Chapter IV

THE BILL OF LADING AND THE HAMBURG RULES

This chapter analyses the status of the bill of lading under the Hamburg Rules, by making an articlewise examination of the related provisions on bill of lading. It traces the legislative history of the provisions on bill of lading and presents the various viewpoints put forth by different interest groups at the UNCITRAL and at the Hamburg Conference.

The UNCITRAL, called upon to revise the Hague Rules, constituted a Working Group¹ which developed a programme of work on the bills of lading.² The Working Group called upon the Secretary-General to prepare a report setting forth the proposals, indicating possible solutions, with respect to the question of responsibility for cargo for the entire period it is in the charge or control of the carrier or his agents, the question of jurisdiction, and the responsibility for deck cargoes.

1  See UN Doc.,A/CHN,9/55.
live animals and trans-shipment, the scheme of responsibilities and liabilities, elimination of invalid clauses in the bill of lading, the question of burden of proof, extension of the period of limitation, definition of various terms in the Convention, and the question of deviation, sea worthiness and unit limitation of liability.

Though most of the provisions of the Carriage of Goods by Sea Convention 1978 (hereinafter referred to as Hamburg Rules) have a direct bearing on the bill of lading, only the questions of issue contents, reservation and evidentiary effects, documents other than bill of lading, jurisdiction clauses and invalid clauses are only discussed here from the point of view of evaluating the status of bill of lading under the Hamburg Rules.

**Issue of Bill of Lading**

A bill of lading is sometimes issued before the goods are actually shipped. Such a bill of lading only states that the goods have been received for shipment to
on the vessel. The hammering rules have adopted the same

the goods to the carrier and not on the actual loading

under American law, the stipulation about the time of

goods were "received for shipment" on the contract date. A

how obligation by producing a document which shows that

means actual shipment, and the matter does not exist

the contract of sale specifies a date for shipment. If

the carrier's responsibility under English law, where

leading to uncertainty from the point of view of the

shipment is received by the carrier and the issue of the receipt for

before loading the goods, the vessel of received for shipment

the vessel. It is also possible for the shipper to send

is not embarrassed able to determine which ship would carry

bill of lading is sometimes necessitated as the carrier

which is returned to the carrier when a "shipped" bill of lading

carrier can demand a "received for shipment" bill of lading

be put on board a particular vessel. In such a case the
system and the carrier must issue a bill of lading to the shipper on demand, when the carrier or the actual carrier takes the goods in his charge.\(^5\)

Article 14, together with article 15, of the Hamburg Rules represent the revision of Article 3(3) of the Hague Rules. The Working Group at its fifth session\(^6\) focussed its attention on the situation where the contracting carrier arranged to have the goods transferred to an "actual carrier" at an intermediate point between the port of loading and the port of discharge and noted that the problem was not analytically different from the case where the contracting carrier substituted carriage by an actual carrier at the port of loading itself. When such substitution took place at the port of loading, the problem was further complicated by the fact that the only bill of lading issued to the shipper might bear an inscription to the effect that the bill of lading was signed "for the master".\(^7\) It was noted that such a bill of lading might include a "demise" or "identity of carrier" clause laying down that the contract evidenced

---

7 This was noted in the second Report of the Secretary General, See UN Doc.A/CN.9/76/Add.1, Part V(B).
by the bill of lading was between the shipper and the owner or (demise charterer) of the vessel stated in the bill of lading, and that the shipping line or company which executed the bill of lading was under the contract of carriage subject to no liability. The relevant question here was whether such a provision might prevent the carrier with whom the shipper had dealt with from being the "contracting carrier" and might serve to substitute the "actual carrier" as the contracting carrier and should be responsible under the Convention for the carriage to the port of destination in spite of the bill of lading provisions stated above. For realising this objective various proposals were submitted. One approach required the identification of the contracting carrier in the bill of lading. The other approach was that when goods were received in the charge of either the contracting carrier or the actual carrier, the carrier shall, on demand of the shipper, issue a 'bill of lading giving specified' particulars. Under this approach the master on behalf of the contracting carrier was to be empowered to issue the bill of lading. There was general approval for this in the Working Group and therefore it was embodied in the text prepared by it.
After deliberations in the UNCITRAL Committee and at the Hamburg Conference certain amendments were made and the following text of Article 14 was adopted.

1 When the carrier or the actual carrier takes the goods in his charge, the carrier must on demand of a shipper, issue to the shipper a bill of lading.

2 The bill of lading may be signed by a person having authority from the carrier. A bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.

3 The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.

It is clear from the above definition that the carrier is under an obligation to issue a bill of lading to the shipper on demand. But such an issue of the bill of lading could take place only when the goods are taken charge of by the carrier or the actual carrier. The authority to sign the bill of lading could be delegated to any other person by the carrier. The implication of Article 14, paragraph 2, is that the master of the ship carrying the goods do not need any special authority or
delegated power from the carrier to issue the bill of lading. Any such bill of lading issued by the master of the ship would be treated as having issued on behalf of the carrier. The signature on the bill of lading so affixed by the issuing authority could be given in handwriting, printed in facsimile, perforated, stamped, in symbols or made by any other mechanical or electronic means. But such signatures should not be against the law of the country where the bill of lading is issued.

Contents of Bill of Lading

Article 15 of the Hamburg Rules deals with the contents of bill of lading. Article 15, paragraph 1, reads:

1 The bill of lading must include inter alia the following particulars:

(a) The general nature of the goods, the loading marks necessary for identification of the goods, an express statement, if applicable as to the dangerous character of the goods the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

(b) the apparent condition of the goods;

(c) the name and principal place of business of the carrier;
(d) the name of the shipper;
(e) the consignee if named by the shipper;
(f) the port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading;
(g) the port of discharge under the contract of carriage by sea;
(h) the number of originals of the bill of lading if more than one;
(i) the place of issuance of the bill of lading;
(j) the signature of the carrier or a person acting on his behalf;
(k) the freight to the extent payable by the consignee or other indication that freight is payable by him;
(l) the statement referred to in paragraph 3 of Article 23;
(m) the statement if applicable that the goods shall or may be carried on deck;
(n) the date or period of delivery of the goods at the port of discharge if expressly agreed upon between the parties; and
(o) any increased limits of liability where agreed in accordance with paragraph 4 of Article 6.

There have been ambiguities with regard to certain items required to be included under Article 3, paragraphs 3(a) to (c), of the Hague Rules. One of the problems concerned the effect of stating in the bill of lading more than one of the characteristics laid down in sub-paragraph 3(b) or fewer such characteristics than were furnished.

Article 3, subparagraph 3(b), of the Hague Rules reads: "Either the number of packages or pieces, or the quantity or weight, as the case may be as furnished in writing by the shipper".

by the shipper to the carrier. Another problem was that Article 3, paragraph (c), of the Hague Rules required the carrier to show the apparent order and condition of the goods. The statements of the carrier in this regard more often related to packaging.

Article 15, paragraph 1(a), retains the substance of Article 3(3)(a) of the Hague Rules in a different way but clearer language. Paragraph 1(a) modifies Article 3(3)(b) of the Hague Rules by making it obligatory on the part of the carrier to include in the bill of lading both the "number of packages or pieces, and the quantity or weight" provided both are furnished by the shipper, instead of mentioning "either the number of packages or pieces or the quantity or weight". It was felt that the bill of lading should include a brief statement about the nature of the goods. Any such statement would be in general terms, particularly in cases where the goods are in packages or containers. The Working Group, therefore, included the words, "the general nature of the goods" in Article 15, paragraph 1(a).

9 See UN Doc.A/CH.9/96, pp.10-12.
Article 15, paragraph 1(b), modifies Article 3(3)(c) of the Brussels Convention in that the former refers to only "the apparent condition of the goods" whereas the latter denotes "the apparent order and condition of the goods". Many members in the Working Group also wanted the phrase "including their packaging" to be added to Article 3(3)(c) on the reasoning that the apparent condition of packaging was often indicative of the condition of the goods within such packaging. Moreover as the carriers were not supposed to open sealed containers or packages, they were mostly able to examine only the outward condition of the packaging and not of the goods themselves. Consequently, the text formulated by the Working Group included the words "the apparent condition of the goods including their packaging". But later the words "including their packaging" was dropped by the Working Group at its eighth session (1975) as the definition of "goods" in the Convention (Article 1, paragraph 4) had incorporated the word "packaging".

Article 15, paragraph 1, subparagraphs (c) to (m) are intended to make the bill of lading quite comprehensively informative. Subparagraph (c) of this article requires
carriers to include in the bill of lading "the name and principal place of business of the carrier". At the beginning the term "contracting carrier" had been used, but the word "contracting" was dropped later in view of the comprehensive definition of "carrier" adopted in the Draft Convention.

A majority of the members in the Working Group had agreed that the bill of lading should contain informations relating to the name of the shipper, the consignee if named by the shipper, the port of discharge under the contract of carriage, and the number of originals of the bill of lading. In view of this, the Working Group included subparagraph (d), (e), (g) and (h) in Article 15. Nevertheless, on the question of provisions relating to negotiability of bill of lading there was opposition in the Working Group. Article 15, paragraph 1, subparagraph (f) requires the mention by the carrier in the bill of lading of the port of loading under the contract of carriage, and the date on which the consignee takes over the goods. Sub-paragraph (i) requires mention in the bill of lading of the place of issuance of the bill of lading. In favour of these additions, it was argued that the date on which the carrier takes over the goods at the port of
loading establishes the commencement of the period of carrier's responsibility whereas the place of issuance was important in determining the geographical scope of application of the Convention. Subparagraph (j) adopted by the Working Group thus recognized "the signature of the carrier or a person acting on his behalf; the signature may be in handwriting, printed in fascimile, perforated, stamped, in symbols or made by any mechanical or electronic means, if the law of the country where the bill of lading is issued so permits". Only the first clause of the provision was retained by UNCITRAL; the rest was omitted in view of the fact that there had not yet been any legislative or judicial pronouncements regarding signature of documents by mechanical or electronic means in a number of countries. Sub-paragraph (k) requires mention of freight in the bill of lading when it is payable at the destination. Subparagraph (l) attempts to strike down the invalid clauses in the bill of lading by requiring the carrier to include a statement in the bill of lading to the effect that the carriage is subject to the provisions of this Convention. It may be noted that Article 23, paragraph 3, of the Convention makes this obligatory. It lays down that:
Where a bill of lading or any other document evidencing the contract of carriage is issued, it must contain a statement that the carriage is subject to the provisions of this Convention which nullify any stipulation derogating the reform to the detriment of the shipper or the consignee.

Subparagraph (m) of Article 15 was included by the UNCITRAL at its ninth session in 1976. It was felt that the bill of lading should bear a statement whenever the carrier was authorised to carry the goods on deck. 10

Article 15, paragraph (2), deals with "shipped" bills of lading. This provision clarifies Article 3(7) of the Hague Rules without changing its substance.

The important question which the working group considered later was whether the contents of the bill of lading as set forth above, should or should not be mandatory. There were mainly two views expressed in the Working Group on this point. According to the first view, making the required information mandatory would serve to protect third parties acquiring bills of lading; if the document did not contain the required information it would not be a bill of lading but would still be a document evidencing the contract of carriage. The second view was

10 Article 9 paragraph 2 of the Hamburg Rules requires such a statement in the bill of lading. And therefore it cannot but be said that Article 1 paragraph 1(m) contains an avoidable repetition.
that the approval of a document lacking one or more of the items listed, as a bill of lading would have the effect of denying to holders of such documents the protection of the Convention. It was pointed out that regardless of any omissions a document should be considered a bill of lading if it met the requirements set out in the definition of the terms "bill of lading" as set forth in Article 1(b) of the Draft Convention. This view was accepted in paragraph 3 of the Working Group definition of Article 15.

Contents of Bill of Lading (Article 15) - An Appraisal:

The article lists about fifteen particulars which as the introductory line suggests "must" be included in the bill of lading. Of these items nine items must always be included in the bill of lading. The remaining six items vis., (a), (h), (k), (m), (n), and (o) should be included only if appropriate and applicable.

The list of items in Article 15, paragraph 1, is of course quite comprehensive. Is such a long list necessary at all or would a shorter list have served the purpose. The inclusion of so many particulars in the bill of
lading would certainly increase the paper work and may possibly slow down the process of issuing bills of lading. It would also impose on the parties to the contract a rigid set of obligations which may well be commercially unrealistic and unwanted and may produce undesirable and even dangerous consequences. An extended list would mean restricted flexibility which is essential in international trade.

Contracting states could no doubt enact legislations on penalty on the carrier for non-compliance to the provisions of Article 15. This is true specially if compliance to the requirements of Article 15 is not mandatory as the Convention offers no penalties for failure to comply with the provisions. Further, Article 15, paragraph 3, implies that the absence of one or more of the particulars in the bill of lading will not have any dire consequences for the shipowner.

It may be relevant here to recall the definition of bill of lading laid down in Article 1, paragraph 7,

referred to in Article 15, paragraph 3. "Bill of lading means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against the surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person or to order or to bearer constitutes such an undertaking." It is possible to conceive of a variety of contracts which fall outside the purview of this definition, and it may be that new forms of contracts of this type may be developed which will accordingly not be covered at all by the Hamburg Rules. 12

**Bill of Lading: Reservations and Evidentiary Effect**

Article 16 of the Hamburg Rules deals with reservations and the evidentiary effect of bill of lading. It lays down that reservations the carrier must include in the bill of lading, and the consequences of the carrier's failure to do so. In paragraph 4 of Article 16, references are also made to demurrage in bills of lading. The Hague

12 See Ibid., p.213.
Rules, after laying down the required contents in the bill of lading, added the following as a general proviso to Article 3 (3):

Provided that no carrier, master, or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.\(^\text{13}\)

This provision of the Hague Rules merely authorises the carrier to omit certain matters from the bill of lading whereas commercial practice called for the inclusion of such matters, subject to an appropriate statement or reservation by the carrier. At the seventh session (1974) when this matter was discussed in the Working Group, several representatives favoured a provision which would require the carrier to insert in the bill of lading statements concerning the marks, description, quantity, weight etc. of the goods, but which would permit the carrier to specifically note his reservation if he had any reason to doubt the accuracy of the shipper's

statements or had no reasonable ways of checking it. It was also proposed that such a provision should be supplemented by a provision, stating that, as against third parties acting in good faith, the carrier could only invoke a reservation that made specific reference to the suspected inaccuracy.

**Article 16 : An Appraisal**

Article 16 deals with what reservations the carrier must include in the bill of lading, and what are the consequences of his doing so. Therefore, the actual meaning of the article is not so much that the owner is legally obliged to make reservations but that he would better do so if he wants to avoid the consequences. Therefore, under the article, if the carrier knows that the bill of lading details are inaccurate he is supposed to specify the inaccuracies and also record the grounds of his suspicion, if any, of the details. He is also supposed to state if he had no reasonable means of checking.

It can be argued that these stipulations could create delay in cargo operations and could, to an extent, create disagreement over facts and give rise to litigation.
And what exactly is meant by reasonable means of checking?\textsuperscript{14}

Does the fact that the carrier has the services of some inefficient and probably corrupt tallymen, who are incapable of recording accurate figures, mean that he has or has not reasonable means of checking?\textsuperscript{15}

The requirement of paragraph 4 of the Article is that the carrier is to indicate in the bill of lading accordingly when demurrage is payable by the consignee. The wording in paragraph 4 implies that the clause in the bill of lading must not only say that the consignee is to pay demurrage but must also state the amount payable. The calculation of the demurrage could cause disagreement on the figures and may invite dispute and considerable delay at the port of loading.

Further, it cannot but be said that this article would certainly create an excessive burden on the carrier in requiring him to carry out all inspections on the cargo as envisaged by this article. But in any case it safeguards the interests of the shipper.

\textsuperscript{14} See, Goldie, n.11, p.214.
\textsuperscript{15} Such questions can only be resolved by Courts in due course of time.
Documents other than the Bill of Lading

Article 18 of the Hamburg Rules speaks about documents other than bill of lading and its evidentiary value in the contract of carriage by sea. It is in fact meant to extend the scope of the Convention to all documents evidencing the contract of carriage by sea. No article on the same lines exists in the Hague Rules.

While the Working Group considered this article at its Sixth Session in 1973, the desirability to expand the scope of Article 3 (3) of the Hague Rules beyond bills of lading so as to include informal documents evidencing the contract of carriage was examined. It resolved that the revised Convention ought to apply to all contracts of carriage for the carriage of goods by sea. The idea was to give the parties complete flexibility to follow the varying practices on documentation existing in international trades. And this forms the contents of Article 18 of the Hamburg Rules.

Article 18: An Appraisal

The Article provides that "where a carrier issues a document other than a bill of lading to evidence the
receipt of the goods to be carried, such a document is *prima facie* evidence of the conclusion of the contract of carriage by sea and the taking over by the carrier of the goods as therein described*. The article does not however contain any provision as to the details or any other particulars of such a document, unlike what is provided in Article 15 of the Convention regarding the contents of the bill of lading. It may be recalled that in Article 1 of the Convention it is stated that "carrier means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper".  

This connotes that there must already be in existence a contract of carriage with a shipper before Article 18 comes into operation. Therefore, the question remains whether it is necessary to have an article laying down in effect that when a contract of carriage by sea has been concluded between a shipper and a carrier, and when issuing a document other than bill of lading the carrier acknowledges receipt of the goods, that document is evidence of the contract or not? Would n't the parties be in other ways able to prove the existence of their contract?

---
16 See Article 1, paragraph 1, of the Hamburg Rules for the definition of carrier. See UN Doc.A/CONF.89/13.
The practice of issuing documents other than bill of lading is not new. Specially in certain trades shippers do not need a negotiable bill at all. In 1970 SITPRO\textsuperscript{17} in a report stated: "shipping lines, forwarding agents, and combined transport operators should wherever practicable provide shippers with a choice of alternative transport contracts and documents, i.e., either delivery against a simple receipt or, on request, a document of title, to meet the varying requirements of individual export consignments. Recently a number of shipping lines started to use a simple non-negotiable way bill,\textsuperscript{18} like an airway bill. Only future trade practices would show whether the traditional functions of bill of lading would be established or whether new types of documents would take the place of bill of lading.

Elimination of Invalid Clauses in the Bill of Lading

The main function of the Hague Rules was to lay down basic requirements from which carriers may not be relieved. This objective is given effect to by Article 3,\textsuperscript{17}

\textsuperscript{17} United Kingdom Committee for the Simplification of International Trade Procedures.

\textsuperscript{18} Way Bill is a "received for shipment" document but it can be endorsed as a "shipped" way bill. The recent British customs practice accepts a received for shipment way bill as sufficient evidence of exportation for VAT purposes.
paragraph 8, of the Hague Rules which invalidates any clause lessening the carrier's liabilities other than as provided in the Hague Rules. Nevertheless the practice cluttering bills of lading with invalid clauses has caused uncertainty and increasing litigation in maritime trade. Such clauses often mislead cargo owners thus causing them to drop the pursuit of valid claims. This particularly causes considerable injustice to shippers from developing countries. They encourage unnecessary litigation and also present an excuse for prolonging discussion and negotiation of claims which otherwise might have been promptly settled.

The clauses like "freight clauses", "refrigeration clauses" have frequently been held invalid. The "freight clauses" usually lessens the carrier's liability and therefore contravenes the provisions of Article 3, paragraph 8, of the Hague Rules. A common "freight clause" which appears in bills of lading generally is as follows:

freight on the goods shall be deemed earned on shipment and shall be payable vessel and/or goods lost or not lost.

19 There are other clauses like the one granting the carrier the liberty to carry goods on deck, to dry dock with cargo on board, to leave goods on the wharf on arrival if the goods are not promptly collected, and to postpone the date of the ship's departure and the date of delivery of the goods, which go under the genre "Liberty clauses". See S. Dor, Bill of Lading Clauses and the International Convention of Brussels 1924 (Hague Rules), (London 1960), p.41.
This could contravene the provisions of Article 3, paragraph 8, of the Hague Rules if the carrier is responsible for the loss.

The "refrigeration clause" is inserted in the bill of lading often with the idea of relieving the carrier from liability for the defective functioning of the refrigerating machinery. These clauses have very often created problems for the cargo interests.

Invalid Clauses and the Hamburg Rules

Article 23 of the Hamburg Rules provides for contractual stipulations. It stipulates that the contracts of carriage shall be null and void to the extent that they derogate directly or indirectly from the provisions of the Hamburg Convention.

The Working Group after deliberations formulated the draft which was considered by the UNCITRAL Committee. Excluding paragraph 2, there were proposals to amend the other three paragraphs, but the Committee decided to retain the Working Group text. At the Hamburg Conference again
there were 5 proposals\textsuperscript{20} for amendment of this article. The only proposal accepted by the Conference was that of Iraq\textsuperscript{21} on paragraph 1. Iraq wanted the first paragraph to commence as "any stipulation in the contract of carriage, in a bill of lading or any other document evidencing..." The article was so modified by the Conference.

\textit{Article 23: An Appraisal}

Article 23 of the Hamburg Rules requires the contracts of carriage to contain a paramount statement that the carriage is subject to those provisions and that the Article nullifies any stipulation derogating there from, to the detriment of the consignee. The article also provides that where a cargo claimant has incurred loss, damage or delay as a result of a stipulation, or as a consequence of the omission of the paramount statement the carrier shall pay him full compensation including his costs of litigation.

\textsuperscript{20} Proposals were submitted by Turkey, Iraq, Japan, Federal Republic of Germany and France.

\textsuperscript{21} UN Doc. A/CONF.89/C.1/L. 204.
The problems caused by the indiscriminate use of invalid clauses had stopped the growth of cargo interests in developing countries. The practice of including invalid clauses indiscriminately in bills of lading could in a way be discouraged by providing in the Convention that claims brought against such documents would not be subject to the time bar in Article 20. This could perhaps have a deterring effect. But it may be noted that the Hamburg Rules do not provide so.

The problems posed by the bill of lading in its commercial functioning underscores the importance of having a standard form of transport document with standard clauses which carriers should not be allowed to amend.²² In any case what is important in any trade is that a document used should not defeat the commercial interests. It is too early to say how far the Hamburg Rules stipulations on bill of lading would in effect help to promote the commercial interests by striving to strike a balance with the cargo interests which invariably would have a bearing on the economy of many developing countries.

²² It may be noted that such standard forms of transport documents are used in the international carriage of goods by air, rail and road. There is no reason why this could not be the case with ocean carriage.
Jurisdiction and Choice of Law Clauses

The choice of jurisdiction and choice of law clauses are common in bills of lading and no doubt are inserted in the full knowledge that their effectiveness is uncertain. The Hague Rules neither contain any provision on jurisdiction nor on the validity of the jurisdiction clauses. The jurisdiction clauses are generally inserted in the bills of lading by carriers to suit their own interests. They are set out in standard forms and are not the subject of free negotiation. Carriers usually try to avoid problems which a particular legal system of a particular country might create against their interests by inserting in the bills of lading a clause saying that the court of a particular country would have jurisdiction in settling disputes. Such a choice of court of jurisdiction may be more important than the express terms of the contract as it may be determinative of the outcome. In adopting the Hague Rules in their national legislation, most countries did not make any inference to the question.


24 A jurisdiction clause is a clause which states the place or country where the proceedings may be started but does not determine as to which laws shall apply to the dispute.
of jurisdiction, and therefore, their courts may either accept or refuse jurisdiction. A shipper may find it extremely difficult to sue the carrier in a foreign country if the jurisdiction clause provides so. Apart from this the jurisdiction clause could also be used as a means to evade the applicability of the Hague Rules by choosing to transfer the dispute to a country which has neither adopted nor incorporated the Hague Rules. American courts, both at the state and the federal level have shown a marked hostility towards choice of jurisdiction clauses, but in cases of suits involving aliens they have given effect to contractual choice of forum. The choice of a non-American forum in a transnational contract was also given effect to by the United States Supreme Court N/S Bremen and Untervasser Reederei, GmbH v Zapata Off-shore Company.

A constant source of complaint against the Hague Rules and the 1968 Protocol was that the port of discharge — where in fact most, if not all, cargo claims arise and

25. In Indussa Corporation v The Ranborg the Court stated that to require a consignee claiming damages in the sum of $2600, to travel 4200 miles to a Court with a different legal system and language would in practical effect, decrease the carrier's liability. Therefore the Court invoked Article 3, paragraph 8 of the Hague Rules. See, A.N.C., (1967), p.589.


are most frequently lodged — was not specifically mentioned as a permissible venue for legal action; and bills of lading very often contained jurisdiction clauses which reserved competence either to a national law that was alien to that applying to the port of discharge or to the courts of the country of shipment.28 As it turned to be, the place specified in the bill of lading was often so inconvenient to the cargo owners as to impede fair representation and adjudication of claims.

Usually a jurisdiction clause in the bill of lading is seen in the following two forms:

1. Any dispute arising under this bill of lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply.

2. The contract evidenced by this bill of lading shall be governed by _______ law and dispute determined in _______ (or at the option of the carrier, at the point of destination) according to _______ law to the exclusion of the jurisdiction of the courts of any other country.29

It may be noted that the jurisdiction clause usually states the place or country where proceedings may be

28 See UN Doc TD/B/C.4/ISL/19 p.43.
29 See S. Mankabady, "Comments on the Hamburg Rules", in Mankabady, n.3, p.98.
started but does not determine which laws shall apply to the dispute. For example, an English court can decide a question of foreign law on the basis of expert advice provided the jurisdiction of the court is accepted.

Under English Law jurisdiction clauses providing for settlement of disputes in England are in principle considered valid. The American practice however was that the jurisdiction clauses were not considered valid per se as purporting to oust the courts of their jurisdiction. Under French law the rule of validity of jurisdiction clauses differed as to whether the Hague Rules or the municipal act incorporating the provisions of the Hague Rules applied to the particular dispute. When the Hague Rules applied the French courts recognised foreign jurisdiction clauses on the basis of freedom of contract.

30 The practice in England on this is that, all persons, regardless of their nationality or domicile, may invoke or may become subject to the jurisdiction of British courts, even in causes of action arising abroad. In such cases jurisdiction is either in rem or in personam. The jurisdiction in rem is based on the presence of the res within the jurisdiction and that of in personam exists whenever the defendant can be served with a writ or notice of writ and unless a statute provides otherwise, it is founded on either presence or submission. See also The Eleftheria Lloyd’s Law Reports 1 (1969), p.237. For a detailed discussion on jurisdiction in rem and in personam, see, T.S. Rama Rao, "Private International Law in India", Indian Year Book of International Affairs 1955 (Madras, 1955), pp.240-45.
The general practice however has been that the validity of jurisdiction clauses has been determined by courts under different legal systems according to considerations of "convenience" and their "reasonableness" under the circumstances. What is "reasonable" is for the courts to pronounce. In Muller V Swedish American Lines Ltd\footnote{A.M.C. (1955), p.1697.} the test of "reasonableness" has been clarified.

The case dealt with a British vessel which was lost at sea in its cruise from Sweden to Philadelphia with cargo. The carrier was sued for damages by the American consignee. The bill of lading clause on jurisdiction stated that all disputes would be settled in Sweden under Swedish law. The American Court held that courts should enforce a forum clause in an international contract unless it is unreasonable or prohibited by statute. The burden of proving that the clause is unreasonable is on the plaintiffs. In this case as the plaintiff had received contract consideration for the agreement to litigate all claims with stipulated forum it was held that "mere inconvenience or additional expense is not the test of unreasonableness". The court found the clause to be reasonable and dismissed the writ.
Considerable debate had taken place in the Working Group on the question of jurisdiction. A few members favoured a separate protocol stating the provision on choice of forum as that would make it possible to adopt the rules on carrier responsibility contained in the Hague Rules even if they were opposed to a provision on jurisdiction. Various other viewpoints were expressed in the Working Group. The first view was that no provision on jurisdiction at all be added in the Convention. The second view was that a clause should be inserted in the Convention to the effect that all foreign jurisdiction clauses should be considered null and void. The third approach favoured the insertion of a provision setting out general criteria for the validity of foreign jurisdiction clauses. The fourth approach was the call for a provision specifying several alternative provisions before which a claim may be brought. Such a provision would, however, not always give effect to an agreement between the parties on the choice of a court. It was also suggested that foreign jurisdiction clauses should be effective as long as alternative courts are also provided in the contract of carriage. Most of the members

32 See UN Doc. A/CH.9/63/Add.1.
in the Working Group favoured the fourth approach which called for a provision specifying several alternative places before which a claim may be brought. Accordingly the Working Group formulated the text.

In the UNCITRAL Committee there was a proposal for the deletion of the entire article.\(^{33}\) Similarly, arguments were raised in favour of retention of the Article too.\(^{34}\) After deciding to retain the article in the model Convention the Committee considered other proposals. All the proposals were considered, and the Committee adopted the Working Group text without any change.\(^{35}\)

At the Hamburg Conference as many as 13 amendments were proposed to Article 21.\(^{36}\) The Soviet proposal to delete the whole article was rejected.\(^{37}\) However, it was at the instance of USSR that the words "rules of the law

\(^{34}\) Ibid., p.60.
\(^{35}\) For the Text of Article 21 adopted by the UNCITRAL Committee, See, Ibid., pp.61-62.
\(^{36}\) Amendments were proposed by the Union of Soviet Socialist Republics, Japan, Tunisia, the German Democratic Republic, the United States of America, Federal Republic of Germany, Bulgaria, Canada, Uganda, Greece, Argentina and Liberia.
\(^{37}\) See UN Doc. A/CONF.89/C.1/L.188.
of that state and international law" added to the paragraph 2, subparagraph (a) of Article 21. Another amendment accepted by the Conference was that of the United States\textsuperscript{38} to paragraph 2(a) seeking to change "courts of any port" to "courts of any port or place". All other proposals for amendment were either rejected or withdrawn. There were two proposals by Argentina and Liberia for addition of a new paragraph to Article 21. The former was rejected and the latter withdrawn.

\textbf{Article 21: An Appraisal}

Article 21 provides that the plaintiff at his option may bring an action in the courts of six different places.

1. the place of the carrier's business or in the absence thereof the habitual residence of the defendant,

2. the place where the contract was made,

3. the port of loading,

4. the port of discharge,

5. the agreed place in the contract,

6. the place where the vessel has been arrested.

\textsuperscript{38} See UN Doc.A/CONF.89/C.1/L.69.
A close look at the article might reveal some contradictions. Article 21, paragraph 1(a), reads: "the principal place of business, or in the absence thereof the habitual residence of the defendant". Here the word "residence" could create problems of interpretation. The place where the contract is made and the port of loading are usually the same as the bill of lading is normally issued at the port of loading. Therefore, Article 21, paragraph 1(b), is unnecessary. Moreover, this provision states:

the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made.

Here the word "agency" might create problems of interpretation; given the nature of modern international trade and functioning it is very difficult to give a precise definition to the word "agency".

Article 21, paragraph 2, adds a new location for determining jurisdiction, namely, the place where the vessel is arrested. Some delegations pointed out that this provision might give rise to difficulties for states which
are parties to the International Convention for the
Unification of certain Rules Relating to the Arrest of Sea-
going Ships.\textsuperscript{39} Article 1 of this Convention stipulates
the ground on which the ship might be arrested. Damage to
or loss of the cargo cannot justify an arrest. But under
the Hamburg Rules this is the basis for action by the
shipper.\textsuperscript{40} Generally, after arrest the vessel is released
upon payment of a security or after furnishing guarantee.
The procedures set out in paragraph 2 for starting an
action and then removing it to another court are likely to
cause far more problems than this paragraph in fact
solves.\textsuperscript{41}

The Hamburg Rules have solved innumerable problems
relating to bill of lading which the Hague Rules and the
1968 Protocol could not take note of. Nevertheless, it is
yet to be seen as to how the Rules would operate in the
prevailing maritime trade climate specially as to how they
would cater to the interests of the developing countries.

\textsuperscript{39} For the text of the Convention see Singh, n.13,
p.1438. This Convention was signed at Brussels on
10 May 1952.
\textsuperscript{40} Mankabady, n.3, p.105.
\textsuperscript{41} Ibid.