INTRODUCTION

Man has employed great ingenuity in devising new means of transportation at different periods of history, not only for the movement of self but also for the movement of goods. All kinds of obstacles were overcome by his pertinacity, so much so that we are burrowing today under the surface of land and sea, moving across the surface of earth and of oceans, and flying through the air. A variety of means of propulsion are being employed for these purposes: the forces of nature, animals and machines; and equally manifold are the vehicles used to satisfy this perambulatory urge.

Technological advance has radicalised the modes of transport. This has necessitated codes of conduct which would ensure the smooth movement of traffic. The rapid development of traffic during the 19th century brought about a legal regime in the highly commercialised countries where traffic had become dense. As regards maritime transport it came to be recognized that the owners of unseaworthy ships be made liable for the damage done by such a ship to others. This was the beginning of absolute
statutory responsibility in connection with traffic and today we have a good deal of legislation of this nature in most countries.

The problems of sea traffic have been quite different from that of other modes of transport. The oceans were more perilous than the roads, so ships had to be fit for the carriage and seaworthy. There were no visible lanes of traffic, so flexible yet strict rules had to be devised to regulate the difficult sailing or sometimes unfit ships. The advent of mechanical transportation speeded up traffic and led to its rapid intensification. And thus safety at sea became a matter of primary concern. And thus rules of law started evolving themselves, which cumulatively came to be known as maritime law.

What are the components of this maritime law? Maritime law is a branch of law which regulates human activity in relation to all matters maritime. The following human activity is subsumed under maritime law.

1) Human activity confined to the surface of the sea utilising it as an international highway for the passing and repassing of vehicles of commerce and thus serving the essential purpose of an ever open base of communication between States.

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ii) Human activity exploring the inner region of the sea exploiting its living and non living resources including fisheries.

iii) Human activity connected with the bottom of the sea, namely the continental shelf\(^2\) and the exploitation of the mineral resources of the sea bed.

Different branches of law govern the human activity stated in the above categorization. The first one is that branch of law which we call the Law of Merchant Shipping. The Law of Shipping or the Law of Admiralty may be defined as a corpus of rules, concepts and legal practices governing certain centrally important concerns of the business of carrying goods and passengers by water.\(^3\) The principles of law which govern the business of carrying goods and passengers by water are to be found partly in the Municipal Laws of the Maritime States and partly in multilateral treaties and international conventions a large number of which has been designed for the safe and efficient operation of maritime activity. We are here concerned with one branch of maritime law, i.e. the Law of Carriage of Goods by Sea.

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2 For the definition of continental shelf, see Article 76, Draft Convention on Law of the Sea UN Doc A/CONF.62/W.P.10/Rev.3.
Maritime law has grown out of the business customs of early seafaring traders. Various problems of legal and commercial significance must have arisen from the earliest days. The practice followed, gave rise to customary norms to govern the conduct to guarantee the smooth and trouble free functioning of trade. Not much is known today of the legal provisions that performed this function in ancient times. No formal sea code has survived from Greek or Roman antiquity, and the few glimpses we get of the working of what might today be called maritime law could at the most serve as bases for reconstructions of doubtful validity. The Courts of several maritime States have also played a significant role in clarifying and moulding many of the principles derived from ancient practice.

4 See, Ibid., p.2.
5 India had enjoyed supremacy in Maritime trade even during ancient times. For a detailed account of India's maritime activity in the ancient times, see Radha Kumud Mookerji, A History of Indian Shipping (Calcutta, 1962), p.14 ff. The author establishes India's supremacy in maritime activity and commerce in the ancient times by bringing in evidence from Sanskrit and Pali Literature, from Indian sculpture, painting and coins, and discusses the history of Indian Maritime activity from the Mauryan period to the reign of Aurangzeb. For an account of modern Indian Shipping, see, T.S. Sanjeeva Rao, A Short History of Modern Indian Shipping (Bombay, 1965), p.189 ff. Today in the East, India's merchant fleet is second only to that of Japan. With growing Industrial strength of the country and the expected expansion in her international trades, India is supposed to play a vital role in International Shipping. See Ibid., p.233.
Also see, T.K. Sarangan, "India and Shipping Conferences", Indian Shipping, vol.27, no.7 (1975), p.25. Also see T.M. Goculdas, "Future Co-operation in Liner Shipping", Ibid., n.10, p.11.
6 See Gilmore and Black, n.3, p.2.
It is generally believed that the structure of modern shipping law and the associated law has had its origin in the practice of the Italian city-states of the eleventh century. From this origin and under the protections of the civil law\(^8\) maritime law grew steadily. This influence of civil law persists even today and often the courts in common law countries too administer the civil law norms.\(^9\) When Europe witnessed the growth of the great nation States, the international law of the sea came to be assimilated into national law. Thus began the process of codification of maritime law. The principal object of the codification of rules relating to maritime trade whether it formulates existing norms, or whether it lays down rules of public law or private law, was therefore to build up a body of internationally accepted legal norms for the settlement of problems connected with maritime trade.\(^{10}\) Even though national laws constitute an important ingredient of international custom, their diversity called for international legislation.\(^{11}\)

This process in the beginning created a uniform body of maritime law under the initiative of the colonial

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8 Here the term civil law means the system based on the Roman Law as distinguished from the common law systems which had its origin in the Anglo-Saxon systems.
9 See Gilmore and Black, n.3, pp.7, 8.
10 See Thommen, n.7, p.2.
11 See Ibid., p.3.
nations and most particularly by developed nations with shipping interests. This created from the very beginning a bias in maritime law favouring carrier interests over cargo interests quite inimical to the developing countries. Most of the cargo movement has been traditionally from the developing to the developed countries. The less developed countries by and large do not have substantial merchant fleet. Therefore such a law basically shaped by developed nations grew to the detriment of the unorganized shipper interests of the developing countries.

If we look at the history of maritime law, we could find that the central question which has been of tremendous significance since the mid-nineteenth century is as to how the losses arising from the carriage of goods by sea should be borne. Maritime law, historically, held the carrier absolutely liable for loss or damage to cargo whether or not he was negligent and regardless of the cause of the loss. The carrier could only escape this liability if the loss or damage was caused by an act of God, public enemy, or due to inherent vice. Even these

12 See Gilmore and Black, n.3, p.119.
exceptions implied by the law did not, it would seem, apply to the shipowner unless they were expressly stipulated in the bill of lading.

Thus the carrier was deemed to be liable for any loss or damage occasioned to cargo carried on his vessel if it occurred either through his own negligence or through the unseaworthiness of the vessel. Therefore the shipowner's liability under both the common law and the civil law codes was in theory strict. It was in this background that the Brussels Convention, 1924 (otherwise known, and hereinafter cited, as the Hague Rules) was formulated.

The conceptual underpinning of the Hague Rules was not of English origin. It can be traced to the United States Harter Act of 1893, a remarkable statute enacted in the field of shipping law. The Hague Rules brought about uniformity of rules of law in the field of shipping. It suited the needs of the merchant community and with the growth of trade many States enacted national laws for the regulation of international commerce and navigation. Many states without being a party to the Hague Rules had given effect to the Hague Rules by enacting similar
municipal legislations. The primary objective of the Hague Rules was threefold. Firstly, the Hague Rules were meant to help all shipping interests by creating a uniformity in rules, which they always deemed essential for their work. It clearly defined the rights and liabilities of cargo-owners and carriers, which had been given conflicting definitions and interpretations in different countries, creating considerable difficulties in maritime trade. Secondly, it was meant to standardize within certain limits the rights of the holder of every bill of lading in relation to the shipowner. A standardized bill of lading would benefit consignees, bankers, and others who were not parties to the original contract and did not effectively control its terms. Thirdly, it was meant to expedite quick settlement of disputes by laying down a one-year time limitation. Where the defendants accepted liability and the nature and value of the goods were not declared and inserted in the bill of lading, claimants could accept the maximum limit allowed under the Rules (£100 per package or unit) rather than going in for protracted litigation.14

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13 For example, India and Soviet Union are not parties to the Hague Rules. But they had through municipal legislations vis. The Carriage of Goods by Sea Act 1925 and the Merchant Shipping Code of 1929 respectively given effect to the Hague Rules. For a detailed discussion of this, see Thorsten, n.7, p.1.
What was desired by the adoption of the Hague Rules was the establishment of just solutions taking account of the interests of shippers and carriers, by standardizing the liabilities of carriers at an international level. But in its day-to-day operation the Hague Rules created problems of interpretation and inadequacy. Therefore the need was felt to amend those parts of the Hague Rules which were thought to be defective. Thus in 1959 the Comité Maritime International (CMI) took the initiative in revising the Hague Rules by proposing positive recommendations to formulate an additional Protocol to the Hague Rules, that did not disturb its general scheme. This led to the enactment of the Brussels Protocol of 1969. 15

Later, it was felt that both the Hague Rules and the 1968 Protocol had not taken into consideration the interests of the developing countries in as much as both these instruments served essentially the interests of the shipowners by allowing them to exempt themselves from practically every liability in ocean carriage. 16 As and

when a court decision went against the carrier, they resorted to inserting a fresh clause in their bill of lading to nullify such result in future. Thus bills of lading came to include stipulations to the effect that the carrier was not to be liable for the results of his own negligence or that of his employees. Another abuse of the unlimited freedom of contract by the carriers was their indiscreet insertion of choice of law and choice of forum clauses in bills of lading. The carriers chose the law of those countries which suited their interests to the great detriment of the shippers. In the same way, the choice of the forum of jurisdiction created difficulties for the shippers to travel miles to settle their disputes. This created great dissatisfaction amongst the cargo-interests mainly in the developing countries. The voice of the developing countries was raised against excessive exemptive privileges for carriers, exoneration from negligence in key shipowner operations such as navigation and restrictive jurisdiction clauses incorporated in bills of lading. It came to be realized that a solution would have to be based on an entirely new international agreement in order to be of any practical value in modern international trade.
Thus for the first time at the intergovernmental level the developing countries raised their voice favouring radical revision of the Hague Rules at the Delhi session of UNCTAD in 1969. Later in 1970 the UNCTAD prepared a detailed study containing a number of proposals for the revision of the Hague Rules.

The UNCTAD study examined various aspects of the Hague Rules and came out with the following findings:

(a) Uncertainties arising from vague and ambiguous wording in certain areas of the Rules which lead to conflicting interpretations (and which complicate such matters as the allocation of responsibility for loss or damage to cargo; and the burden of proof, this being subject of complaints by both carrier and cargo interests)

(b) The continued retention in bills of lading of exonerating clauses of doubtful validity, and the existence of restrictive exemption and time limitation clauses in the terms under which cargo is deposited with warehouses and port authorities;

(c) Exemptions in the Hague Rules which are peculiar to ocean carriage in cases where the liability should logically be borne by the ocean carrier, such as those which excuse him from liability in respect of the negligence of his servants and agents in the navigation and management of the vessel, and in respect of perils of the sea etc.

17 See UN Doc. TD/B/C.4/ISL/19
18 See UN Doc. TD/B/C.4/ISL/6
(d) The uncertainties caused by the interpretation of terms used in the Hague Rules, such as "reasonable deviation", "due diligence", "properly and carefully" "in any event", "loaded on", "discharge";

(e) The ambiguities surrounding the seaworthiness of vessels for the carriage of goods;

(f) The abysmally low unit limitation of liability;

(g) Manifestly unfair jurisdiction and articulation clauses;

(h) The insufficient legal protection for cargoes with special characteristics that require special stowage, adequate ventilation, etc., and cargoes requiring deck shipment;

(i) clauses which apparently permit carriers to divert vessels and to tranship or land goods short of or beyond the port of destination specified in the bill of lading at the risk and expense of cargo owners;

(j) clauses which apparently entitle carriers to deliver goods into the custody of shore custodians on terms which make it almost impossible to obtain settlement of cargo claims from either the carrier or the warehouse.19

The UNCTAD desired the UNCITRAL to take up the work on international shipping legislation. Later, the Sixth Committee of the General Assembly debated the question of entrusting the work on international shipping legislation to the UNCITRAL. The twenty fourth session of the General

Assembly in its resolution 2502(xxiv)\textsuperscript{20} stated that it, "Endorses the inclusion by the UNCTRAL on the basis indicated in its report of International Legislation on Shipping among the priority topics in its programme of work."\textsuperscript{21} Thus the UNCTRAL established a Working Group on International Legislation on Shipping.\textsuperscript{22} The mandate given to the Working Group was "to indicate the topics and method of work on the subject" giving full regard to the recommendations of UNCTAD and any of its organs.\textsuperscript{23} On the basis of a working paper prepared by the Secretariat\textsuperscript{24} the possible topics and methods of work were considered by the Working Group. The Working Group decided to give priority and in-depth consideration to the subject of bills of lading.\textsuperscript{25} The Working Group wanted the revision and amplification of the rules contained in the Hague Rules and in the 1968 Protocol to amend that Convention and the formulation of new international convention under the auspices of the United Nations. It identified in precise terms the areas of consideration for revision. It wanted to mainly aim at the removal of such uncertainties.

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  \item \textsuperscript{20} See Official Records of the General Assembly, Twenty Fourth Session, supplement No.18, Doc.A/7616.
  \item \textsuperscript{21} Ibid., p.235.
  \item \textsuperscript{22} The Working Group consisted of seven members of the UNCTRAL viz. Chile, Ghana, India, United Arab Republic, USSR, UK and the USA.
  \item \textsuperscript{24} See Doc.A/CN.9/NG.3/W.P.2.
  \item \textsuperscript{25} See UNCTRAL Year Book 1971, n.23.
\end{itemize}
and ambiguities as existed and at establishing a balanced allocation of risks between the cargo owner and the carrier with appropriate provisions concerning the burden of proof. In particular, the Working Group identified the following areas for its consideration for revision.

i) Responsibility for cargo for the entire period it is in the charge or control of the carrier or his agents;

ii) The scheme of responsibilities and liabilities and rights and immunities, incorporated in articles III and IV of the 1924 Convention as amended by the Protocol and their interaction and including the elimination or modification of certain exceptions to carrier's liability;

iii) Burden of proof;

iv) Jurisdiction;

v) Responsibility for deck cargoes, live animals and trans-shipment;

vi) extension of the period of limitation;

vii) definitions under article I of the Convention;

viii) Elimination of invalid clauses in bills of lading;

ix) Deviation, seaworthiness and unit limitation of liability.

26 See UNCITRAL Yearbook 1971, n.23.
It was further decided to establish a new and enlarged Working Group on International Legislation on Shipping having regional representation and taking into account the economic interests involved in the same. The UNCITRAL then enlarged the Working Group and commenced its substantive work at its third session.

In this session the Working Group formulated draft texts on the period of carrier's responsibility, responsibility of deck cargo and live animals, clauses in bills of lading confining jurisdiction over claims to a selected forum, and approaches to basic policy decisions concerning allocation of risks between the cargo owner and the shipper.

In 1972, at its fourth session, the Working Group considered and formulated texts on the basic rules governing the responsibility of the carrier and the arbitration clauses. At its fifth session in 1973 the important problems of the unit limitation of liability, the period of limitation and the problems of transhipment and deviation were taken up. Later in 1974, the Working

Group at its sixth session considered the questions of the liability of the carrier for delay, documentary scope of application of the convention, geographical scope of application of the convention, elimination of invalid clauses, carriage of cargo on deck, carriage of live animals, definition of carrier and contracting carrier, definition of actual carrier and the definition of ship.28

The contents and legal effects of documents evidencing the contract of carriage, validity and effects of letters of guarantee and definitions of "contract of carriage" and "consignee" were debated at the seventh session in 1974. And in 1975, at its eighth session, the Working Group formulated draft texts on the basic rule on the exoneration of the shipper from liability, the dangerous goods, notice of loss, damage or delay, relationship of the Convention with other conventions and general average. The final draft text on the carriage of goods by sea was also finalized at that session, thereby fulfilling the mandate given to it.

28 The definition of 'ship' however has not been included in the Hamburg Rules. For some aspects on the nationality of ships, see D.H.N. Johnson, "The Nationality of Ships", Indian Year Book of International Affairs, 1959 (Madras, 1959), pp.3-15.
The draft text formulated by the Working Group was debated at the UNCITRAL committee which transmitted the Draft Convention to the UN Conference on the Carriage of Goods by Sea, held at Hamburg in March 1978. The Conference considered the draft and, after amending and incorporating certain provisions, adopted the Convention which is now known as the Hamburg Rules.

The Hamburg Rules in effect are very much different from The Hague Rules. The Convention has succeeded in unifying the rules of liability so as to balance the interests of shippers and carriers, to accommodate developments in technology and to achieve a measure of harmonization with the rules governing other means of transport. It differs essentially from the Hague Rules on a number of points. Firstly, its provisions are to apply to all international contracts of carriage of goods by sea, instead of simply to cases in which a bill of lading was drawn up. Secondly, liability under the contract of carriage is to fall not only on the carrier concluding the contract, but also, as in the case of carriage of goods by air,29 on the actual carrier. Thirdly,

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under the Convention liability would also extend to deck
cargo and this is of special significance for the carriage
of containers. Fourthly, for the first time in the
history of international law relating to the carriage of
goods by sea an attempt has been made in the Hamburg Rules
to set internationally uniform standards for the validity
of the shipper's obligations towards the carrier, under a
letter of guarantee. Fifthly, from the economic point of
view, the rules applicable to the shipowner had been made
comparatively stricter. Under the Hamburg Rules, the
liability of the shipowner is to be governed by the fault
principle and the exemption from liability for nautical
fault on the part of the shipowner's servants or agents
and for damage caused by fire, as provided for in the
Hague Rules, has been done away with.

This then is the major theme of the present study.
The study confines itself to a limited area of the Hamburg
Rules - the liability regime - which has in the past
created and which might in the future create problems of
interpretation and application. The question of liability,
in fact, has various dimensions, and under different
jurisdictions and legal systems this could create
innumerable problems of conflict of laws even though the
Hamburg Rules are meant to bring in uniformity. The study
attempts to understand the problems relating to bills of lading, highlight the liability problems relating to the carrier and the shipper, examine the impact of marine insurance on carrier's liability and assess the conceptual problems of unit limitation of liability under the Hamburg Rules.

Following is the scheme of enquiry pursued in this study. Chapter I i.e. the present introduction highlights the problems under consideration and also pinpoints in brief the problems which led to the revision of the Hague Rules leading to the formulation of the Hamburg Rules. The chapter briefly identifies the areas of revision as taken up by the UNCTAD and the UNCITRAL. The chapter also delimits the scope and objective of the study.

Chapter II deals with problems of terminological definitions and scope of application of the Hamburg Rules. Perhaps the use of terms in a Convention could decide its fate as much as the substantive rules contained therein. The interpretation given to the definitions could have a lasting impact on the smooth operation of the Convention. This chapter deals essentially with the inadequacies of the definitions in the Hague Rules and, by presenting the
legislative history of the terms defined by the Hamburg Rules, points out the impact of these terms generally on the questions of liability which it could pose in its day-to-day operation.

The third chapter presents the general problems, particularly that of carrier liability presented through the bill of lading. This chapter examines the definition and historical evolution of bills of lading and points out the other problems the bill of lading presents specially from the liability point of view. An analysis of the status of the bill of lading under the Hague Rules has been made here pointing out its deficiencies and ambiguities. This is followed by an assessment of the reforms brought about by the 1968 Protocol.

Chapter IV critically analyses the status of the bill of lading under the Hamburg Rules. This chapter presents the legislative history of the bill of lading under the Hamburg Rules. It slightly deviates from the structural framework followed in other chapters and presents an article wise analysis of the relevant provisions relating to bills of lading under the Hamburg Rules. The questions examined relates to the issue of
bill of lading, contents of the bill of lading, the reservations and evidentiary effect of bill of lading, the status of documents other than the bill of lading, the question of elimination of invalid clauses in the bill of lading and the problems of jurisdiction and choice of law clauses. Such an analysis has been necessitated in order to have a close understanding of the status of bill of lading under the Hamburg Rules and present briefly the problems it could face in its future operation.

The fifth chapter, as the title suggests, presents the problems of liability of the carrier and shipper. As the two parties to the contract of carriage, perhaps the liability problems of both the carrier and shipper form the crux of the Hamburg Rules. The general questions of liability specially its concept at common law, and civil law, the various attempts for the unification of rules on liability in international transport, the difference of liability regimes under various international transport conventions have all been examined. The chapter particularly analyses the carrier liability regime under the Hague Rules in detail before presenting the problems and prospects of the carrier liability regime under the Hamburg
Rules. Here all questions like the period of responsibility, basis of liability, the question of liability for delay, liability for fire, liability for the carriage of live animals, problems regarding carrier's measures to save life or property at sea and the liability for the carriage of deck cargo, the carrier's partial liability, the liability of contracting carrier, actual carrier and the problem of through carriage have been examined. This is followed by a brief examination of shipper's liability towards the carrier, specially for the carriage of dangerous goods.

Chapter VI discusses the problems relating to the unit limitation of carrier's liability. It points out the deficiencies in the Hague Rules provisions on unit limitation and discusses the problems concerning the definition of "unit" and "package". Here again the reforms brought about by the 1968 Protocol have been examined. Other problems relevant to the unit limitation, like the problems in conversion of the amount of liability, the problems of having gold as a basis for fixing the liability and the introduction of the Special Drawing Right (SDR) in the Hamburg Rules have been examined.
The seventh chapter briefly analyses the impact of the new liability regime on marine insurance. It attempts a legal analysis of the correlation between liability and insurance under the Hamburg Rules. The chapter starts with a brief analysis of the basic principles of insurance law and proceeds to examine its international characteristics and also the question of overlapping insurance, before analysing the impact of the Hamburg Rules on marine insurance. The analysis per force has been brief and impressionistic.

The concluding chapter of the work embodies summation and certain relevant submissions and also briefly presents the problems of interpretation and application which the Hamburg Rules might create in future.

The analysis on the whole attempts to transpose the traditional law, the Hague Rules, and the 1968 Protocol on to the newly codified Hamburg Rules. The main focus of all issues has been the question of liability. Nevertheless, all other important questions redressed by the Hamburg Rules have also been touched upon. Important case law has been relied upon, but a lengthy discussion of the same has been avoided.
In examining the issues, emphasis has been at places given to the legislative efforts of the UNCTRAL which has been responsible for drafting the Hamburg Rules. As a matter of fact, the work has borrowed a great deal from the UNCTRAL, UNCTAD documents.

Lastly, a word of what the present study does not deal with. It focusses on the liability regime under the Hamburg Rules. As such, the questions of liability of the port authority,\textsuperscript{30} warehousemen, stevedores,\textsuperscript{31} the liability for pollution, the liability for collision, etc. have not been discussed.
