules?" 2011 *Journal of Maritime Law and Commerce* 441-452

Lannan 2009 *Unif L Rev*

Lannan K "Behind the Numbers: The Limitation on Carrier Liability in the Rotterdam Rules" 2009 *Uniform Law Review* 901-929

Lejnieks "Diverging Solutions"

Lejnieks M "Diverging Solutions in the Harmonisation of Carriage of Goods by Sea: Which Approach to Choose?" in Acts of the 75<sup>th</sup> Anniversary Congress of the International Institute for the Unification of Private Law (UNDRIT) on *Worldwide Harmonisation of Private Law and Regional Economical Integration* 27-28 September 2002 Rome 303-307

Luddeke *et al Marine Claims*

Luddeke C *et al Practical Guides Marine Claims* 2<sup>nd</sup> ed (LLP Limited London 1996)

Metuge *Hague to Rotterdam*

Metuge DN *Carriage of Goods By Sea – From Hague to Rotterdam: Safer Waters* (Thesis Nelson Mandela Metropolitan University 2012)

Moore 1978 *J Mar L & Com*

Moore JC "The Hamburg Rules" 1978 *Journal of Maritime Law and Commerce* 1-11

Myburgh 2000 *VUWLR*

Myburgh P “Uniformity or Unilateralism in the Law of Carriage of Goods by Sea” 2000 *Victoria University of Wellington Law Review* 355-382

Myburgh 2002 *NZBLQ*

Myburgh P “All that Glisters: The Gold Clause, the Hague Rules and Carriage of Goods by Sea” 2002 *New Zealand Business Law Quarterly* 260-265.

Nicoll 1993 *J Mar L & Com*

Nicoll CC “Do the Hamburg Rules Suit a Shipper-Dominated Economy” 1993 *Journal of Maritime Law and Commerce* 151-179

Nikaki and Soyer 2012 *Berkeley J Int’l Law*

Nikaki T and Soyer B “A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive AND Efficient, or Just Another One for the Shelves?” 2012 *Berkeley Journal of International Law* 303-348

O’Hare 1977 *Monash U L Rev*

O’Hare CW “Allocating Shipment Risks and the UNCITRAL Convention” 1977 *Monash University Law Review* 117-154

Pallarés 2011 *J Mar L & Com*

Pallarés LS “A Brief Approach to The Rotterdam Rules: Between Hope and Disappointment” 2011 *Journal of Maritime Law & Commerce* 453-463

Pejovic 2015 *JLIA*

Pejovic C “Clean Bill of Lading in Contract of Carriage and Documentary Credit: When Clean may not be Clean” 2015 *Penn State Journal of Law and International Affairs* 127-150

Ramberg *et al Guide to Export-Import*

Ramberg J *et al Guide to Export-Import Basics* (International Chamber of Commerce Paris 2008)

Ramsden 1989 *J Mar L & Com*

Ramsden WA "Maritime Law in South Africa: Recent Developments" 1989  
*Journal of Maritime Law and Commerce* 191-198

Reynolds "The Hague Rules, the Hague-Visby Rules and the Hamburg Rules"  
Reynolds F "The Hague Rules, the Hague-Visby Rules and the Hamburg  
Rules" in Maritime Law Association of Australia and New Zealand *New  
Zealand Branch Conference* April 1990 Tokaanu 16-34

Reynolds and Tsimplis *Shipowners' Limitation of Liability*  
Reynolds BWB and Tsimplis MN *Shipowners' Limitation of Liability* (Kluwer  
Law International Netherlands 2012)

Schoenbaum *Admiralty and Maritime*  
Schoenbaum TJ *Admiralty and Maritime Law* 3<sup>rd</sup> ed (West Group Minn 2001)

Selvig 1981 *J Mar L & Com*  
Selvig E "The Hamburg Rules, the Hague Rules and Maritime Insurance  
Practice" 1981 *Journal of Maritime Law and Commerce* 299-326

Singh *Law of Carriage*  
Singh L *The Law of Carriage of Goods by Sea* (Bloomsbury Professional Ltd  
United Kingdom 2011)

Staniland 1987 *LMCLQ*  
Staniland H "The New Carriage of Goods by Sea Act in South Africa" 1987  
*Lloyd's Maritime and Commercial Law Quarterly* 305-316

Staniland 1992 *LMCLQ*  
Staniland H "The Himalaya Clause in South Africa" 1992 *Lloyd's Maritime and  
Commercial Law Quarterly* 317-322

Sturley 2009 *TILJ*  
Sturley MF "Modernizing and Reforming U.S. Maritime Law" 2009 *Texas  
International Law Journal* 427-455

Tetley 1983 *J Mar L & Com*

Tetley W "An Update of the Per Package Limitation" 1983 *Journal of Maritime Law and Commerce* 331-344

Tetley *Marine Cargo Claims*

Tetley W *Marine Cargo Claims* 3<sup>rd</sup> ed (International Shipping Publications Canada 1988)

Tetley 1999 *McGill Law Journal*

Tetley W "The Demise of the Demise Clause?" 1999 *McGill Law Journal* 807-848

Thomas 2010 *NTVH*

Thomas RD "Special Liability Regimes under the International Conventions for the Carriage of Goods by Sea – Dangerous Cargo and Deck Cargo" 2010 *Nederlands Tijdschrift Voor Handelsrecht* 197-202

Thompson 1992 *BLR*

Thompson SM "The Hamburg Rules: Should They be Implemented in Australia and New Zealand?" 1992 *Bond Law Review* 168-185

Van Niekerk 1993 *SA Merc LJ*

Van Niekerk JP "Carriage of Goods by Sea" 1993 *South African Mercantile Law Journal* 78-98

Van Niekerk and Schulze *South African Law*

Van Niekerk JP and Schulze WG *The South African Law of International Trade: Selected Topics* 3<sup>rd</sup> ed (SAGA Legal Publications Pretoria 2011)

Von Ziegler 2009 *Unif L Rev*

Von Ziegler A "Delay and the Rotterdam Rules" 2009 *Uniform Law Review* 997-1009

Von Ziegler 2010 *EJCCL*

Von Ziegler A "Compensation for Damage: The Rotterdam Rules Appraised"  
2010 *European Journal of Commercial Contract Law* 51-62

Von Ziegler, Schelin and Zunarelli (eds) *Rotterdam Rules*

Von Ziegler A, Schelin J and Zunarelli S (eds) *The Rotterdam Rules 2008*  
(Kluwer Law International Netherland 2010)

Wilson *Carriage of Goods by Sea*

Wilson J *Carriage of Goods by Sea* 2<sup>nd</sup> ed (Pitman Publishing London 1993)

Zeller 2017 *ITBLR*

Zeller B "Himalaya v Privity: Protecting Third Parties to Shipping Contracts"  
2017 *International Trade and Business Law Review* 33-175

Zhou *Carrier's Obligations and Liabilities*

Zhou B *Carrier's Obligations and Liabilities in International Sea Carriage: A Comparative Study of the Nordic Maritime Codes, Chinese Maritime Codes and the Rotterdam Rules* (Thesis University of Helsinki 2014)

Zondo *Limitation of Liability for Maritime Claims*

Zondo W *Limitation of Liability for Maritime Claims: A South African Perspective* (Dissertations World Maritime University 2016)

Zunarelli 2009 *Unif L Rev*

Zunarelli S "The Carrier and the Maritime Performing Party in the Rotterdam Rules" 2009 *Uniform Law Review* 1011-1023

## **Case Law**

*Achille Lauro Fu Gioacchino and Co v Total Societa Italiana Per Azioni* 1698 2  
Lloyd's Rep 247

*Adler v Dickson* 1954 2 Lloyd's Rep 267

*Albacorra SRL v Westcott and Laurance Line Ltd* 1966 2 Lloyd's Rep 53

*GH Renton & Co Ltd v Palmyra Trading Corporation of Panama (The Caspiana)* 1956 2 Lloyd's Rep 579

*Kyokuyo Co Ltd v A.P. Moller-Maersk A/S (The Maersk Tangier)* 2017 1 CLC 253

*Maxine Footwear Co v Canadian Government Merchant Marine Ltd* 1959 2 Lloyd's Rep 105

*Mutual and Federal Insurance Co v Oudtshoorn Municipality* 1985 1 SA 419 A

*New Zealand Shipping Co Ltd v AM Satterthwaite and Co Ltd (The Eurymedon)* 1975 AC 169

*Northern Shipping Co v Deutsche Seeleederei G.m.b.H and Others (The Kapitan Sakharov)* 2000 2 Lloyd's Rep 255

*Reardon Smith Line v Black Sea and Baltic General Insurance* 1939 AC 562 HL

*Riverstone Meat Co (Pty) Ltd v Lancashire Shipping Co (The Manchester Castle)* 1961 1 Lloyd's Rep 57

*Santam Insurance Company Limited v SA Stevedores Limited* 1989 1 SA 182 (D)

*Serena Navigation Ltd v Dera Commercial Establishment (The Limnos)* 2008 1 Lloyd's Rep 50

*Stag Line Ltd v Foscolo Mango and Co Ltd* 1932 AC 328

*The Bouygues Offshore and Another v Owner of the MT Tigr and Another* 1995 4 SA 49 (C)

## **Legislation**

*Admiralty Jurisdiction Act* 105 of 1983

*Carriage of Goods by Sea Act* 1 of 1986

*Constitution of the Republic of South Africa*, 1996

*Merchant Shipping Act* 57 of 1951

*Sea Transport Act* 65 of 2000

*Shipping General Amendment Act* 23 of 1997

## International Instruments

*Convention for the Contracts for the International Carriage of Goods Wholly or Partly by Sea* (2008)

*Convention on the Limitation of Liability for Marine Claims* 1976

*International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* (1924)

*Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading* (1968)

*United Nations International Conventions on the Carriage of Goods by Sea* (1978)

## Internet Sources

Anonymous Date Unknown *Contract of Carriage* <http://www.lawteacher.net/free-law-essays/contract-law/contract-of-carriage.php#ixzz3wCdz4Q00> [date of access 25 Nov 2015]

Anonymous 2010 *Himalaya Clauses – Are Third Parties Hague Carriers* <https://www.steamshipmutual.com/publications/Articles/Whitesea0210.html> [date of access 24 June 2017]

Berlingieri F 2008 *Carrier's Obligations and Liabilities* <http://www.cmi2008athens.gr/sub3.5.pdf> [date of access 14 Sept 2015]

Berlingieri F *et al* 2009 *The Rotterdam Rules: An Attempt to Clarify Certain Concerns that have emerged* <http://www.comitemaritime.org/draft/pdf/5RRULES.pdf> [date of access 25 June 2017]

Berlingieri F 2009 *A Comparative Analysis of The Hague-Visby Rules, The Hamburg Rules and the Rotterdam Rules* [https://www.uncitral.org/pdf/english/workinggroups/wg\\_3/Berlingieri\\_paper\\_comparing\\_RR\\_Hamb\\_HVR.pdf](https://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf) [date of access 14 Sept 2015]

Berlingieri F 2012 *An Analysis of Two Recent Commentaries of the Rotterdam Rules* <http://www.comitemaritime.org/Uploads/An%20analysis%20of%20two%20recent%20commentaries%20of%20the%20RR-F.Berlingieri.pdf> [date of access 25 June 2017]

Comitè Maritime International 2008 *Resolution Adopted at the 39<sup>th</sup> CMI Conference on the UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea in Athens 17 October 2008* [http://www.uncitral.org/pdf/english/texts/transport/rotterdam\\_rules/CMI\\_endorsements\\_17\\_October2008](http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/CMI_endorsements_17_October2008) {date of access 25 June 2017}

Diamond A 2008 *The Next Sea Carriage Convention?* <http://www.ilaw.com/ilaw/doc/view.htm?id=165211m>. [Date of access 09 Aug 2015]

European Association for Forwarding, Transport, Logistic and Customs Services 2009 *Position Paper RE: 2008 - United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules") - CLECAT*  
<http://www.clecat.org/dmdocuments/PP0OOMAmaO9O529PosPapRottRules.pdf>  
[date of access 20 June 2017]

European Community Shipowners' Association 2009 *ECSA Annual Report 2008-2009* [http://www.ecsa.eu/images/files/downloads\\_annualreports/Rapport%202008-2009.pdf](http://www.ecsa.eu/images/files/downloads_annualreports/Rapport%202008-2009.pdf) [date of access 27 June 2017]

European Shippers' Council 2009 *View of the European Shippers' Council on the Convention on the Contracts for the International Carriage of Goods Wholly or Partly by Sea known as the "Rotterdam Rules"* <http://www.comitemaritime.org/drafi/pdf12ESC.pdf> [date of access 20 June 2017]

Hasan ZB and Ismail N 2007 *The Weakness of the Hague Rules and the Extent of Reforms Made by the Hague-Visby Rules* <http://www.ssm.com/abstract=2234211>  
[date of access 03 Sept 2014]

Hughes D 2009 *ECSA backs Rotterdam Rules*  
<http://www.mgn.com/news/dailystorydetails.cfm?storyid=10023> [date of access 20 June 2017]

International Chamber of Commerce 2009 *Comments on the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules)*  
[http://www.uncitral.org/pdf/english/texts/transport/rotterdam\\_rules/ICC\\_Statement\\_27\\_May2009.pdf](http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/ICC_Statement_27_May2009.pdf) [date of access 03 March 2018]

Igbokwe M 2001 *Contracts of Sale & Carriage of Goods*  
<http://www.mikeigbokwe.com> [date of access 03 March 2016]

International Chamber of Shipping 2011 *A Position Paper by the International Chamber of Shipping*  
[http://www.uncitral.org/pdf/english/texts/transport/rotterdam\\_rules/ICS\\_PositionPaper.pdf](http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/ICS_PositionPaper.pdf) [date of access 20 June 2017]

International Federation of Freight Forwarders Association 2009 *Position on the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules") UNCITRAL*

<http://www.uncitral.org/pdf/english/texts/transport/rotterdam-rules/FATApaper.pdf>  
[date of access 20 June 2017]

Johansson S, Oland A, Pysden K, Ramberg J, Tetley W and Schmitt D 2009 *A Response to the Attempt to Clarify Certain Concerns over the Rotterdam Rules*  
<http://www.mcgill.ca/files/maritimelaw/Summationpdf.pdf> [date of access 27 June 2017]

Katsivela M 2010 *Overview of Ocean Carrier Liability Exceptions Under the Rotterdam Rules and Hague- Hague/Visby Rules*  
<http://www.id.erudit.org/iderudit.1026957ar> [date of access 13 Aug 2015]

Lannan K 2009 *The Launch of the Rotterdam Rules*  
[http://www.shhsfy.gov.cn/hsinfoplat/platformData/infoplat/pub/hsenglish\\_42/docs/200911.doc](http://www.shhsfy.gov.cn/hsinfoplat/platformData/infoplat/pub/hsenglish_42/docs/200911.doc) [date of access 06 Jun 2015]

Livermore *et al* 1998 *Electronic Bill of Lading and Functional Equivalence*  
[http://elj.warwick.ac.uk/fac/soc/law/elj/jilt/1998\\_2livermore/](http://elj.warwick.ac.uk/fac/soc/law/elj/jilt/1998_2livermore/) [date of access 29 March 2018]

Marin J 2012 *The Rotterdam Rules – An Overview of Their Key Provisions*  
<http://www.bib.irb.hr/datoteka/49470.Marin.pdf> [date of access 16 Aug 2014]

Mbiah K Date Unknown *Updating the Rules on International Carriage of Goods by Sea: The Rotterdam Rules* <http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Paper%20of%20Kofi%20Mbiah.pdf> [date of access 05 May 2014]

National Industrial Transportation League 2009 *Response of National Industrial Transportation League to European Shippers' Council's Position Paper on the Rotterdam Rules* <http://www.nitl.org/NITLRESPONSEPAPER.pdf> [date of access 20 June 2017]

Saad S 2011 *Global Reference Guide: Infrastructure 2011 Carriage of Goods by Sea – An Overview* <http://www.financierworldwide.com> [date of access 18 Oct 2014]

Schelin J 2013 *Shipper's Obligations under the Rotterdam Rules – A Fundamental Change of View* <http://www.maritimelawlibrary.se/carriage-of-goods/shippers-obligations-under-the-rotterdam-rules-a-fundamental-change-of-view/> [date of access 15 Aug 2015]

South Africa Department of Transport 2008 *Draft South African Maritime Transport Policy 2008* [http://www.gov.za/sites/default/files/Draft%20Maritime%20Transport%20Policy%202008\\_0.pdf](http://www.gov.za/sites/default/files/Draft%20Maritime%20Transport%20Policy%202008_0.pdf) [date of access 08 May 2018]

Tetley W 1977 *Application of the Rules Generally*  
<http://www.dutchcivillaw.com/legislation/Hague-Visby%20comments> [date of access 10 May 2018]

Tetley W 2002 *Responsibility for Fire in the Carriage of Goods by Sea*  
[http://www.mcgill.ca/maritimelaw/maritime-admiralty/fire/#\\_ftnref30](http://www.mcgill.ca/maritimelaw/maritime-admiralty/fire/#_ftnref30) [date of access 19 Sept 2015]

Tetley W 2008 *Summary of Some General Criticisms of the UNCITRAL Convention (The Rotterdam Rules)* [http://www.fd.unl.pt/docentes\\_docs/ma/wks\\_MA\\_20185.pdf](http://www.fd.unl.pt/docentes_docs/ma/wks_MA_20185.pdf) [date of access 07 Jul 2015]

United Nations Commission on International Trade Law 2018 *Status of the Hamburg Rules 1978*  
[http://www.uncitral.org/uncitral/en/uncitral\\_texts/transport\\_goods/Hamburg\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html) [date of access 10 May 2018]

United Nations Information Services 2014 *Congo ratifies the UN Convention on Contracts for International Carriage of Goods Wholly or partly by Sea*  
<http://www.unis.unvienna.org/unis/en/pressrels/2014/unisl196.html> [date of access 29 Sept 2014]

World Shipping Council, Baltic and International Maritime Council, International Chamber of Shipping and European Community Shipowners' Association 2009 *ICS/ECSA/BIMCO/WSC Press Release: The Rotterdam Rules: Wide Support by States at the Signing Ceremony in Rotterdam*  
[http://www.uncitral.org/pdf/english/news/ICS\\_ECSEA\\_BIMCO\\_WSC\\_Press\\_release.pdf](http://www.uncitral.org/pdf/english/news/ICS_ECSEA_BIMCO_WSC_Press_release.pdf) [date of access 21 March 2018]

Yuzhuo S and Jinlei Z 2012 *An Analysis and Assessment on the Rotterdam Rules in China's Marine Industry*  
<http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Paper%20of%20Prof%20Si%20Yuzhuo%20and%20Dr.%20Zhang%20Jinlei.pdf> [date of access 14 Feb 2018]

## **Other**

UNCTAD *The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention* (United Nations New York 1991)