FREIGHT FORWARDING AND MULTIMODAL TRANSPORT CONTRACTS

SECOND EDITION

DAVID A GLASS

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To my wife Jane

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PREFACE TO SECOND EDITION

In the eight years since the first edition of this book there have been some major developments alongside a gradual evolution. The major developments include the adoption by the United Nations of the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules) and the adoption by the EU of the Rome I and Rome II Regulations. Whilst the Rotterdam Rules are not yet in force, their adoption now forms a major part of the current discourse across many of the areas covered by this book and their potential impact, particularly on the liabilities and documentation used by parties to multimodal contracts, is charted at various points. The new EU legislation is in addition to the ever burgeoning case law in the areas of conflicts of law and jurisdiction. Whilst only a limited account of these areas is possible, it is hoped that a sufficient guide is given to enable the overall developments to be appreciated in the practical context of the forwarding and multimodal transport industry.

From the evolutionary perspective there have been subtle rather than major changes to the development of documents used in the industry, at least as embodiments of contract terms. In terms of form, the change towards electronic documentation continues apace although still mainly in terms of the development of a paper-free environment rather than one that is entirely paperless. However, this book is focused on the development of standard terms affecting legal liability in which the picture is more one of evolution than revolution. Radical change has not so far affected the main terms used in English practice, although more attention must now be given to the continuing development in respect of logistics contracts in which comprehensive and standardised sets of terms are making more of an appearance. The reader will find that, in many cases, whilst new standard terms have come to replace older ones, they still tend to reflect or build on older forms. Consequently, whilst the book endeavours to reflect standard forms currently in use, reference is still made to some of the older forms, which, whilst no longer in everyday use, may continue to provide a useful comparator for appropriate wording. This is especially true of the ICF (Intercontainer-Interfrigo) terms, which, despite the demise of the company, still provide a major example of comprehensive terms available for international rail container carriage. A particular difficulty, however, in reflecting current usage, is the reluctance of some organisations and companies to make their terms available for discussion in a book such as this. This is unfortunate, since a discussion based on concrete examples can perhaps be of assistance to effective drafting. Special thanks, therefore, are due to those organisations and

companies that have been willing to let me have sight of and reproduce their terms and conditions.

Among the more notable of the many cases decided since the first edition are: *Datec Electronic Holdings Ltd* v. *United Parcels Service Ltd*,with a robust view taken by the House of Lords of a contract of carriage despite limitations on acceptable goods sought to be imposed by the contractor; *Jet2.Com Limited* v. *Blackpool Airport Limited*,which reflects the increasing importance of co-operation duties in the context of long-term business collaboration of the type seen in contract logistics; *Geofizika DD* v. *MMB International Ltd Greenshields Cowie & Co Ltd (Third Party) (The "Green Island")* where the Court of Appeal has delivered a salutary lesson to forwarders about the potential danger in giving a warranty to insurers of under deck shipment and *Röhlig (UK) Ltd* v. *Rock Unique Ltd*, where the Court of Appeal has continued to affirm the reasonableness of the time limit in BIFA conditions.

My thanks are due to the staff at Informa for their assistance, particularly the considerable support and assistance given to me by Nicola Whyke and the hard work of Chris Betney and the production team. I am grateful also for the encouragement and support of my wife, my friends and my friends and colleagues at Cardiff Law School, notably James Davey, Cliona Kelly and especially Dominic De Saulles without whose efforts to revive my sometimes flagging spirit this second edition would have been even further delayed.

I have endeavoured to state the law as at the end of August 2012.

David A. Glass
Cardiff

PREFACE TO FIRST EDITION

This book reworks material previously contained in Parts 6 and 7 of *Contracts for the Carriage of Goods by Land, Sea and Air*, first published by LLP in 1993 and maintained, until now, as part of the looseleaf service for that publication. It is hoped that the format now adopted will make the material easier to access. The opportunity has been taken to rewrite some of the material, in some areas substantially, in order to provide what will now be, it is hoped, a clearer account. Equally, it is intended that the overview now provided in Chapter One will enable the links between different parts of the work to become more apparent.

While the previous work placed material on freight forwarding and multimodal transport in distinct parts, they are brought together here. They are naturally linked: the modern world of transport of goods draws on the skills and services of both intermediaries and operators in a movement towards increasing provision of integrated intermodal transport, as well as expanding to capture a market in value-added services. Linked also is the use of the maritime container and other means of consolidating goods that have produced much of the motive power behind the provision of such services.

As in its previous incarnation, the work focuses on standard contract terms and provisions drawn from each of these three streams. This includes terms in direct operation, whether appearing in contract forms in use or as the standard trading conditions of a trade association such as BIFA. It includes also provisions contained in international materials such as rules produced by the International Chamber of Commerce or through the United Nations such as the International Convention on Multimodal Transport. These can provide either a potential source of contract terms or form part of a wider context into which contract terms can be placed. The overall aim is to provide a reference guide to many of the terms themselves and to the legal issues and materials related to them generally from a perspective of English law.

A recent development likely to become an important part of the context is the work being undertaken under the auspices of UNCITRAL towards a new international convention covering carriage of goods by sea and including provisions relevant to door-to-door movements. Discussion of the development so far is included. Some endeavour has also been made to take account of the increasing interest in more widely based logistics contracts.

My thanks are due to the staff at Informa for their assistance, most notably Wendy Gill, Victoria Ophield and Lyn Overton.

I have endeavoured to state the law as at the end of July 2004.

DAVID A GLASS Cardiff

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BIBLIOGRAPHICAL AND OTHER ABBREVIATIONS

AAI Conditions: AAI Forwarding Ltd, Terms and Conditions (2003–2006)
ADSp: German Freight Forwarders Standard Terms and Conditions (2003)
Amended Convention: The Hague Protocol to the Warsaw Convention 1955
Arnold: Arnold, *Outsourcing Contracts* (Sweet & Maxwell, 1995)
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BIFA: British International Freight Association
BIFA Guide: *Exporter and Forwarder, The Professional Guide*, by the British International Freight Association (1990)
BIFA 2005A: BIFA Standard Trading Conditions 2005A (2009)
BIMCO: Baltic and International Maritime Council
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CIT: International Rail Transport Committee

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Combiconbill: BIMCO Combined Transport Bill of Lading (1971, revised 1995)
Combidoc: BIMCO Combined Transport Document (1977)
Conlinebill: BIMCO Liner Bill of Lading (1978 and 2000)
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CMI: Comité Maritime International
CMNI: Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway 2000
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COGSA: Carriage of Goods by Sea Act 1936 (USA)
COTIF: Convention concerning International Carriage by Rail (COTIF) 1980, as amended by the Protocol of Vilnius 1999
CMR: Convention on the Contract for the International Carriage of Goods by Road 1956
CTD: Combined Transport Document
CTO: Combined Transport Operator
DAMCO STC: DAMCO Standard Trading Conditions (2012)
DAMCO BL: DAMCO Combined Transport Bill of Lading
DB Schenker Rail (UK) GCOC: DB Schenker Rail (UK) General Conditions of Carriage (2009)
DB Schenker AG: DB Schenker Rail Deutschland AG Provisions for International Carriage by Rail (2007)
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ETL: *European Transport Law* (Antwerp)
Evergreen bill of lading: Evergreen Line Bill of Lading Terms and Conditions (2012)
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FBL: FIATA Combined Transport Bill of Lading (1987) and Multimodal Transport Bill of Lading (1992)
FCR: FIATA Forwarders Certificate of Receipt
FCT: FIATA Forwarders Certificate of Transport
Fenex Conditions: General Conditions of the Netherlands Association for Forwarding and Logistics 2004
FIATA: International Association of Freight Forwarders Association
FIATA BL: FIATA bill of lading (see FBL)
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GTC-CIM: General Terms and Conditions of Carriage for International Freight Traffic by Rail
HAFFA: Hong Kong Association of Freight Forwarding and Logistics
Hague Rules: International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1924
Hague-Visby Rules: The Hague Rules as amended by the Brussels Protocol of 1968
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House BL: House Bill of Lading
ICC: International Chamber of Commerce
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ISO: International Organisation for Standardisation
ICF Conditions: Intercontainer-Interfrigo General Conditions Applicable to Combined Transport (2000)
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MTD: Multimodal Transport Document
MTO: Multimodal Transport Operator
MULTIDOC 95: BIMCO Multimodal Transport Bill of Lading (1995)
NSAB: General Conditions of the Nordic Association of Freight Forwarders (2000)
NSFCC: North Sea Freight Conditions of Carriage (2011)
NSSCC: North Sea Standard Conditions of Carriage (2001)
NVOCC: Non-vessel-operating common carrier
OOCL Logistics BTC: OOCL Logistics Group of Companies Business Terms and Conditions (1998–2012)
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TT CLUB: Through Transport Mutual Assurance Association Ltd
TT CLUB 100: TT CLUB Bill of Lading Conditions, Series 100
TT CLUB 400: TT CLUB Forwarder Trading Conditions, Series 400
TT CLUB 600: TT CLUB Logistics Conditions, Series 600
TT Talk: TT CLUB electronic newsletter
UCTA: Unfair Contract Terms Act 1977
UIC: International Union of Railways
UIRR Conditions: General Conditions for International Road-Rail Transport of the International Road-Rail Federation (1998)
UKWA Conditions: United Kingdom Warehousing Association Conditions 2002
UKWA Logistics Conditions: UKWA Contract Conditions for Logistics 2006
ULR: Uniform Law Review
Ulfbeck: V. Ulfbeck, "Contracts of logistics under the Rotterdam Rules" (2011) 17 JIML 210
UNCTAD: United Nations Conference on Trade and Development
UNCTAD/ICC Rules: *Unctad/ICC Rules for Multimodal Transport Documents*, Publication No. 481 (1992)
URCIM: Uniform Rules Concerning the Contract of International Carriage of Goods by Rail, Appendix B to the COTIF Convention
UTI: Intermodal Transport Unit
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CHAPTER 1

INTRODUCTION AND OVERVIEW

1A INTRODUCTION

1.1 In very general terms combined or multimodal transport means the linking of two or more transport modes under a contractual arrangement which either envisages or permits such a link.[1] Whereas it is possible to focus on the law of an individual mode and to treat links with another mode as incidental, this book puts such links at the forefront of the discussion. In the past the linking of modes in order to provide a through service for customers not wishing to create the link themselves might commonly require the services of an agent such as a shipping or forwarding agent. Alternatively, modal carriers or their agents might sometimes be prepared to take on such a role. Less usually, and commonly linked to the needs of a specific trade, a dedicated service might link modes often on the basis of a joint operation between operators of different modes. Since the Second World War, transport services were transformed by the development of unit load devices to ease the handling of goods and facilitate transfer between modes, most notably the development of the maritime container.[2] This development, in particular, enabled the link between sea and land modes of carriage to be made with ease and facilitated the ability of various kinds of operators to market through transport services. Forwarders and sea carriers were naturally at the forefront of this development. Furthermore, the more recent interest in expanding into the provision of wider-based logistics services has particularly involved both of these types of participants and has in turn been facilitated by developments associated with the container revolution.

1.2 Taking this development as its primary theme, forms of contract which provide the basis for modern through transport services and terms adopted in them lie at the

1. In 1995 the UNCTAD Secretariat defined multimodal transport broadly as "the movement of goods from one country to another by at least two different modes of transport performed under one contract", *Facing The Challenge of Integrated Transport Services*, 28 April 1995, UNCTAD/SDD/MT/7. Whereas the emphasis in this book is on the contractual rather than the mere physical linkage of transport modes, it is not confined to a link based on a single contract in the sense of a contract providing for a through liability. A contract which provides for the linking of modes by combining contracts, which is typical of arrangements made by freight forwarders, is naturally included. Further, whilst there is an emphasis on contracts which are likely to involve a cross-frontier movement, the book includes contracts designed for or used in the context of purely domestic transport.

2. The container revolution is said to date from 1956 when Sea-Land, which was originally a road haulier, started its containership service between New York and Puerto Rico, see Johnson and Garnett, *The Economics of Containerisation* (1971), p. 12. The movement of Sea-Land into the transatlantic trade was a major spur to the involvement of other operators. 1969 has been seen as the true start of the "Container Age": *Jane's Freight Containers*, 1969–70.

core of this book. Since forwarding contracts are often a crucial part of the context of these services and because the use of unit load devices has been crucial to their development it seems natural to expand into those areas in order to fill in the wider context. Further, since terms adopted in some forms are derived from attempts by international bodies to provide solutions to certain difficulties associated with them, the terms adopted in these efforts are also examined.

1.3 In later chapters detailed consideration will be given first to conditions used in respect of forwarding and logistics services taking account of both the terms and forms of document in use. The trading conditions adopted by the British International Freight Association (BIFA) are completely reviewed in Chapter 2 but within that review the legal difficulties produced by the involvement of forwarders in more integrated services and the movement towards logistics services are considered. Further, forwarders issuing carriage documentation or making use of documentation issued by a performing carrier have long needed to make reference to their trading conditions either on the carriage document itself or by other means.[3] The increasing provision of added value services may also require reference to general trading conditions beyond those focused on the provision of carriage.[4] The main issues arising from the need to incorporate standard trading conditions and the need to link with carriage documents is considered also in Chapter 2.[5]

1.4 The primary forms of contract dedicated specifically to the provision of the main forms of combined or multimodal services are considered in detail in Chapter 3. The order of treatment in that chapter will follow the historical development of carriage documentation specifically devoted to integrated services especially arising from the container revolution in the context of liner shipping. Since each development demonstrates commercial and legal possibilities which can still be employed today it is necessary to see them all as having potential relevance. Each development will be placed in its specific context at the appropriate point in Chapter 3 but an overview is given below, as part of this introductory chapter, so that the development can be seen as a whole.

1.5 Finally, contracts or specific contractual terms focused on the use of containers or other unit load devices are examined in detail in Chapter 4. This also provides the opportunity to draw in terms used in other forms of combined transport.

1.6 In general, the discussion will revolve around forms and conditions which are issued either by British operators or are likely to be relevant to traders operating from the UK. Reference may, however, be made to terms and conditions used in other parts of the world by way of contrast, illustration or as part of overall context. Similarly, whilst the discussion will be largely from the perspective of English law, the nature of the subject inevitably requires reference to legal materials drawn from other jurisdictions. The remainder of this chapter is devoted to matters of definition and practice and placing the overall development into its commercial and legal context.

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3. Similarly, liner operators operating in a conference have needed to make reference to wider conditions contained in their tariff, see 4.92.

4. Richardson, p. 293.

5. See 2B.

1B TERMINOLOGY AND PRACTICE

1B.1 DEFINITIONS

It is common to see references to combined, multimodal or intermodal transport. *1.7*
These are sometimes said to be interchangeable terms referring to the carriage of goods involving more than one mode of transport.[6] From the paragraphs above one can also see a reference to the term "through transport" which can also be applied in this context. The confusion in terminology derives in part from the need to cover different ideas as well as variations in commercial or geographical usage. The historical course of international legislative efforts has been a further factor. For example, it was common in the past to make reference to combined transport but the more modern reference is to multimodal transport which reflects the influence of the United Nations Convention on International Multimodal Transport of Goods 1980 (MMTC).[7] The older term, however, is still in use, especially in current documentation which has not yet been adapted to the newer usage. It has also been used in respect of certain types of combined transport, particularly in the context of European road/rail transport[8] and is commonly used to reflect the idea of use of a unit load system to link modes. A similar range of use applies to the word intermodal.[9] The discussion may be helped by keeping in mind the distinctions made in the following paragraphs.

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6. Clarke, "Multimodal Transport in the New Millennium", (2002) 1 *WMU Journal of Maritime Affairs*, p. 71, citing the UNCTAD *Review of Maritime Transport* 1997 (UNCTAD/RMT (97)/1).

7. See 1.37.

8. It has been said that for the European railway industry "combined" transport refers to bimodal road/rail transport (UNCTAD/SDD/MT/7, above n. 1, para. 64). This usage is reflected in older regulatory instruments, e.g. EC controls in respect of haulage quotas, such as the Council Directive of 17 February 1975, 75/130 EEC. Since the replacement of the ICC Rules for Combined Transport with the UNCTAD/ICC Rules for Multimodal Transport Documents, see 1.38, it is said that this has allowed the European Transport Industry to use the term "combined" transport to mean road/rail combinations only (UNCTAD report, above, n. 1, para. 65). More recently, the secretariat for the inland transport committee of the UNECE has defined combined transport as "intermodal transport where the major part of the European journey is by rail, inland waterways or sea and any initial and/or final legs carried out by road are as short as possible": *Terminology on Combined Transport*, TRANS/WP.24/2000/1, 1 February 2000, para. 1.2). Other views are that combined transport refers to conveyance of one transport vehicle on another: see Cuadernos de la Cepal, *The International Common-Carrier Transportation Industry and the Competitiveness of the Foreign Trade of the Countries of Latin America*, p. 40, who states that intermodal transport is simply a transfer of goods between different modes.

9. Commonly found in US practice. For the UNECE (see report noted above, fn. 8) intermodal transport is "The movement of goods in one and the same loading unit or road vehicle, which uses successively two or more modes of transport without handling the goods themselves in changing modes" (*cf* Chenal, "Uniform Rules for a Combined Transport Document in Light of the Proposed Revision of the Hague Rules" (1978) 20 *Arizona Law Review* 954, at p. 954, n. 9: "Inter-modal refers to the use of more than one mode to carry goods"). The report notes that by extension the term "intermodality" has been used to refer to transport by the same loading unit or truck in a "door to door transport chain" (citing COM(97) 243). Other sources have emphasised the organisation by one carrier of the door to door movement as the salient characteristic of this term: UNCTAD 1995 report, above, fn. 1, para. 66. A later report (*Implementation of Multimodal Transport Rules*, UNCTAD/SDTE/TLB/2, 25 June 2001) refers to the glossary adopted by the UNECE but notes that these definitions are not applicable in their strictest sense to the legal field. For Hayuth, intermodality is the movement of cargo by at least two different modes of transport under a single rate, through-billing and through liability, p. 15.

1.8 First, the physical combinations that may be possible and produced by loading techniques must be distinguished from the contracts that may be made to utilise them. Reference to an intermodal or combined transport technique may be referring simply to the fact that a container may be carried on a road vehicle and a ship. Within this general distinction further sub-distinctions can be made. A distinction exists between a unit load device which is carried by modes of transport but is not a mode of transport in its own right (e.g. a container) and one that is, but might still be carried by another means. A further sub-distinction arises where one carrier is able to link modes because of ownership of the means of utilising them and where several carriers must be used.

1.9 Secondly, a basic distinction can be drawn relevant to the legal significance attached to contracts made in this context; that is, between contracts which simply link operators of different modes to the customer and those which provide for a through liability notwithstanding that different modes or different carriers may be used to perform the contract. Under the influence of the MMTC the term multimodal transport tends to be used today to express the idea of a carriage of goods from one place to another by at least two modes of transport under a single contract.[10] As we have seen, the term combined transport is also used to express this idea. It is at its clearest where mode to mode transport is the method envisaged.[11] This is distinguished from liability which is divided between the different carriers, thus producing a segmented rather than a continuous liability attached to a single operator.

1.10 The term "through transport" is often used in this context where different modes of transport are connected in this way, but again one must have regard to usage where this term is used merely to reflect the fact that different carriers have been used in a movement, regardless of the contractual basis with the customer.[12]

1B.2 UNIT LOAD DEVICES

1.11 Through services linking modes and the use of unit load handling of goods are not a modern phenomenon.[13] The focus of modern times, however, has been on the tremendous increase in combined transport services prompted by the container

10. *Cf* Art. 1.1 of the MMTC and Kiantou-Pampouki, "The General Report", in Kiantou-Pampouki, pp. 3–66, at p. 6.

11. Putting aside for the moment whether mode on mode transport, sometimes called "mixed" transport, is multimodal transport. See Kiantou-Pampouki, above, fn. 10, at p. 10, and see 3.98.

12. Because of the documentary history it overlaps with the use of combined or multimodal transport. According to Faber, for lawyers practising in England a combined transport document signifies a through liability whereas a through transport contract signifies that liability is engaged only for the part performed by the carrier contracting with the customer, *Multimodal Transport, Avoiding Legal Problems*, p. 1, see also Carr, "The Current State of Multimodal transport Law in the UK", Kiantou-Pampouki, pp. 205–234, at p. 209. However, the difference can also be a matter of form. This is considered in detail at 3.6. Where the same mode is involved the term overlaps with use of the term "successive carriage".

13. E.g. Beare, "Liability regimes: where we are, how we got there and where we are going" [2002] LMCLQ 306 at pp. 310–311, notes that in the heyday of the Hapsburg Empire, Trieste offered an arrangement for a combined tariff to include inland transport and sea freight in order to counter competition from its North Sea rivals, citing Jan Morris, *Trieste and the Meaning of Nowhere* (Faber, 2001) p. 159.

revolution. The use of containers as a means of interconnection between transport modes does not necessarily require combined transport services but naturally facilitates them. A major stimulus to this revolution was standardisation of containers which provided the basis for the development of specialist ships, port handling equipment, lorries and rail wagons.[14]

1.12 The International Organisation for Standardisation (ISO) adopted a general definition of a container which covers a wide range of equipment. A container is defined as an article of transport equipment:

(a) of a permanent character and accordingly strong enough to be suitable for repeated use;
(b) specially designed to facilitate the carriage of goods by one or more modes of transport, without intermediate reloading;
(c) fitted with devices permitting its ready handling, particularly its transfer from one mode of transport to another;
(d) so designed as to be easy to fill and empty;
(e) having an internal volume of one cubic metre or more but excluding vehicles or conventional packing.

1.13 This wide definition covers all types of container system. ISO recommendation 668, however, approved the basic characteristics of the standard freight container most notably the Series 1 type which is in most common use today.[15] This has an 8 foot × 8 foot 6 inch end section and is generally 20 or 40 foot long.[16] A 20-foot long container is referred to as a TEU, a 20-foot equivalent unit and is used as a general indicator, for example, of capacity of ships.[17] Standard freight containers are the main means of providing links between surface modes of transport.[18] In air transport lighter and often differently configured containers are in use.[19] Consequently, combined transport services involving air will more likely involve linking air and land surface modes of transport. Further differentiation can be made between standard surface freight containers which were specifically designed to link sea carriage with other surface modes, other containers in use in continental trades (in the USA and the continent of Europe), and swap-bodies, all of which (as well as air freight containers) fall within the general definition noted above. Nevertheless the

14. Johnson and Garnett, *op cit.*, p. 14.
15. See further *Jane's Freight Containers* (1986), p. 658.
16. When introduced in 1964 ISO 668 series 1containers were 8ft × 8ft but were later increased in height to 8ft 6in. By 1990 some 92% of the world's dry container stock consisted of this type of container, UNCTAD Bulletin, No. 14, May–June 1992.
17. De Wit, para. 1.9. By January 2011 the fleet of containers had reached 29 million TEUs, UNCTAD *2011 Review of Maritime Transport*, p. 39.
18. ISO 668 standard takes into account the requirements of rail, marine and road transport and main national transport regulations. Within the basic framework of the Series 1 containers, including flatracks and open-sided ones, the individual types have been standardised for the carriage of dry, refrigerated, liquid and bulk cargoes: UNCTAD's *Review of Developments in Standardization of Containers and Related Activities*, TD/B/C.4/329, 31 January 1990.
19. The marine container has a strong steel frame capable of withstanding stacking up to nine high and is heavy (on average 2.45 tonnes) and its cuboid shape is inhibitive of air transport, see Graham and Hughes, *Containerisation in the Eighties*, p. 39, who refer to the development of lightweight igloo-type containers for airfreight use, see also Mahoney, *Intermodal Freight Transportation*, pp. 50–51.

Container Safety Convention 1972,[20] which contains a similarly wide definition,[21] excludes air containers and swap-bodies, unless the swap-body is carried by or on board a sea-going vessel, and is not mounted on a road vehicle or rail wagon.[22]

1.14 All of the above are a form of unit load device which enables goods to be transported across modes without the need for intermediate handling of the goods within them. Other forms of unit load systems which enable or can be used to link modes are pallets[23] and road vehicles including trailers and semi-trailers. The latter is termed piggyback transport.[24] Another system is the lash barge system which links carriage by inland waterway (the barge as one mode) with ocean carriage (the ship as another mode).[25]

1.15 In terms of transfer between modes a distinction is made, especially in the context of containers, between lo-lo (lift-on lift-off) and ro-ro (roll-on roll-off). The former refers to the vertical handling process necessary to load containers on to a ship especially the modern cellular containership. The latter refers to the horizontal technique of loading containers on a ship designed to carry trailers, the container moving on the ship either remaining on the trailer used to deliver to the ship or by means of a ship's trailer.[26] As noted above, a similar but more conceptual distinction can be made between mode to mode and mode on mode systems of carriage. Mode to mode involves removal of goods from one mode of carriage to another. In respect of the use of a type of unit load device which, in itself, cannot be defined as a mode of transport, this will involve removing the unit from one mode in order to load it on another mode. The movement of a container is typical of this. Freight containers are not generally regarded as modes of transport as such but as means of handling the goods. Mode on mode involves goods remaining present on one mode which is then transported by another mode. Typical of this is the case of a road vehicle being transported on a ro-ro ship. The road vehicle may be regarded as both a unit load

20. Which lays down, for purposes of safety, a system of approval and obligations as to maintenance etc.

21. But with a different dimensional requirement to the effect that the area enclosed by the outer bottom corners be either 7 square metres if the container is fitted with top corner fittings or 14 square metres if not.

22. See Booker, *Containers*, chs 1 and 2; see also the Freight Containers (Safety Convention) Regulations 1984 (SI 1984/1890) which implements the Convention. Regulation 2 defines a swap-body as "a container which is specially designed for carriage by road only or by rail and road only and is without stacking capability and top lift facilities".

23. As a handling technique the container has its origins within a general move to unitise cargo. Graham and Hughes, p. 17, state that early examples were packaged timber, bundled and looped for lifting, and pallet loads of general cargo. These authors note that ships were improved to handle pallets and that for a time the debate between pallet and container proponents was fierce, but the container proved superior in protection, security and handling characteristics. The two techniques are not infrequently combined.

24. In the United States the rail regulatory system recognised a piggyback type of service termed TOFC (trailer on flat car). This compared with the similarly recognised COFC (container on flat car) service, see Wood, "Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading", in Kiantou-Pampouki, pp. 235–268, at p. 241.

25. See Graham and Hughes, p. 20, Lash was an expensive system and has had only a limited use where a major river system can be exploited (notably Mississippi and Rhine). Similar systems are SEABEE (Sea Barge Carrier) and BACAT (Barge on Catamaran), see 1975 DOT Study p. 5.

26. Their respective development is described by Graham and Hughes, at p. 19. These authors also note the adaptation of standard multideck cargo liners to accommodate containers (combination carriers) and the carriage of containers on certain bulk carriers (conbulkers).

device and as a mode of transport. This systems distinction can have legal significance, as under the CMR Convention.[27]

1B.3 PRACTICAL CONTEXT OF OPERATIONS

1.16 As stated above, the container revolution prompted an increase in combined transport operations. Particularly notable were changes to liner shipping involving deep-sea transport and the service changes prompted by this. Containerisation required specialised berths to handle gearless containerships and the appropriate handling equipment. It has been noted that, in the main, infrastructure has been provided by port authorities and the equipment by terminal operating companies in which container service operators have sometimes invested.[28] It has also been said that with the container revolution, the shipowners came ashore and had to consider the inland movement of containers.[29] Sometimes the movement was the other way,[30] and indeed the very first container operator was a road carrier who went to sea. Operators who wished to take advantage of containers in providing a complete door to door service[31] needed to secure road carriage arrangements[32] and to engage in activities traditionally the province of forwarders. Furthermore, they saw the possibility of providing for less than container load carriage, and depots were provided near ports or industrial centres variously called Inland Clearance Depots,[33] Containerbases or Container Freight Stations.[34] The economics of the revolution forced rationalisation of the industry, not least impelling a high degree of concentration through mergers or the creation of subsidiaries dedicated to the provision of container services.[35] Today some 20 container liner operators control around 70 per cent of global container sea carriage capacity.[36] Rationalisation was also achieved through several forms of cooperation, among operators especially,

27. See below 1.28.

28. Graham and Hughes, p. 23. See also, Heaver, below fn. 73, pp. 383–384.

29. Graham and Hughes, p. 24.

30. J Ramberg, "The Implications of New Transport Technologies", *Ocean Transport Documentation and its Simplification*, UNCTAD-SIDA, 1980, p. 22.

31. For Hayuth, p. 51, during the early stages of containerisation the container-vessel operator pursued activity beyond the ports mainly to control inventory, i.e. the containers, but became more motivated to capture market share through vertical integration.

32. Most usually provided either directly or through long-term arrangements such as via a joint venture or formal supply contract, see e.g. *Cel Group Ltd* v. *Nedlloyd Lines UK Ltd* [2003] EWCA Civ 1716, [2004] 1 Lloyd's Rep 381, where the merger of Nedlloyd with the P&O Group in 1996 and consequent use of P&O's own haulage business (P&O Roadways Ltd) had the effect of putting Nedlloyd in breach of their own haulage supply contract.

33. Alternatively Inland Container Depots, see Hayuth, pp. 107–116.

34. Graham and Hughes, p. 24. An Inland Clearance Depot (ICD) is a CFS (Container Freight Station) with customs clearance facilities.

35. See further, Graham and Hughes, p. 25.

36. UNCTAD *Review of Maritime Transport*, 2011, p .45.

initially through joint fleet consortia.[37] From this arises the current use of cross-chartering between liner operators, on the basis of an operating agreement, to provide regular services. These involve cross-charterparties commonly linked to an operating agreement between operators. They operate on the basis of a space or slot charter[38] of part of a container ship to other operators in respect of the carriage of containers on that ship, such containers containing the goods of customers of the cross-charterer.[39] This arrangement requires the use of complex indemnity clauses in the cross-charterparty. These must also be reflected in the document issued by the cross-charterer to his customer, usually a bill of lading or waybill. Some joint service arrangements, however, may involve each operator marketing a service but by use of a clause which is, in effect, an agency or demise clause, the contract is expressed to be between the owner of the vessel named in the bill of lading (or substitute) and the customer. The use of a demise or agency clause, however, can appear odd and may produce difficulties when a combined transport bill has been issued by the charterer.[40]

1.17 Apart from joint service arrangements, it is not uncommon for operators to market services based on long-term or ad hoc chartering of vessels. On the one hand the charterer may issue bills of lading in such a way as to assume contractual responsibility towards the holder of the bill of lading. This bill of lading is then used to effect delivery. On the other hand the shipowner may retain contractual responsibility for the carriage by sea so far as the charterer's customer is concerned. In this case the charterparty may authorise the charterer to issue bills of lading on behalf of the master or to present bills to the master to sign, such bills of lading evidencing a contract between the customer and the shipowner.[41] The charterer may therefore either issue a bill of lading to the customer or a confirmation note which is supplemented by the shipowner's bill of lading if this is required for the purpose of a documentary credit.[42] In the former case an agency or demise clause in the bill of lading may well seek to establish a contract between the shipowner and the customer. In the latter case the charterer makes clear in the confirmation note

37. More recently the movement from consortia towards development of global strategic alliances can be noted, going beyond focus on a particular trade towards a global strategy across trades and including greater levels of cooperation in respect of multimodal operations and logistics services, Dong-Keun Ryoo and Tae-Woo Lee, "The Roles of Liner Shipping Co-Operation in Business Strategy and the Impact of the Financial Crisis on Korean Liner Shipping Companies", *The Handbook of Maritime Economics and Business* (Costas Th. Grammenos, ed., 1st edn, 2002, LLP), p. 346 at p. 357, citing H.A. Thanopoulou, D.K. Ryoo and T.W. Lee, "Korean Liner Shipping in the Era of Global Alliances", *Journal of Maritime Policy and Management*, Vol. 26, No. 3 (1999), 209–229.

38. Space on a container ship is usually chartered by "slot," each slot representing the space required to accommodate one TEU, see Reilly, "Identity of the carrier: issues under slot charters", 25 Tul. Mar. L.J. 505, at p. 506.

39. See generally *Modern Liner Contracts*, and J. Richardson, *Combined Transport Documents*. See further, M.R. Brooks, *Sea Change in Liner Shipping* (2000). This author, at p. 1, notes the use of the word consortia in the context of European regulation whereas the word alliance incorporates this concept in North American contexts. See further Reilly, previous footnote and C. Hancock, "Containerisation, slot charters and the law" in *Legal Issues Relating to Time Charterparties*, ch. 14.

40. Richardson, p. 65. See further, 3.31.

41. E.g. the Boxtime Charterparty provides for this in cl. 13(o). The charterparty also recognises, however, that the charterer may take on the contractual responsibility under the bill of lading and provides protection to the shipowner under cl. 16(a), (b), (c) and (f), see Richardson, pp. 64–67.

42. J. Ramberg, "The Vanishing Bill of Lading & The 'Hamburg Rules Carrier'", (1979) 27 AJCL 391, at p. 397.

that his contract is to procure carriage rather than to carry.[43] Whilst the arrangements just described involve charter of a whole ship the use of stand-alone slot sale charters can be noted typically standing outside consortium arrangements. BIMCO created SLOTHIRE as a standard format for slot chartering in 1993[44] and, as with cross-charter arrangements this envisages that the slot charterer takes contractual responsibility towards its customer,[45] and provides merely for a receipt to be issued by the owner to the charterer.[46] A further arrangement that should be noted is the use of service or cover bills of lading issued where a container is transhipped on to or from a vessel servicing ports which cannot be reached by a large containership.[47] This may be linked with a feeder slot charterparty to guarantee space.[48]

The arrangements described above are not necessarily confined to joint arrangements made by shipowners or to shipowners wishing to supplement their services. Forwarders and other transport operators provide container or combined transport services. Traditionally, forwarders have provided a range of intermediary services for customers and have generally taken advantage of the possibility of profit through the consolidation of goods whenever this has been possible in respect of a particular mode.[49] The competitive challenge presented by the movement of shipowners and other operators into their traditional areas of expertise meant that they had to develop similar container-based services. This required investment in or contractual arrangements enabling them to maintain warehousing and distribution facilities.[50] In trades where a substantial sea leg is involved they may procure the carriage by sea by means of chartering a complete ship or slots on the basis of a slot charter or other space booking arrangement.[51] Additionally or alternatively they may link into the general service provided by a shipowner or other operator. In such cases the forwarder may make use of the ship operator's bill of lading.[52] Where the forwarder is consolidating goods belonging to several customers into a container, such goods being destined for delivery to a single consignee or several consignees, a "groupage" 1.18

43. *Ibid.*

44. See Richardson, p. 143 *et seq.*

45. See Richardson, p. 155. Clause 13(a) requires the charterer to undertake that bills of lading issued by them contain no identity of carrier clause which purport to establish a contractual relationship between the owners and the cargo interests of the charterers. In *The Tychy*, [1999] 2 Lloyd's Rep 11, Clarke LJ accepted as accurate the following definition of a slot charterer given by Griggs and Williams in *Limitation of Liability for Maritime Claims* (3rd edn): " . . . a party who has the right to use a specified part (but not the whole) of the cargo carrying capacity of a vessel on a particular voyage and who often issues his own bills of lading. Such a party is described in common parlance as a 'charterer' ".

46. Clause 11(b).

47. Gaskell *et al.*, para. 1.38, *Modern Liner Contracts*, p. 77. They may also be termed feeder bills, see e.g. *The Pioneer Container* [1994] AC 324.

48. E.g. see Richardson, p. 355.

49. See generally Hill, and especially ch. 1 for the earlier history.

50. The larger forwarder would anyhow often combine the functioning of warehousing or wharfinger with that of forwarding, see Hill, p. 216. Further added value activities, such as packing might be undertaken. Such services may well be marketed today as part of a "logistics" package, see below.

51. See e.g. *Coli Shipping (UK) Ltd* v. *Andrea Merzario*, [2002] 1 Lloyd's Rep 608, where the forwarder had an annual contract with the shipowner whereby a certain number of slots would be available for carriage on a particular route on vessels owned or operated by the shipowner.

52. See the use made of shipowner's bills of lading in *Coli*, above and *Cho Yang Shipping Co Ltd* v. *Coral (UK) Ltd* [1997] 2 Lloyd's Rep 641. In these cases the customer is brought into direct relations with the shipowner although the forwarder is not acting as an agent, in the fullest sense, for either the shipowner or the customer, at least in respect of the freight. See further 2.92.

or ocean bill of lading may be obtained from the ship operator. The forwarder consigns the goods to his agent who will deliver the goods to the ultimate consignees or against production of the forwarder's own document.[53] Such document may take a bill of lading form such as a "House" bill of lading, a traditional type of forwarder's document used in carriage by sea particularly where the forwarder is controlling the movement and delivery of the goods by himself or through agents other than the sea carrier.

1.19 In the US the concept of the non-vessel operating common carrier (NVOCC) emerged in the course of regulatory control. This recognised the involvement of transport intermediaries in providing services beyond agency and document processing, particularly in respect of consolidation of goods and involved recognition of their role, in effect, as an operator in the provision of carriage by sea services.[54] From this the more general idea of the NVOC can be identified which is commonly used to express the involvement of non shipowning intermediaries in services involving sea carriage where they undertake responsibility as a carrier. References to NVOCC (non-vessel operating common carrier) or NVOC (non-vessel operating carrier) or more recently, NVOMTO (non-vessel operating multimodal transport operator),[55] arise frequently in the context of combined sea container services. The term is used to cover forwarders and charterers in general.[56] One might, however, distinguish charterers of whole ships, who can perhaps be regarded as ship operators,[57] especially where their documentation controls the delivery of the goods by the shipowner.

1.20 The involvement of these various intermediaries requires their roles to be analysed to determine the level of responsibility they undertake and the status of documents they issue. These issues arise quite apart from any further issues stemming from combined transport operations and need earlier clarification. They arise naturally in the context of forwarding contracts and are dealt with in Chapter 2.[58] For the moment a range of possibilities can be noted. On the one hand, such intermediaries may take on a purely agency role as in the case of the traditional forwarder. On the other hand, their involvement with transport supply may see them regarded as being a principal to an extent commensurate with full responsibility as a carrier. In between, some shifting between these extremes may be possible.[59]

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53. See Hill, p. 195, and BIFA guide p. 166. See e.g. *Sonicare International Ltd* v. *East Anglia Freight Terminal Ltd* [1997] 2 Lloyd's Rep 48.

54. See Sorkin, para. 1.15(8). See also Hayuth, pp. 126–128. Similar recognition was developed in respect of US regulatory practice in respect of other modes, e.g. the Part IV forwarder (later termed the surface freight forwarder) and the indirect air carrier. See further Sorkin, para. 1.15(2).

55. See e.g. H.M. Kindred, D. Manara and S.G. Ellis, *Freight Forwarders' Legal Liabilities for the Multimodal Movement of Goods*, Transport Canada, TUP 1985/86, Transportation Series Report No.17, Canadian Marine Transportation Centre, p. 7.

56. See e.g. Gaskell *et al.*, para. 1.42.

57. Thus the significance in references to non-vessel *operating* common carriers, *cf* Sorkin, above, fn. 54.

58. See, 2C.4.

59. See e.g. *Coli* and *Cho Yang*, above, fn. 51. Compare *Maersk Air Ltd* v. *Expeditors International (UK) Ltd* [2003] 1 Lloyd's Rep 391 where the forwarder, although associated with a company providing transport service, was itself concerned only in providing a payment and invoicing service within the context of a chain of transport suppliers servicing the ultimate customer's requirements.

1.21 The types of arrangement noted above tend to be associated particularly with deep-sea container operations. Other types of arrangement can be identified often associated with a particular mode or a particular grouping of modes. For example, in UK short sea movements, forwarders and road carriers are notably engaged in the provision of international road movements including consolidated trailer loads and will (apart from use of the Channel tunnel) make use of ferries as a seabridge. The form of groupage adopted here is often distinguishable from container movements in that goods consigned by several customers may be collected into a road vehicle organised by forwarders or vehicle operators for carriage in that vehicle.[60] Forms of consolidation similar to those operated in sea carriage are a common feature of carriage by air. Similar door to door movements, focused on air as the main transport mode, are particularly engaged in by forwarders or consolidators linking into services operated by line haul operators and issuing their own "house" or neutral air waybill[61] to the customer. Combined air and road or rail services may be provided by an air operator under cover of an air waybill for the whole journey.[62] Much of the intermodal movement connected with rail tends to focus on container or piggyback services designed to link in with wider services provided by sea carriers, road hauliers or forwarders. Contract forms particularly associated with such services are considered in detail in Chapter 4.[63] A particular feature here is the use of "aggregators" to supply services to shippers and operators based on the wholesale control of the rail movement. One can note also the existence of "integrators" engaged in parcels and express services which make use of owned or chartered aircraft and maintain ground delivery forces.[64]

1.22 Ideally the flexibility provided by containerisation and other unit-load techniques should enable two developments in order to take full advantage of it: first, the possibility of separating the operation of transport modes from ownership; secondly, the ability to provide an integrated transport service across modes, which implies at its fullest extent responsibility and liability for the whole movement. Development in both these respects depends upon factors other than facilitation through unit load

60. See e.g. *Texas Instruments Ltd* v. *Nason (Europe) Ltd* [1991] 1 Lloyd's Rep 146.

61. E.g. the FIATA neutral air waybill based on the standardised neutral air waybill introduced by IATA under IATA Resolution 600a. This can be used by the forwarder either when contracting as carrier or when acting as agent for the carrier.

62. In *The Economic Impact of Carrier Liability on Intermodal Freight Transport*, a report produced for the EC by IM Technologies Ltd, europa.eu.int/comm/transport/final_report.pdf, at p. 8, there is noted the regular practice in intra-European traffic of an air freight carrier substituting truck or rail for air movement (in German: "ersatzverkehr") under cover of an air waybill. Such "substitution" might be on the basis of a discretion provided by the contract or agreed by the relevant parties, see further Giemulla/Schmid, paras 18(53) *et seq*. See further, *Quantum Corp Inc* v. *Plane Trucking Ltd* [2002] EWCA Civ 350, [2002] 2 Lloyd's Rep 25, for a case where there was both a house and air carrier's waybill covering a combined carriage by air and road.

63. Detailed consideration is given to contract terms used by: Freightliners, Intercontainer, and UIRR companies, see Chapter 4. Many other companies providing combined road/rail transport in Europe operate on BIFA Conditions, see the report, above, fn. 62, p. 13.

64. Companies such as UPS, DHL, TNT and FedEx, see *Understanding the Freight Business*, p. 46. See also Reynolds-Feighan, "Air Freight Logistics", Brewer *et al.,* ch. 28 at pp. 432–433. This type of company is geared to express delivery. A further sub-division can be made between companies providing courier service, express delivery service, and parcel services, see Sage, "Express Delivery", Brewer *et al.*, ch. 30, pp. 456–458.

devices, such as regulation of ownership, operation and rationalisation. Historically this has impacted to some degree on contract forms[65] and may continue to influence contract clauses or provide the underlying reason for a particular type of clause. Furthermore, the emphasis today is on operation rather than ownership of distinct modes of transport as well as on the supply or use of a unit load system. The focus therefore should be on the contractual operation as a whole rather than on the underlying modes utilised. This has yet to be realised completely but the development towards the concept of multimodal transport and its legal underpinnings are part of a continuum towards it. In very general terms operators engaged in the supply of services can range from those who own no modal assets to those who may own all or some of the transport modes involved in a particular movement.[66] Because movements may be strongly associated with a particular mode, for example where it is an important wholesale asset and is utilised for the major leg of a movement, the service is likely to be marketed around it and strongly associated with it. Particular trade conditions may involve a strong association with particular modes or combination of them and be marketed on that basis. This has implications for the legal classification and control of contracts, especially those purporting to deal with contracts built around intermodal arrangements.

1.23 Before turning specifically to contracts and the legislative background a further development affecting practice must be noted. Recent focus has been on the marketing of logistics services.[67] These embrace services connected with the process of planning, implementing and controlling the efficient and cost-effective flow or storage of raw materials, in process-inventory, finished goods and related information from the point of origin to the point of consumption and for the purpose of conforming to customer requirements.[68] At its most complete it involves customer outsourcing[69] inventory and distribution functions of the business, including related

65. Particularly in trades connected with US operations, see 3.7. In Europe the ability of members of conferences to integrate inland and terminal activities under one umbrella has been restricted by concern to preserve their antitrust immunity, see "Maritime Logistics", Brewer *et al.*, ch. 27 at p. 425. This may well impact on the motivation to offer uniform liability terms.

66. See De Wit, p. 5, where the author identifies three models of integration: (A) forwarders coming into integration as a newcomer; (B) carriers in one mode extending their operations to provide an integrated supply (either on the basis of ownership or subcontract); (C) forwarders linking the customer to other suppliers of integrated services. The developing role of ports in expanding beyond consolidation into transport and forwarding was noted by Hayuth, p. 68.

67. For an early perspective see Hayuth, ch. 7.

68. Canadian Association of Logistics Management. The UNCTAD Report, *Facing the Challenge*, above, fn. 1, para. 23 notes the move from the organisation of inventory by manufacturers to anticipate customer needs (the speculative approach) to "inventory postponement" strategies trading off costs between inventory and transport. For the Institute of Logistics and Transport "Logistics is the time related positioning of resource or the strategic management of the total supply chain". For the US Council of Supply Chain Management Professionals "Logistics is that part of the supply-chain process that plans, implements and controls the efficient, effective forward and reverse flow and storage of goods, services and related information between the point of origin and the point of consumption in order to meet customers' requirements".

69. This has been said to be the business practice of a company contracting out in-house services to outside providers normally in respect of non-core functions of the business, Arnold, *Outsourcing Contracts*, p. 1.This suggests a process of moving from in-house provision to outside providers. A wider definition refers simply to the strategic decision to contract out one or more activities required by the organisation: Browne and Allen, "Logistics Out-Sourcing", Brewer *et al.*, ch. 16, p. 253. There can, however, be recognition of core activities which would normally be served in-house (i.e. "a bundle of

activities of storage,[70] transport management and supply and extending possibly to assembly[71] and order processing and billing, and perhaps even marketing. The term third party logistics has come to embrace the direct or indirect supply of these services.[72] The traditional functions of carriers and forwarders are logistical functions within the overall concept, the essence of the more recent focus being on the development of management (for example, supply chain management) and control systems geared towards efficient product distribution.[73] It is common today to refer to "contract logistics" which captures the idea of a third party providing the planning, implementation and control of a logistics system under a contract[74] tailored to the particular customer.[75] Thus a continuum of services is identifiable,[76]

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corporate skills that can be put to work in producing different products" Jané and de Ochoa, p. 5) and other activities where a choice can be made for internal or external provision. Typical functions for which an outsourcing choice is likely are IT provision, personnel functions, training, equipment provision and maintenance. In the transport and warehousing context major wholesale and retail companies may outsource former in-house distribution activities previously centred on owned storage and transport facilities.

70. Distribution services are likely to be focused on the supply and activities surrounding the operation of dedicated warehouse facilities, see e.g. the Example Contract for Logistics Services in Slater, *How to prepare*.

71. A logistics contract may involve a variety of added value activities (Slater, *How to Prepare*, p. 25) such as packing, labelling and ticketing. A recent trend for port operators such as ABP to become involved in providing services such as bagging, blending, sorting etc is noted in "Supply chains-Industry Perspective" 1(4) S&TLI (1999) p. 34.

72. The term Lead Logistics Partner (LLP) has been defined as a third party logistics (3PL) provider of logistics services which controls other outsourced supply-chain elements (see further Jané and de Ochoa, p. 18). Fourth party logistics (4PL) involves supply-chain coordination and management by an entity that does not supply (operate) underlying logistical services.

73. "Supply chain management, according to the IOLT is 'a sequence of events intended to satisfy a customer' and can include procurement, manufacturing, distribution, waste disposal, and associated transport, storage and IT. In other words, a supply chain is what is created in a customer-focused era to satisfy the physical requirements necessary in fulfilling an order. Logistics is the process by which the supply chain is formulated, maintained and continually improved", *Understanding the Freight Business*, p. 203. I.e. supply-chain management is the wide framework within which logistics functions, Trevor D Heaver, "Supply Chain and Logistics Management: Implications for Liner Shipping", *The Handbook of Maritime Economics and Business,* above fn. 37, p. 375 at p. 376. The definition of logistics given by the Association of Logistics Management, above fn. 68, is said to recognise the distinction between SCM and logistics, SCM being a wider concept which has been re-conceptualised from integrating logistics across the supply chain to the current understanding of integrating and managing key business processes across the supply chain, Lambert "The Supply Chain Management and Logistics Controversy", Brewer *et al.*, ch. 7 at p. 101.

74. Logistics World Directory (www.logisticsworld.com).

75. Usually involving a degree of exclusivity, see Kimball pp. 65–66, and reflected in conditions restricting rights of assignment without prior agreement, e.g. TT CLUB, cl. 21, OOCL Logistics Business Terms and Conditions, cl. 8.

76. "At one end of the continuum a TPL may offer as little as would a traditional freight forwarder acting as an agent of the cargo-owner and contracting for carriage. At the other end, the TPL may provide as much as would a shelf-to-shelf logistical management firm which undertakes whatever services are required of it. A TPL may offer a full range of services but be contracted by different cargo owners for differing services on this continuum", H.M. Kindred and M.R. Brooks, *Multimodal Transport Rules*, 1997, pp. 13–14. At p. 14 the authors provide a useful list of typical logistics functions. See also the list in *Understanding the Freight Business*, p. 203. Browne and Allen, above fn. 69, at p. 257 provide a list which distinguishes classical outsourcing (e.g. transport), advanced services (e.g. assembly/ packaging) and full services (e.g. order processing, invoicing, payments collection).

and to which forwarders and transport operators have naturally turned.[77] Different service patterns may raise different customer expectations.[78] The development in turns reflects how containerisation facilitated it by capacitating time sensitive transport services,[79] and how it is influenced, in part, by similar factors relevant to intermodal integration.[80] Furthermore, it is impelling similar rationalising liaisons.[81]

1.24 This development may well replicate some of the legal issues that have arisen in the past in the movement from traditional forwarding functions into transport operation and further highlight issues already implicit in that movement. Most important will be the classification of role as agent or provider. However, contract logistics will naturally involve a more complex relationship with a mix of different services so that it may be even more appropriate to regard it as a mixed contract from a legal perspective.[82] Furthermore the collaborative nature of the relationship is closer than a purely transactional one so that it may appear more as a partnership or joint venture: "prolonged, inter-dependent, and (it is hoped) cooperative and

77. Freight transport and warehousing services along with documentation services to support the flow of products may be regarded as more traditionally available services. The more recent development involves an expanding range of services such as final assembly of products, inventory management, product and package labelling, tracking and tracing along the supply chain, order planning and processing and reverse logistics (i.e. collection and recovery of end-of life products and used packaging), Browne and Allen, "Logistics Out-Sourcing", Brewer, Button and Hensher, *Handbook of Logistics and Supply-Chain Management*, 2001, ch. 16, pp. 253–268, at pp. 256–257. This couples with the development of logistics management being perceived and audited as an integrated function adding value rather than functioning as individuated units of cost. Recognition of this along with factors contributing to the use of outsourcing has led to the developed market in "logistics services", see Heaver, "Perspectives in Global Performance Issues", Brewer *et al.*, ch. 2, pp. 11–28 at p. 13.

78. The UNCTAD secretariat indicate that ambitious logistics companies consider three distinctive sets of customer: (1) those who want traditional transport and distribution services focusing on price and quality; (2) those requiring selected logistics services, such as merge-in-transport or pan European distribution and (3) those looking for supply and chain management services customised to their particular requirements, sometimes covering some of their risks, see *Institutional and Technological Changes in Transport/Logistics Field*, UNCTAD/SDTE/TIB/3, pp. 4–5. Satisfaction of customer expectations may be built into the contract through provision of performance standards. A feature of larger scale contracts is likely to be provision of agreed performance standards based on agreed measures of performance, see Slater, *How to Prepare*, p. 27 and p. 37.

79. Just in time delivery. A means of reducing inventory and one of a number of cost reduction strategies which exemplify the role of logistics in improving supply-chain performance. See Heaver (fn. 73, above at pp. 377–379) who identifies also: low-cost location sourcing, postponement of manufacturing, and supply-chain visibility (e.g. through automatic relay of point of sale information or cargo tracking, both enabled through IT).

80. Kindred and Brooks, at p. 13, cite D.J. Bowersox, "The Strategic Benefits of Logistics Alliances" 90:4 Harvard Business Review (1990), who identified four dominant forces creating an environment where logistic alliances could flourish. The first two are particularly pertinent to intermodal services: (1) deregulation of transport; (2) the explosion of information technology. The remaining two are: (3) the emphasis on leaner organisations and the propensity to seek external expertise; (4) the escalating competitive environment.

81. E.g. between groups of forwarders, groups of carriers such as Transplace.com (reported in UNCTAD Trade Facilitation and Multimodal Transport Newsletter, No.11 Dec. 2000, p. 15). The evolution of logistics services from different bases is traced by Heaver, "Evolving Conditions in Supply Chain Management and Logistics," in *The Handbook of Maritime Economics and Business* (Grammenos, 2nd edn, 2010) pp. 462–464.

82. V. Ulfbeck, "Contracts of logistics under the Rotterdam Rules" (2011) 17 JIML 210.

mutually beneficial."[83] Building on the collaborative nature of such agreements is a movement towards "vested outsourcing."[84] This seeks to reconcile the conflicting interests of the customer to reduce costs and the supplier to increase the size of the contract by emphasising the mutually beneficial collaborative structure to provide outcomes beneficial to both parties. It advocates a less transaction based approach to the contract focusing more on outcomes rather than activities. To a large extent this should be what a contract of this type should be aiming for. The contract should provide an appropriate division of risks and balance of penalties and incentives.[85] As a warning against an over regulated contract, it is salutary, but if a corollary is a reliance on goodwill rather than a robust contractual framework this could leave a hostage to fortune should the relationship break down.[86] Since many of the more complex contracts will be bespoke and available only to the immediate parties and their lawyers there is only limited public access to standard contract provision although several texts contain suggested terms.[87] The logistics agreement provided in TT CLUB 600 for members of the club may well prove to be highly influential. There are publicly available a large number of standard conditions for logistics but these relate to more standardised services which do not necessarily require the same complex provision as the more extensive arrangements that major distribution outsourcing may require.

1.25 A further practical distinction which has already been noted in the earlier developments surrounding containerisation[88] is between asset based and non asset based providers.[89] This may have some impact on how contractual arrangements with the customer are perceived. Further, companies with an asset based starting point may provoke concern in the customer about neutrality. This concern has led some shipping companies to constitute logistics as an independent business unit separate from their shipping and intermodal business.[90] Despite this, concerns about potential conflict of interest might continue to arise.[91]

1.26 Some aspects of the more complex and long-term contracts involving logistics outsourcing will fall outside the scope of this book, such as property and

83. G. Kimball, *Outsourcing Agreements A Practical Guide* (OUP, 2010) p. 2 (said in respect of outsourcing generally).

84. K. Vitasek, M. Ledyard and K.B. Manrodt, *Vested Outsourcing: Five Rules that will Transform Outsourcing* (Palgrave Macmillan, 2010).

85. Kimball, above, fn. 83, pp. 8–9.

86. S. de Silva speaking at a CILT Outsourcing and Procurement Forum event, 17 March 2011.

87. Kimball, above, fn. 83, Lewis, below fn. 92, Slater, above, fn. 78, Jané and de Ochoa.

88. See 1.18.

89. E.g. Geologistics eschewed conventional asset ownership, their main capital investment involved IT systems, 1(4) S&TLI (1999) p. 34. Other companies started from an asset base. Heaver notes the American example of Ryder System Inc, "which has incorporated additional information technologies and logistics management skills in its fleet management expertise to become a major logistics provider" "Perspectives on Global Performance Issues", Brewer *et al.*, ch. 2, p. 13. See also Brooks and Fraser, "Maritime Logistics", Brewer *et al.*, ch. 27, p. 423 who note the modest growth of businesses related to marine carriers.

90. Heaver, above, fn. 73, at p. 385.

91. Brooks and Fraser, above fn. 89, p. 425. P&O Nedlloyd Logistics e.g. gave some recognition of this in that their website indicated that their supply-chain solutions were provided using managed subcontractors, including ocean carriers other than P&O Nedlloyd.

employment issues arising from the transfer of assets and personnel.[92] Another example is the need to make more detailed provision for variations in or termination of the relationship.[93] Some issues inherent in forwarding, however, may be enhanced in the context of a more complex and symbiotic relationship and are relevant in the context of a discussion of forwarding and transport. Since the supplier may well take on extensive responsibility for both the preparation of goods and their transport there is a greater blurring of the demarcation of the roles of shipper and carrier. This has implications for the application of compulsory carriage regimes so that the liability of the supplier is properly engaged notwithstanding that the act causing loss normally falls within the shipper's responsibility.[94] A further example is that since a logistics operator is likely to have access to information regarding matters such as the customer's volume of sale and the identity of suppliers it will be important to seek to clarify the extent of a duty of confidentiality.[95] A common feature of such contracts is the inclusion of performance targets which expressly impose specific requirements as, for example, the time by which goods are to be collected or delivered.[96] The monitoring of performance levels over a range of movements obviously introduces a degree of complexity to the more standard issues of liability for loss, damage or delay which would be relevant to a single movement. In that regard also, the existence of an "umbrella contract" may well raise problems of conflict and interpretation whenever separate contractual documentation is issued for each movement.[97] Where compulsory regimes of liability are potentially applicable to a particular movement of goods their precise application in the context of such umbrella contracts may also be a matter of some difficulty.[98]

1C THE DEVELOPMENT OF FORMS OF CONTRACT

1.27 By the early 1970s it was possible to see the development of modern forms of combined/multimodal transport documents in light of three stages originally identified by Gronsfors.[99] Most of this development will be described in terms of bills of lading. Despite the flexibility of the maritime container this is natural given that shipowners and ship operators still dominate the supply of present day

92. E.g. those raised by Transfer of Undertakings (Protection of Employment) Regulations. These are beyond the scope of this book but see further e.g. Slater, *How to prepare*, p. 15, A. Lewis, *Outsourcing Contracts—A Practical Guide* (City & Financial Publishing, 3rd edn, 2009). See also Arnold, above, chs. 3 and 5.

93. See Slater, *How to prepare*, p. 14 and cl. 4 of the Example Contract.

94. Ulfbeck, above fn. 82, at pp. 221–225.

95. See 2.98. See cl. 12.1 of Example Contract for an example of an express term imposing a duty not to disclose confidential information. See also TT CLUB 600, cl. 22.

96. E.g. cl. 5.6 of Example Contract. See also Slater, *How to prepare*, pp. 37–38.

97. See e.g. *Rhône Poulenc Rorer Ltd* v. *Trans Global Group Ltd*, QBD, 18 June 1997, unreported, see 2.11.

98. See e.g. in the context of the CMR Convention, *Gefco UK Ltd* v. *Mason* [1998] 2 Lloyd's Rep 585. See 2.25.

99. K. Gronfors, "Container Bills of Lading—A New Trend in Documentation", in *Law and International Trade—Festschrift für Clive Schmitthoff* (1974); see also "Container Bills of lading and Multimodal Transport Documents", in *Ocean Transportation*.

container services. Naturally, therefore, the documentary development has tended to involve mainly adaptation of, or evolution from, traditional shipping documents. As will appear below the modern form of bill of lading used in container trades will offer a choice of terms depending upon whether combined transport is provided or simply a service confined to carriage by sea. Furthermore, international trade and documentary credit arrangements have traditionally revolved around the legal recognition given to the bill of lading as a transferable document.[100] Newer forms of document have needed to keep close to the model of the traditional bill so as to encourage recognition. This links also with the emphasis placed on the bill of lading by the Hague Rules.[101] These points may explain why so much documentation issued by forwarders, who were also in the forefront of developing through transport services, tended to take on a bill of lading form as a means of enabling their documentation to fit in with the traditional uses of such documentation in the shipping context.[102] Even with newer forms of documents seeking to move away from the traditional bill of lading, such as waybills, there seems to have been a shipping culture which distinguishes their form and the way they are used from documents used in a non-shipping context, such as road and rail consignment notes.[103] Similarly, recent efforts to create electronic transport documents still seem to reflect a divide between those focused on replicating documents with a bias towards sea and those linked mainly to other transport modes.[104] New developments[105] could point the way to a transformation in both paper and electronic documents but there is some way to go before these become fully operational. Consequently the description is conducted mainly in terms of describing the development of bills of lading but other document forms can also be related to it.

1C.1 THE EARLY STAGES

1.28 The first stage involved the adaptation of traditional shipping documents to take account of supplemental modes, i.e. the adaptation of conventional or through bills of lading to take account both of containers and supplemental transport requirements. Particular legal difficulties arose from the fact that such bills commonly involved a segmented rather than an integrated liability especially when an agency

100. See especially the developments in respect of the Uniform Customs and Practice on Documentary Credits at 3.44.

101. See 2C.4.4.

102. See the FBL, below.

103. See generally "The Use of Transport Documents in International Trade" UNCTAD, 26 November 2003 (UNCTAD/SDTE/TLB/2003/3).

104. Commercial e-document developments in international shipping, such as those initiated by Bolero and @GlobalTrade, still refer mainly to bills of lading and waybills. See further, for developments in respect of waybills and paperless documentation, Ramberg, "The Multimodal Transport Document", and Gronsfors, "The Paperless Transfer of Transport Information and Legal Functions", in Schmitthoff and Goode, pp. 1 and 19; Williams, "Waybills and Short Form Documents: A Lawyer's View" [1979] LMCLQ 297; Tetley, ch. 45; Debattista, ch. 2; see further G. Humphreys and A. Higgs, "Waybills: A Case of Common Law Laissez Faire in European Commerce" [1992] JBL 453.

105. Notably the Rotterdam Rules, see 1.40.

role was adopted by an operator seeking to provide the relevant through link. Although through liability is currently the norm in respect of through container transport these problems still have relevance today to operations involving forwarders and in both containerised and non-containerised transport where operators may only be prepared to provide a through link on an agency basis.[106] The section on Through Bills of Lading[107] takes the opportunity to explore these problems in their different contexts.

1.29 The next stage saw the appearance of "first generation" container bills, whereby modal operators focused on extending into an integrated liability for the through movement and to address problems perceived as arising from this. First, liability was extended to cover both transport stages and periods incidental to the transport stage such as intermediate warehousing. Secondly, liability was managed to make use of any possible freedom of contract especially to align the contracting operator's liability with those of subcontractors.[108] In addition, some opportunity to manage the potential application of mandatory rules might be taken to a greater or lesser extent. Individual transport modes are subject to a range of rules which may have mandatory operation. This can depend upon which national law applies to the contract and whether the transport takes place as a domestic operation or operates over international boundaries. There exists some degree of uncertainty as to how far such rules will apply in the context of a contract which extends liability beyond a particular mode. Nevertheless, where international carriage is involved there is, at least, the possibility that one or more international conventions may apply to a transport utilising different modes.[109] Particular note should be taken of: for carriage by sea the potential application of the Hague Rules 1924, the Hague-Visby Rules 1968,[110] or the Hamburg Rules 1978; for carriage by air, the Warsaw regimes[111] or the Montreal Convention 1999;[112] for carriage by road, CMR;[113] for rail the URCIM[114] and for inland waterways CMNI 2001.[115] Apart from impacting

106. See e.g. *Coli*, above fn. 51.

107. See, 3.B.

108. See the contract clause quoted by Gronsfors, above, fn. 99, at p. 35. A similar clause is reproduced in *Schmitthoff's Export Trade* (D'Arcy *et al.*, 2000), p. 367, taken from a bill of lading used by EUCON of Dublin, Rotterdam and other centres.

109. See generally, De Wit, ch. 2, Bugden, chs 16 and 17.

110. See the Carriage of Goods by Sea Act 1971. See further *Scrutton*, Carver, *Carver on Bills of Lading*.

111. Consisting of the original Warsaw Convention, the Convention as amended by the Hague Protocol and the Convention as amended by Montreal Protocol No.4. See the Carriage by Air Act 1961. See also the Carriage by Air (Supplementary Provisions) Act 1962. See further Shawcross & Beaumont, Giemulla/Schmid, Clarke, *Contracts of Carriage by Air* (Informa, 2nd edn, 2010), Clarke & Yates, Part 3.

112. In force in the UK from 28 June 2004. See Schedule 1B of the Carriage by Air Act 1961.

113. See The Carriage of Goods by Road Act 1965. See Clarke, *Hill and Messent*, Clarke & Yates, Part 1. CMR and CIM are regional regimes focused essentially on European operations. Other regionally based regimes exist e.g. The Montevideo Treaty on International Land Carriage 1940, applied in MERCOSUR Member States, see Fresnedo de Aguirre, "Unifying the Law of Carriage of Goods: a View from MERCOSUR" 2003–1/2 ULR 241.

114. Appendix B of COTIF 1999, Clarke & Yates, 2.477 *et seq*.

115. In force from 1 April 2005.

directly on a particular mode some of these regimes contain rules which either extend the regime to multimodal operations or which relate expressly to them.[116]

A leading example of a first generation type of bill sought to reduce potential issues of conflict by acknowledging the existence of the common international rules and attaching them to the relevant stages of the transport.[117] Where subcontractors were used in those parts of an operation that were potentially outside the scope of such rules it referred to the conditions utilised by its subcontractors. In essence a network form of liability was adopted which influenced developments in the next stage. *1.30*

Such bills also sought to deal with the problem of unlocalised damage. The carriage of goods in containers can raise particular problems of proof as to whether the loss or damage occurred while the goods are the responsibility of the carrier. There is also the particular difficulty of identifying the stage at which damage occurred where the container travels across modes. Where there is segmented liability across operators it will normally be necessary to identify the operator responsible for the loss, damage or delay so that the appropriate legal regime is attached whether this is mandatory, based on implied rules of national law or regulated by contract.[118] Where an integrated liability is adopted the focus may turn to identifying the appropriate legal rule applicable. Where the loss, damage or delay is localised to a particular stage the contract terms or an applicable mandatory rule may attach a particular liability to that stage. If this stage cannot be identified then some rule must be employed to determine liability and these bills sought to manage this through the contract.[119] *1.31*

1C.2 SECOND GENERATION BILLS AND TCM

The third stage saw the "second generation" of container bills, based on the TCM Draft Convention 1971. This represented the culmination of a process which can be traced back as far as 1911 so far as interest in the development of rules for through transport is concerned.[120] The draft ultimately produced represented an evolution *1.32*

116. Article 2 of CMR, Art. 1(4) of URCIM, Art. 1(6) of Hamburg Rules, Arts 18(3) and 31 of the Warsaw Convention, and Arts 18(4) and 38 of the Montreal Convention.

117. See cl. 3 of the ACL bill reproduced by Gronfors, fn. 99, at pp. 35–36. Compare the Hapag Lloyd conditions of carriage and the bill of lading discussed in *Princess Buitoni* v. *Hapag-Lloyd* [1991] 2 Lloyd's Rep 383, discussed at 369.

118. See the material at 3B.7, which is directed to issues of proof of this nature.

119. E.g. the ACL bill (see above fn. 117), in such circumstances, deemed the damage or loss to have occurred during the sea voyage and applied the Hague Rules.

120. De Wit, para. 2.172, noting that the Comité Maritime International (CMI) devoted some attention to through carriage at its Paris and Copenhagen conferences in 1911 and 1913. A detailed review of the development of TCM and the later development up to and including the Multimodal Transport Convention is provided by this author, paras 2.172–2.195. See also Beare, "Liability regimes: where we are, how we got there and where we are going" [2002] LMCLQ 306, pp. 310–313.

of work emanating mainly from two bodies. The first was the Comité Maritime International (CMI) which operated from a maritime perspective and whose final draft put stress on the establishment of a document similar to the bill of lading, possessing all its characteristics and in particular its negotiability.[121] The second was the work of the Institute for the Unification of Private Law (Unidroit) which produced a draft in 1961, was inspired by CMR and focused on the establishment of a liability system.[122] The Unidroit draft brought forth the notion of a combined transport document and worked out a system of liability based on the network approach. It also provided rules for unlocalised damage which were not associated with a particular mode and a system of rules for claims and limitation which likewise would operate without regard to the particular modes. The final product was a modified draft, produced in the course of joint ECE/IMCO meetings based on a merger of the previous work known as the Rome draft.[123]

1.33 In summary, the draft TCM convention[124] sought to harmonise contract terms so that operators from different modal starting points could compete on the same level of terms. This gave credence to the notion of the Combined Transport Operator (CTO) and was the beginning of a move to develop the concept of an integrated contract service dissociated from any particular mode. With this development came also the first effort to provide a uniform definition of combined transport and to provide for combined transport documents, in negotiable or non-negotiable form rather than bills of lading. It also provided that by issuance of a combined transport document the CTO undertakes to perform, or in his own name procure the performance of, the entire transport giving distinct recognition to the non-owning or operating contractor. It can also be noted here that it envisaged voluntary adoption by the parties rather than mandatory application.[125] For various reasons formal adoption of the draft never occurred.[126] First there was air industry opposition. The negative view of the airlines had already wrought one concession since Article 1 of the final draft excluded pick-up, delivery and transhipment

121. De Wit, para. 2.185. The reference is to the Tokyo Rules accepted by CMI in 1969 (see (1969) 1(1) JMLC 186). Several drafts had been considered in CMI prior to this. A notable feature of the Tokyo Rules was that they permitted the carrier to incorporate an international convention concerning carriage of goods by sea where loss or damage occurred at sea and where no mandatory rules would otherwise apply, see Art. VIII (2), i.e. the Hague Rules. This would be in preference to a uniform regime otherwise applicable in cases where there was no mandatory law. The uniform regime (essentially based on reasonable diligence) applied to unlocalised loss or damage.

122. De Wit, para. 2.185. Note also the involvement of important bodies representing commercial interests such as the ICC see 3.41.

123. For the Rome draft TCM see (1970) 1(4) JMLC 651.

124. See UN Doc. TRANS/370, CTCIII/1, Annex 1, see also Unification of International Law Yearbook 1970–71, pp. 63–83.

125. Seen as a weakness by De Wit, para. 2.190. More recently, and given the subsequent difficulties of introducing mandatory rules in this area, the suggestion has again been made for a non-mandatory regime, but this time operating on a default basis, see Asariotis *et al.*, *Intermodal transportation and carrier liability*, European Communities, 1999, paras 18–20. This links with EU developments considered further below at 1.41.

126. See Massey, "Prospects For A New Intermodal Regime" (1972) 3(4) JMLC 725, De Wit, paras 2.190–2.192. See further, 3.93.

operations carried out in the performance of an air transport contract. Also a desire for further study was expressed by the United States and there were concerns of developing countries which were not well represented at IMCO.[127] As a result the initiative passed to UNCTAD and the process of creating an international convention began afresh.[128]

Part of the debate around this time included concerns about the merits of a network system. This emerged particularly towards the end of the TCM and had already been manifested in the final draft itself. The lead provisions provided for a network liability system for localised loss or damage.[129] These directed the parties to mandatory rules applicable to the particular stage or to an expressly incorporated international convention appropriate to that stage or to default liability rules applicable where damage was unlocalised or, if localised, no mandatory rule or convention was applicable to the stage where loss or damage occurred. The default liability rules were essentially based on fault liability by reference to certain defences but without reference to certain special defences available in some modal transport uniform laws which reduced further a carrier's potential liability.[130] However, an alternative provision was included in the final draft.[131] This alternative provided for a uniform system of liability,[132] as well as for a stricter liability than that proposed by the base rule in TCM for unlocalised loss or where no mandatory rule applied.[133] The twin issues of whether the system should be network or uniform or some modified system[134] and the level of liability to be imprinted on a base or uniform liability rule are among the core issues around which debate has raged in the efforts

1.34

127. The concerns of the developing countries were focused more on economics, most notably, the fear of domination by large container consortia controlled by developed countries, rather than the specific terms of TCM, see Selvig, "The Backround to the Convention", para. 8, Southampton Seminar.

128. An International Preparatory Group (IPG) was set up to prepare the new draft, see 3.93.

129. The issue of liability for delay was a matter of some difficulty and was not clearly resolved in TCM. The approach of later initiatives has varied and will not be considered in this overview but as they arise in the detailed discussion in Chapter 3. Note also that the developments described here also sought to provide detailed rules regarding the transport document and in respect of claims and actions, particularly provision of a uniform time limit. These will be considered at relevant points in the more detailed discussion in Chapter 3.

130. Such as the defence of negligent navigation and management in Art. IV, r. 2(a) of the Hague and Hague-Visby Rules in respect of carriage of goods by sea. See also in respect of fire caused otherwise than by the carrier's actual fault or privity (Art. IV, r. 2(b). *Cf*, in relation to carriage by air, the negligent pilotage defence in Art. 20(2) of the Original Warsaw Convention.

131. Proposed by Australia, Canada, Norway and Sweden, see Massey, above, fn. 126, p. 745.

132. Apart from retaining navigation and fire defences for carriage by sea, *cf* the UNCTAD/ICC Rules, 3.

133. A further alternative proposed by France was for a network approach but with a strict liability at base, Massey, above, fn. 126, p. 746.

134. De Wit, paras 2.143–2.169, discusses three different types of system in the abstract—pure network, modified network and uniform and analyses their respective merits. In the context of container transport the adoption of a pure network system is impractical given the problem of unlocalised damage so that some modification is required. A reference to a modified network system therefore can refer to the type of system adopted under TCM. This must be distinguished from the different kind of system of the type adopted by the MMTC 1980 which involves a uniform system of liability with a limited network system in respect of limitation of liability, arguably a "modified uniform" system.

to create an acceptable uniform law in this area.[135] In brief,[136] a network system has the advantage of reducing the potential for conflict with mandatory regimes, applying rules appropriate to the particular mode of transport where loss or damage occurred, and keeping the carrier's liability in line with its recourse position. Particular disadvantages are that the potential liability is unpredictable at the outset and the scope for dispute is considerable, both as to the precise stage where loss or damage occurred and to the precise regime of liability to be applied. Further it is not a satisfactory solution to the problem of cumulative damage or delay. A uniform system provides a potentially more certain system, at least for the cargo interest, but only to the extent that potential conflict with mandatory rules can be avoided.

1.35 Despite the lack of formal adoption, the TCM rules provided a basis for commercial efforts to establish trading conditions acceptable to cargo, insurance, banking and carrier interests. The details of this are traced in Chapter 3.[137] The most notable development was the creation of the ICC Uniform Rules for a Combined Transport Document 1973 amended in 1975. The ICC Rules are no doubt old, but they still form the basis of many conditions still in use. These rules drew on the solution produced by TCM to provide a scheme of liability which could be adopted commercially and recognised as providing a fair balance between cargo and carrier interests. For example, on the one hand, these rules in general[138] prevent the CTO from adopting the conditions used by subcontractors which might be highly restrictive on the rights of cargo interests and so, as under TCM, impose a qualification of the network approach to prevent it. On the other hand the default rule provides for a limit of liability based on the weight limit adopted in carriage by sea which compares favourably with convention limits adopted for other modes so far as the carrier is concerned.

1.36 Some standard form documents developed around this time by important commercially representative bodies such as BIMCO[139] and FIATA[140] were based directly on and made specific reference to these rules. Many shipowners providing deep-sea container transport produced standard terms based largely on these rules and the dynamics of consortia operation meant that common form bills of lading on

135. Support for a uniform system was propounded at an International Seminar on Intermodal Transport held at the University of Genoa, 23–26 May 1972, see the report by Lord Diplock, "The Genoa Seminar" 1972 Il Diritto Marittimo 177. See also Asariotis *et al.*, above, fn. 125, at para. 22. Contrast the view of the UNCTAD secretariat which presented a series of papers to assist the discussion in the process leading to the MMTC, see "International Multimodal Transport Operations", 28 August 1974, TD/B/AC.15/7, paras 52–76. It concluded that a lower aggregate cost of insurance protection to cargo would result from a network liability system combined with an adequate (not strict) level of liability, see para. 74.

136. See further the review in the more recent report of the UNCTAD Secretariat, Multimodal Transport *The Feasibility of an International Legal Instrument*, 13 January 2003, UNCTAD/SDTE/TLB/2003/1, esp. paras 44–53.

137. See 3C.

138. Apart from in respect of inland waterways, see 3.66.

139. Historically considered as a shipowners' organisation but, increasingly, adopting standard forms after consultation with other interests or bodies, Gaskell, *et al.*, para. 1.74. BIMCO documents include Combiconbill and Combidoc, see 3.43.

140. See 2.1. The FIATA FBL first created in 1970 was among the first "official" forms of combined transport bill.

the same terms would be adopted by several operators.[141] These have continued to operate on similar provisions up to the present day. For example, terms and conditions currently adopted in the Maersk Line Multimodal Transport Bill of Lading largely adopt the same basic scheme of liability with relatively few changes over the years mainly to assist clarification and to take account of important developments in respect of the calculation of limits of liability.[142] The reference to documents termed bills of lading is of interest since this appears to run contrary to the attempt by TCM and the ICC Rules to achieve recognition of combined transport documents. This was adopted by some documents[143] at the time but most documents continued to be titled as bills of lading albeit for combined transport or for use either for port to port or combined transport services. Further details concerning forms will be outlined below but it can be noted here that, as with the scheme of liability, the form of combined transport bill of lading developed around this time is still in common use today.

1C.3 MMTC AND LATER DEVELOPMENTS

1.37 The documentary development has not stood still and some further developments have been influenced by continued efforts to establish acceptable international rules. As noted above, after the failure of TCM, the initiative passed to UNCTAD especially with a view to responding to the concerns of developing countries. A major part of the background at that time was the reforming efforts being undertaken in shipping law at around the same time. Bills of lading had already been subject to effort to create a uniform law through the original Hague Rules. A protocol to these rules established the Hague-Visby Rules in 1968 enacted in the UK by the Carriage of Goods by Sea Act 1971. A further protocol changed the basis of calculating limits of liability. The Hague and Hague-Visby Rules had been developed through the CMI and the latter rules represented clarification rather than radical changes to the earlier rules. The UN initially through UNCTAD and later through UNCITRAL considered more radical proposals inspired by the concerns of developing countries to establish a more equitable balance between cargo and carrier interests. The ultimate result was the Hamburg Rules 1978 which came into force in 1992 but has not been adopted by the UK. The result today is a degree of fragmentation among the uniform rules adopted internationally for this mode of transport and to which further efforts are being addressed.[144] The work of UNCTAD was naturally influenced by these developments and the Multimodal Transport Convention ultimately produced in 1980 reflected this influence. It has been said that the IPG[145] considered the problems of multimodal transport from the

141. Modern Liner Contracts, pp. 14–15.

142. Frequent references will be made to this document as it provides a leading example of the type. Naturally such bills need to deal with wider matters than the basic scheme of liability and differences in the various versions of this and the predecessor documents issued by P&O Nedlloyd will be drawn out as appropriate.

143. E.g. Combidoc—although even this document contains spaces to indicate ports of loading or discharge.

144. See below, 1.40.

145. See above, fn. 128.

point of view of shipping and that the Convention must be read with this in mind.[146] Nevertheless, it can be borne in mind that the liability provisions in the Hamburg Rules are closer to other conventions than the Hague or Hague Visby Rules.

1.38 From MMTC the notion of multimodal transport and multimodal transport operator has passed into general parlance as a substitute for those of combined transport and combined transport operator. The details of and further background to the Convention are discussed in Chapter 3.[147] In outline the liability system adopted by it reflected the working out of a compromise between the network and uniform approaches. Arguably MMTC adopts a modified uniform system.[148] A uniform liability is imposed regardless of the stage at which loss, damage or delay occurred provided that the occurrence causing the loss, damage or delay took place whilst the goods were in the charge of the MTO.[149] The level of liability imposed by this rule is based on Article 5 of the Hamburg Rules which essentially imposes fault liability with a reversed burden of proof. A default provision for limitation of liability applies different limits depending upon whether, according to the contract, carriage by sea or inland waterways is included.[150] This enables some account to be taken of the different level and operation of the limit of liability in sea carriage as opposed to other modes. A limited network provision allows for higher limits adopted by applicable international conventions or mandatory national law to be applied where loss or damage can be localised. In some respects the substantive scope of the convention is more complete than the earlier attempt made in the TCM since it includes provisions concerning arbitration and jurisdiction. It also sought to resolve potential conflicts with the operation of other conventions which were perceived to exist. As with TCM much concern was expressed by the air industry about the impact of the convention on established liability conditions.[151] A limited concession was the exclusion of pick-up and delivery services although this is expressed in terms wider than a connection with air transport.[152]

1.39 The convention failed to obtain international acceptance and has not been adopted.[153] There was no commercial acceptance of the scheme of liability adopted by it as a uniform law solution. An effort to deal with commercial objections to the scheme came with the UNCTAD/ICC Rules.[154] These rules sought to achieve greater reconciliation with the Hague Rules so as to be more acceptable to shipping interests. Apart from a uniform liability rule imposing liability for fault it maintains the availability of the distinctive sea carriage defences of negligent navigation or management and fire without the actual fault or privity of the carrier.[155] As with MMTC, the rules for limitation of liability recognise a split between contracts

146. Selvig, in Seminar Papers, para. 10.
147. See 3D.
148. See fn. 134.
149. Article 16, see 3.106.
150. Article 18(1) and (3), see 3.106.
151. See De Wit, para. 2.218.
152. See Art. 1 and 3.
153. See the various explanations offered in the report of the UNCTAD secretariat, above fn. 136, at paras 22–26.
154. Discussed in detail at 3E.
155. Rules 5.1 and 5.4, see 3.128.

including carriage by sea and inland waterways and other modes but adopts the Hague-Visby Rules limit for the former.[156] A network provision applies the limits of liability adopted by applicable international conventions and mandatory national laws.[157] The rules recognise, however, that as purely contractual provisions they may be displaced by mandatory law and so take account of this in Article 13.[158] Some commercial recognition to the Rules has been given by FIATA and BIMCO. A revised version of the FBL[159] in 1992 was issued subject to these rules. Similarly BIMCO Multidoc 1995 is expressly subject to them.[160] Apart from these there appears to have been no wholesale commercial adoption of them. The combined effort of the Convention and the Rules has, however, had some influence on some of the regional and national efforts to provide rules for multimodal transport.[161] The various efforts, however, display a variety of approaches, further clouding a clear way to a uniform solution.

1.40 The search therefore continues for an internationally acceptable solution whether based on a mandatory uniform law or model law.[162] More recently, however, a development from a different starting point could have considerable impact on the future of contracts for multimodal transport. This is the United Nations Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea 2009 (The Rotterdam Rules) the culmination of work undertaken by UNCITRAL.[163] Starting in 1996, the initial focus was on carriage by sea and the need to fill in gaps left by current national and international rules. The work of the Commission linked with work also being undertaken by CMI and culminated in a preliminary draft instrument on the carriage of goods by sea on which further work was conducted by a working group established by UNCITRAL. Ultimately a "maritime plus" regime has been created. Whilst there must always be an element of international sea carriage within the scope of application of the new rules, and which will be regulated

156. Rules 6.1 and 6.3, see 3.132.

157. Rule 6.4, see 3.132.

158. See further 3.120.

159. See above fn. 140.

160. Waybill versions are also available.

161. National examples include the Indian Multimodal Transportation of Goods Act 1993 (see 3.120, and *Bhatia Shipping & Agencies PVT Ltd* v. *Alcobex Metals Ltd* [2004] EWHC 2323 (Comm), [2005] 2 Lloyd's Rep 336) and the Dutch Civil Code (Book 8, 8:40–8:52 and German Commercial Code (s452–452d). Regional examples are the Decision 331 of 4 March 1993 (as modified by Decision 393 of 9 July 1996) of the Andean Community and the ASEAN Framework Agreement on Multimodal Transport. For a review see the report of the UNCTAD Secretariat, *Implementation of Multimodal Transport Rules*, 25 June 2001, UNCTAD/SDTE/TLB/2.

162. See the report of the UNCTAD Secretariat, above fn. 136, based on a questionnaire issued to Governments and industry as well as to interested intergovernmental and non-governmental organisations and a number of experts on the subject. The report displays the variety of opinion on different features of and approaches to a possible uniform law. Majority opinion favours a mandatory regime with an overall fault-based uniform system with modified network in respect of limits of liability, see paras 57, 61, 64, 79.

163. See Thomas, Thomas RR, RRAPA. See further M.F. Sturley, T. Fujita & G.J. van der Ziel, *Rotterdam Rules: The UN Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea* (Sweet & Maxwell, 2010), M.D. Güner-Özbek, *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the "Rotterdam Rules"* (Springer, 2011), A. Von Ziegler, J. Schelin and S. Zunarelli, *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Kluwer Law International, 2010).

by it, it will also regulate contracts of carriage to the extent that they extend beyond the sea.[164] Since such carriage would inevitably be multimodal, consideration has been given to how the Convention should co-exist with modal rules, the decision being taken to confine any such consideration to mandatory international modal regimes of carriage. This development is considered in detail in Chapter 3 although it can be noted here that at the time of writing this Convention has not yet come into force.[165]

1.41 Apart from what is anticipated as a global development, the European Union is giving consideration to the development of a regional legal instrument specifically for multimodal transport with a view to reducing barriers to choosing multimodal transport.[166] Early work focused on the idea of a distinct regime for multimodal transport based on a uniform regime and overriding if required compulsory modal regimes such as CMR.[167] More recently attention has focused on a proposal for a mandatory uniform liability system but with an opt-out in respect of liability limits.[168]

1C.4 THE DEVELOPMENT AND CURRENT FORMS

1.42 Although there has been a progressive development of forms it should be remembered that it may not be possible to exclude the possibility that an older type of form may yet form the basis of litigation. With some forms the changes indicated above may be reflected only in the terminology adopted by the operator rather than in the scheme of liability adopted in the form. Some bills of lading, for example, may pronounce themselves to be combined transport bills but accept only a segmented responsibility. Similarly, some bills of lading now adopt the multimodal transport terminology but still employ essentially a first generation scheme of integrated liability.[169] Others retain the second generation scheme whilst moving to the newer terminology.[170] Furthermore, the different stages of development are sometimes reflected on the face of documents as well as their terms. The earlier type of through bill of lading would indicate the stages of transport on it supplemental to a carriage by sea. Today the prevalence of container transport will require some reference to them to appear even on a standard bill of lading or other transport document. Most

164. The so called "door to door" scope of application.

165. So far only two states have adopted the Convention out of the 20 required.

166. See E. Eftestøl-Wilhelmsson "The Rotterdam Rules in a multimdodal context" (2010) 16 JIML 274.

167. M.A. Clarke, R. Herber, F. Lorenzon and J. Ramberg, "Integrated Services in the Intermodal Chain (ISIC) Final Report Task B: Intermodal Liability and Documentation" (Southampton, 28 October 2005).

168. "Study on the details and added value of establishing a (optional) single transport (electronic) document for all carriage of goods, irrespective of mode, as well as a standard liability clause (voluntary liability) regime, with regard to their ability to facilitate multimodal freight transport" (published June 2009) ec.europa.eu/transport/strategies/studies/doc/2009_05_19_multimodal_transport_report.pdf, see E. Eftestøl-Wilhelmsson, above, fn. 166, p. 279. For further discussion of possible solutions to the multimodal muddle see Hoeks, ch. 11 and B. Marten, "Multimodal Transport Reform in the European Union: A Minimalist Approach" (2012) XLVII ETL 129.

169. E.g. The Hapag-Lloyd Bill of Lading for Multimodal Transport or Port to Port Shipment.

170. E.g. the Maersk Line Multimodal Transport Bill of Lading.

bills of lading can be used to provide for through carriage which includes transport by a different mode. Older bill of lading forms commonly contained spaces to indicate pre-carriage or on-carriage into which the carrier or mode could be specified.[171] Second stage combined transport bills became more open about the stages of transport and indicate a place of receipt and a place of delivery. Some forms are specifically designed to be used for combined/multimodal transport. It is common, however, for a bill of lading to indicate that it can be used either for port to port carriage or for combined carriage. Filling in the place of receipt or delivery will convert it to a combined bill.[172] For port to port carriage only the places of loading and discharge of the ship will be indicated. Even with documents entitled combined or multimodal transport document there may be space for indicating the port of loading and discharge.[173]

1.43 The modern combined/multimodal transport bill is meant to serve integrated "conveyor belt" movement so that it does not need to be aligned to a particular ship or voyage. Early forms of combined bill would indicate the "intended voyage" or "intended port of loading". Today the boxes on the face of bills tend to omit the word "intended". Even if the intended port of loading is indicated the bill will contain a wide liberty clause giving the carrier freedom of route and means of conveyance. Further aspects of commercial practice relevant to container bills involve distinctions to be drawn between full container load movements (FCL) or a part container load (LCL) where a groupage arrangement is involved. Combined with references to house, door, depot and port, an individual service selection can be made by the customer.[174] Bills of lading issued by forwarders will reflect similar patterns. As noted earlier a container bill of lading issued by a shipping line will, however, often refer to and incorporate the carrier's tariff which will reflect agreements made within the shipping line's conference or consortia.

1.44 In trades where sea transport is not contemplated, contract forms may take a pattern more closely aligned to transport documents linked to other modes. Even where a sea leg is anticipated or possible the contract may be evidenced by a consignment note as in the case of the TNT Ipec Consignment Note.[175] Although the thrust of the TCM Draft Convention and the Multimodal Transport Convention 1980 has been to seek to move transport documentation away from the traditional distinction between bills of lading and other documents towards a distinction between negotiable and non-negotiable combined/multimodal transport documents, the development towards this has been slow. As noted earlier the main thrust in the development is strongly related to shipping and a shipping culture

171. See e.g. Conlinebill 2000.

172. See Mitchelhill, ch. 5 and App. H. The NCFCC 2008 use the term gate to gate in contrast to port to port (see cl. 1). The former phrase includes incidental terminal handling in the port of loading and/or port of discharge. See also 3.52.

173. See Combidoc above, fn. 139, and FBL.

174. House-to-house and door-to-door indicates a movement commencing and terminating at traders' premises. Depot and port (or pier, commonly in US practice, see Sorkin, *Goods in Transit*, para. 2.25(5)) will indicate a movement commencing or finishing at a CFS or port terminal. Combination indicates the precise service selection e.g. LCL Door/LCL Depot: carrier collects from shipper and moves to depot for groupage and delivers to importing depot at destination, see *Understanding the Freight Business*, p. 48.

175. See Branch, p. 180.

which still tends to think in terms of bills of lading and waybills and was formed against a background of the traditional use of bills of lading and the potential application of the Hague Rules. Consignment notes and waybills such as the air waybill have not tended to take on a negotiable form and have needed to be aligned to the requirements of conventions governing non sea modes of transport.[176] Depending, however, on the success of the Rotterdam Rules, there may yet be the development of a basic distinction between negotiable and non-negotiable transport documents (paper and electronic) applicable both to contracts of carriage of goods by sea and to multimodal contracts where they involve an element of sea carriage.[177]

176. E.g. the CMR Convention invests a limited control function in the use of the document in a way that is not reproduced in respect of waybills used where carriage by sea forms a substantial element. *Cf* Art. 12 of the CMR Convention with Art. 6 of the CMI Uniform Rules for Sea Waybills. See further D. Glass and R. Nair, "Towards Flexible carriage documents? Reducing the need for modally distinct documents in international goods transport", (2009) 15 JIML 37, European Commission (2006) "ELDOC: legal study on legal and administrative practices regarding the validity and mutual recognition of electronic documents, with a view to identifying the existing legal barriers for enterprises", D3.6 final report, prepared for EC DG Enterprise and Industry, November 2006.

177. For further discussion of general developments including in respect of electronic documentation see: M. Goldby, "The performance of the bill of lading's functions under UNCITRAL's draft convention on the carriage of goods" (2007) 13 JIML 160 and "Electronic alternatives to transport documents: a framework for future development?", Thomas, ch. 9, N. Gaskell, "Bills of lading in an electronic age" [2010] LMCLQ 233, A. Møllmann, "From bills of lading to transport documents—the role of transport documents under the Rotterdam Rules" (2011) 17 JIML 50. See also for industry perspectives, D.A. Glass, P.B. Marlow, R. Nair, "The use and legal effects of carriage documents in international multimodal transport", (2010) 2(4) *Int. Journal of Shipping and Transport Logistics* 347.

CHAPTER 2

FREIGHT FORWARDING CONDITIONS

2A INTRODUCTION

2.1 Virtually all major freight forwarders in the UK are trading members of BIFA.[1] Registered Trading Members of BIFA agree to use the Standard Trading Conditions, employ a minimum number of professional members, maintain liability insurance and abide by the Association's Code of Conduct. Probationary membership is available for companies new to the industry. Ordinary Trading Membership is available for companies unable to comply with all the conditions, in particular those wishing to use their own trading conditions. Such proprietary conditions, which seem to be less common in the UK today, may well reflect the influence of current or previous BIFA Conditions or even the older IFF editions of 1984 and 1981.[2] Other companies, not primarily engaged in forwarding, may in fact utilise BIFA Conditions or incorporate forwarding activities into their general conditions. A further possibility is to use standard conditions drafted by bodies closely involved in claims such as the TT CLUB.[3] Some companies marketing logistics services advertise their membership of BIFA and appear to apply the conditions to them. Others adopt their own conditions in respect of such services. Some companies may contract on BIFA conditions but add supplemental terms,[4] for example dealing with the loading and unloading of transport units,[5] cancellation provisions, demurrage terms etc. It has also been common for logistics services providers to base their terms on Road Haulage Association (RHA) conditions and those provided by the United Kingdom Warehousing Association (UKWA).[6] The use of dedicated terms

1. The British International Freight Association. Prior to 1989 known as the Institute of Freight Forwarders.

2. See e.g. AAI Forwarding Ltd Terms and Conditions (www.aai-intl.co.uk/companies/terms_aaifwd.html).

3. TT CLUB 400 is provided for members requiring freight forwarding terms and TT CLUB 600 is for use by members requiring a full set of logistics conditions.

4. E.g. P&O Ferrymasters GTC 2011 (www.poferrymasters.com/general-conditions-2011-BIFA-conditions-2005A.pdf), See 2.9 below, Ital Logistics Terms and Conditions (www.ital-logistics.com/resources/downloads/Terms & Conditions_ITAL Logistics_June 2012.pdf).

5. E.g. cl. 7 of P&O Ferrymasters GTC.

6. Slater, *How to Prepare*, p. 1. UKWA conditions consist currently of the 2002 Conditions of Contract and the 2006 Conditions for Logistics. *Cf* also the terms used in Holland by Fenex for value-added logistics (1995) which are linked particularly to activity at a logistics centre. An impression of the variety of terms used by various logistics providers which may be more or less influenced by UK associations' terms can be found by consulting terms used by e.g. DAMCO: (www.damco.com/~/media/Files/Download Centre/Handling Documents/Damco STCs 2009.ashx), OOCL Logistics: (www.oocllogis

is more likely the closer and more complex the relationship between customer and service provider,[7] especially where contract logistics involving the outsourcing of a company's logistics requirements are involved. Associations of freight forwarders occur in other countries and, along with BIFA, are members of FIATA.[8] This body provides Model Rules for Freight Forwarding Services[9] and some associations make clear that their conditions give the customer at least the degree of protection stipulated by these Rules.[10] Some national associations have begun to make specific reference to logistics services in their conditions[11] or to provide separate conditions in respect of them.[12] Discussion of the roles adopted by freight forwarders and logistics operators and connected issues concerning their definition and their legal status is made below as they arise in the context of specific terms.

2.2 The 1989 BIFA Conditions continued the policy adopted by the 1984 IFF Conditions which were drafted with an eye to the Unfair Contract Terms Act 1977.[13] They were intended as a more simplified and manageable version of the 1984 edition. The 2000 edition continued this trend which is carried into the current 2005A Conditions.[14] A major change in the 1984 edition was the substitution of the restrictive "omnibus" exclusion found in previous editions,[15] which based liability only on wilful misconduct, with a general exclusion of liability clause[16] more favourable to the customer. Also, it has been said[17] that the drafting of the 1984 Conditions appeared to be with the possibility in mind that a court might be prepared to sever innocent clauses or parts of them from other clauses or

tics.com/businesstermsandconditions/Pages/default.aspx?site=unitedkingdom), DHL Logistics: (www.dhl.co.uk/content/dam/downloads/uk/Logistics/dhl_pallet_network_terms_and_conditions.pdf), Supreme Logistics: (www.supremelogistics.co.uk/pdf/Supreme_Logistics_Business_T_Cs_2011.pdf), Condor logistics: (www.condorlogistics.co.uk/img/Conditions_of_carriage_and_warehousing.pdf), Sbi Logistics: (www.urgent-delivery.com/_docs/Sbi_Logistics_Terms_of_Business.pdf), First GB logistics: (www.firstgblogistics.com/terms.php), Global Logistics: (www.globalistics.com/terms.html), Fresh Logistics: www.freshlogistics.co.uk/termsandconditions.html). An example of a service linked to courier carriers is provided by Rand Logistics: (https://www.randlogistics.com/terms_and_conditions).

7. Included may be tailor-made terms dealing with e.g. dedicated storage facilities, vehicle fleet and performance levels, see generally Slater, *How to Prepare*. Alternatively there may be a tailor-made "umbrella agreement" to which general conditions are attached in respect of particular movements, see e.g. *Rhône Poulenc Rorer Ltd* v. *Trans Global Group Ltd*, below, fn. 48. TT CLUB 600 which is appropriate for contract logistics makes provision for the incorporation of "Standard Conditions" of the member such as TT CLUB 400.

8. International Federation of Freight Forwarders Associations. In Europe they may also be members of Clecat (European Association for forwarding, transport, logistic and customs services). As with BIFA national associations may well issue general trading conditions for local use. Countries with a close connection to the UK may well use terms similar to those used by BIFA currently or previously e.g. the Irish International Freight Association (IIFA) still makes use of 1989 conditions which are similar to BIFA 1989. Others may use conditions based on TT CLUB 400.

9. See below, 2.7.

10. E.g. the General Conditions of the Nordic Association of Freight Forwarders (NSAB) 2000.

11. As in the German Freight Forwarders' Standard Terms and Conditions (ADSp 2003). In Germany the development is now reflected in the name: The Federal Association of German Freight Forwarders and Logistics Operators, similarly in Holland, see fn. 12.

12. The Netherlands Association for Forwarding and Logistics (FENEX) issue general forwarding conditions (2004) and separate terms and conditions for value-added logistics (1995).

13. Hereinafter UCTA.

14. © BIFA 2009.

15. E.g. cl. 18, 1981 Conditions.

16. See cl. 36, 1984 Conditions.

17. Yates and Hawkins, 2G(9), note 5.

parts which offend UCTA.[18] Whilst earlier versions placed a heavy emphasis on a single exclusion the more recent versions are sprinkled with exclusions, limitations and indemnities creating greater opportunity for the wielding of the blue pencil. Nevertheless, there remain general clauses in the more recent conditions[19] and their relationship with other clauses will need careful consideration. Note that the 1981 Conditions also involved a greater degree of complexity than seen in previous versions such as those of 1974 and 1970.

2.3 Various documents may be issued by forwarders depending on the particular relations that the forwarder has to his customer, the goods and carriers or other parties involved.[20] Forwarders are generally intermediaries and normally utilise the documents, such as bills of lading and consignment notes, issued by the carriers involved in the transport. They may on occasion be authorised to issue the document themselves as agent for the carrier. The forwarder may issue a document, for example to a road haulier, to indicate the calling forward of goods from the customer's premises, or to the customer to indicate that the goods have in fact been shipped.[21] Where the forwarder comes into possession or control of the goods a Forwarder's Certificate of Receipt (FCR) or House Bill of Lading (House BL) may be issued. The FCR is used primarily in continental trade and functions similarly to an international consignment note in that goods are forwarded to a named consignee. Countermanding instructions are possible provided that the original receipt is surrendered. The House BL functions similarly to a traditional bill of lading, with provision for endorsement and requiring its production at destination to the receiving agent of the forwarder. It provides a means of control between agents when the forwarder is utilising a receiving agent to control movement or delivery at destination. An alternative is for the sending forwarder to issue a delivery order to the customer to obtain delivery from the receiving agent.

2.4 By issuing a House BL a forwarder is not necessarily contracting to carry the goods to which it relates[22] but may be contracting simply as agent. This was often the intention behind the use of such a document in earlier forwarding practice. Early forms of the House BL would indicate that the forwarder contracted only as an agent. The criteria used to determine this are discussed below.[23] Early authority established that where the forwarder acted only as an agent the House BL issued by him was not a document of title for the purposes of a CIF contract.[24] Nor would it be acceptable for the purposes of a documentary credit.[25] It will be useful, however, in ensuring that the forwarder's standard conditions are incorporated so that any responsibility he may have, even as an agent, is covered by them. An alternative to

18. Discussed below, 2C.2.
19. See cll. 24–29 of BIFA 2000.
20. See *Understanding the Freight Business*, ch. 3
21. E.g. a forwarder's Certificate of Shipment.
22. See *Gagniere* v. *The Eastern Co* (1920) 7 Ll L Rep 188.
23. See s. 2C.4.3.
24. *Emilio Clot & Co* v. *Compagnie Commerciale du Nord SA* (1921) 8 Ll L Rep 380.
25. However, see below, 2.5.

using a House BL is a Forwarder's Certificate of Transport (FCT).[26] This has not been usual in British practice.

2.5 A House BL will be acceptable under Article 20 of the Uniform Customs and Practice for Documentary Credits 2007 (UCP 600), where the forwarder is the carrier or is signing for an identified carrier and it is indicated the goods have been shipped on board. Forwarders providing combined transport services may well issue their own form of bill of lading with the intention of accepting responsibility as a carrier or may use a FIATA Bill of Lading (FBL) which by clause 2.1 involves an express assumption of liability in respect of the carriage of the goods. Other forwarder bills of lading may not be so clear and may be intended as multi-purpose documents so that it will depend on factors other than the form itself as to the capacity in which the forwarder is contracting.[27]

2.6 As a member of FIATA, BIFA is empowered to authorise the use, by its members, of FIATA documents such as the FCR, FCT and FBL.[28] Clause 3(C) of the 1984 edition of the conditions expressly permitted the parties to agree that in respect of all or part of their contract for the movement of goods the forwarder would issue a FIATA Combined Transport Bill of Lading[29] subject to the current conditions governing this document and giving priority to its terms should they prove inconsistent with IFF Conditions, provided that such document was issued subject to the ICC Uniform Rules for a Combined Transport Document and that this is printed on the document.[30] This clause does not appear in the current conditions possibly on the assumption that the issue of an FBL for a particular movement would easily take effect and that any FBL issued by a BIFA member is bound to comply with the stipulations indicated. A benefit of the previous clause, however, was that it continued the effect[31] of the general conditions in the contract, notwithstanding the issue of an FBL except in so far as there was inconsistency, which would enable the forwarder to rely on the general conditions in respect of matters left open by the FBL.[32] The danger of the omission is that a court might ignore the BIFA Conditions and assume that they have been replaced completely by an FBL issued by the forwarder.[33]

2.7 In addition to the above documentation, FIATA produced in 1996 a set of Model Rules for Freight Forwarding Services. These are designed for use as recommendations to legislative bodies in those countries where there is no national statute on forwarding or for use by ordinary FIATA members and their member freight forwarders where national conditions have not been adopted. FIATA also provides

26. FIATA have produced standardised FCR and FCT which are issued by freight forwarder members of affiliated associations such as BIFA, see *Understanding the Freight Business*, p. 83. For further detail on the variety of forwarding documents used in practice, see Jones, *FIATA Legal Handbook on Forwarding* (2nd edn, 1993).

27. Such as the form of signature, see 2.77.

28. The latest version dates from 1992.

29. In respect of the use of an FBL and other forwarder documents where the forwarder is acting as a combined/multimodal transport operator see further, 2C.4.4 and 3C.

30. See 3C.2.

31. Which might not be the case unless the court accepts a variation or considers both sets of conditions to be incorporated by a course of dealing.

32. *Cf* TT CLUB 400, cl. 2(b).

33. On the basis of a variation.

a model for standard national freight forwarders' trading conditions but it has been said that this only sets forth some basic principles.[34]

General conditions such as those adopted by BIFA may be attached to a variety of forms as they are used to cover a variety of services. The front of the forms will provide a box layout for details of parties and goods and may refer to the trading conditions contained on the back. A House BL will indicate conveyance or vessel and will also contain the usual clause as to delivery against the document. 2.8

2B INCORPORATION OF GENERAL CONDITIONS

BIFA 2005A (© BIFA 2009), Preliminary clause, P&O Ferrymasters General Terms and Conditions 2011, clause 2, DAMCO STC, clause 53 2.9

The customer's attention is drawn to specific clauses hereof which exclude or limit the company's liability and those which require the customer to indemnify the company in certain circumstances and those which limit time and those which deal with conditions of issuing effective goods insurance being clauses 8, 10, 11(a) and 11(b), 12–14 inclusive, 18–20 inclusive, and 24–27 inclusive.[35]

2. APPLICATION

2.1 All and any activities of the Company in the course of business (whether gratuitous or not) are undertaken subject to these Conditions.

2.2 The respective rights and obligations of the parties under these Conditions shall be read and construed as being subject to and governed by the following:

2.2.1 the BIFA Conditions except that the definitions above shall be substituted for the definitions in the BIFA Conditions; and

2.2.2 in respect of carriage or transportation by sea for which the company issues a House Bill of Lading, the FIATA Conditions and the terms of that House Bill of Lading.[36]

53. Amendments

The Company may unilaterally amend these Conditions at any time by publishing the amendments on the Company's website. All contracts concluded by the Company and the Customer after such publication shall be subject to the amended Conditions.

The statement in the BIFA preliminary clause above, which appears at the beginning of the conditions, draws attention to those conditions most likely to affect the customer, and combined, normally, with a reference to the conditions on the 2.10

34. See Ramberg, *The Law of Freight Forwarding*, p. 21.

35. The BIFA House BL would also refer to specific clauses on the front of the form drawing attention, e.g. to clauses dealing with compulsory legislation. It is understood that it is no longer the practice of BIFA to issue these leaving it to the practice of the individual forwarder. Any specific reference on the face of the document may amount to a heightened degree of notice for the purpose of incorporation which is discussed at this point, and for purposes of the reasonableness test under UCTA, which is discussed at 2C.2.2.

36. As noted at 2.1 above, some companies supplement BIFA conditions with their own terms but provide for the associations' terms to take precedence.

front of forms issued in connection with a service,[37] seek to encourage the view that sufficient notice has been given to the customer to enable the conditions to be incorporated. Whilst BIFA 2000 made general reference to such clauses, the level of notice is enhanced further by BIFA 2005A which refers specifically to the number of any such clause. With any contract based on standard terms it is necessary for the party relying on them to demonstrate that they have been incorporated. This can be achieved by either getting the customer to indicate agreement to them by signing a contractual document containing them,[38] or by giving sufficient notice of them at the time the contract is made.[39] It seems that the question is whether reasonable steps have been taken and that this is a question of fact.[40] Consequently, whilst the failure to draw the customer's attention to the terms on the face of a contractual document might not be fatal, especially if they are reproduced on the back, it is certainly advisable.[41] Conditions of this type can also be incorporated by a consistent course of dealing.[42] A clause which is considered to be unusual or onerous will require a greater degree of notice.[43] It is not, however, necessary to the

37. See e.g. the FIATA FCR, and see cl. 1.1 of the FIATA Model Rules, cl. 1.2 of which provides that the Rules supersede any additional terms except in so far as they increase the responsibility of the forwarder.

38. *L'Estrange* v. *F. Graucob Ltd*, [1934] 2 KB 394, see Treitel, p. 238, 7–004 and also *Harris* v. *GWR* (1876), cited by Clarke, p. 203. The document must be one that is reasonably expected to contain terms, *Grogan* v. *Robin Meredith Plant Hire*, The Times, 20 February 1996, see Treitel, p. 238, 7–004. *Cf Toll (FGCT) Pty Ltd* v. *Alphapharm Pty Ltd* (High Court of Australia, 11 November 2004), [2004] HCA 52, 219 CLR 165 (onlinedmc.co.uk).

39. *Parker* v. *South Eastern Railway* (1877) 46 LJKB 768. Whether steps were taken to draw the conditions to the other party may be irrelevant if the evidence shows that that party's frame of mind was that he was prepared to enter into the contract on the basis of the terms and conditions whatever they were, see Beldam LJ, *Laceys Footwear (Wholesale) Ltd* v. *Bowler International Freight Ltd* [1997] 2 Lloyd's Rep 369, 378. Here the party knew that there most probably were terms and conditions and that, had he chosen to do so, he could have read them (with some difficulty) but was anyway going to make sure that he was properly insured.

40. *Keeton Sons & Co Ltd* v. *Carl Prior Ltd* [1986] BTLC 30.

41. *Treitel*, in the 11th edn, pp. 218–219, indicated that it is not necessary *as a matter of law* to print words such as "see back" on a document, citing *Burke* v. *South Eastern Railway* (1879) 5 CPD 1. In this case the court distinguished *Henderson* v. *Stevenson* (1875) LR 2 Sc & Div 470, where only the face of the document was considered to have contractual effect but in the context of what the later court considered was a simple bailment of goods. In the current edition it is stated that the absence of the words may make incorporation unlikely (13th edn, at p. 240 and cases cited at n. 35). In *Laceys Footwear (Wholesale) Ltd* v. *Bowler International Freight Ltd*, above, fn. 39, a quotation sent after the contract was made failed to refer to the terms reproduced on the back of a covering letter. For the judge at first instance this meant a failure to give reasonable notice but different facts were emphasised by the Court of Appeal.

42. See e.g. *Circle Freight International* v. *Medeast Gulf Exports* [1988] 2 Lloyd's Rep 427, where, after concluding a contract by telephone the forwarder would send an invoice that gave notice that business was conducted on IFF terms available on request. At least 11 invoices were sent within a period of six months up to the making of the relevant contract, *cf* generally *Sterling Hydraulics Ltd* v. *Dichtomatik Ltd* [2006] EWHC 2004 (QB), [2007] 1 Lloyd's Rep 8.

43. *Treitel*, p. 240, 7–009. See *Thornton* v. *Shoe Lane Parking Ltd* [1971] 2 QB 163 and *Interfoto Picture Library Ltd* v. *Stiletto Visual Programmes Ltd* [1989] 1 QB 433. It is said that the rule premises that the term is not only unusual but also onerous, Clarke citing *O'Brien* v. *MGN Ltd* [2001] EWCA Civ 1279, [2002] CLC 33. Treitel notes further, at p. 238, 7–004, that it has been suggested that "in some extreme circumstances even signature might not be enough", so that a term that was "particularly onerous or unusual" would not be incorporated unless, in addition to the signature, steps were taken to draw the attention to the signer to such a term: *Ocean Chemical Transport Inc* v. *Exnor Craggs Ltd* [2000] 1 Lloyd's Rep 446 at p. 454. It might be ventured that since the point of a signature is to signify consent at the time the contract is made, signing a document after the contract's conclusion might be regarded as insufficient unless taken as consent to a variation.

incorporation of trading terms into a contract that they should be specifically set out provided that they are conditions in common form or usual terms in the relevant business. It is sufficient if adequate notice is given identifying and relying upon the conditions and that they are available on request.[44]

The nature of forwarding operations may make it difficult to ensure that notice is given at the same time that the customer made the contract, as in the case of a receiving forwarder acting for a consignee on instructions initiated by a sending forwarder.[45] It may be easier to establish incorporation when the forwarder is dealing with a commercial customer.[46] Where, however, two forwarders were operating in different countries to provide mutual correspondent services, it was not sufficient for the defendants, who wished to rely on their (BIFA) standard conditions, to send a fax including the statement "The only conditions on which we transact business are shown on the back". It being a fax, nothing was shown on the back. The fact that other documents were sent containing BIFA terms was insufficient given that these documents were concerned with the relationship with the ultimate customer. It was natural for the plaintiffs to assume that the reference to "transacting business" was intended to apply to contracts with the customer and not to a long-term cooperation agency relationship under which the plaintiffs were entitled to expect equality and mutuality, not limitation of liability.[47] In *Rhône Poulenc Rorer Ltd* v. *Trans Global Group Ltd*,[48] complex issues of incorporation arose out of an umbrella agreement which stated that invoices issued under the agreement would be subject to the agreement and BIFA conditions. Colman J held that all the BIFA conditions were incorporated (subject to a conflicts clause), rejecting an argument that only those conditions which relate to the payment of accounts were incorporated. Had he accepted this view he would have rejected an argument that the whole conditions were incorporated by a course of dealing in respect of the invoices. This was because the express incorporation by the agreement of only a limited part of the BIFA conditions would make incorporation of the whole of the conditions by course of dealing untenable. His view on these points was affirmed by the Court of Appeal.[49] In *Granville Oils & Chemicals Ltd* v. *Davies Turner & Co Ltd*,[50] Judge Behrens held that the BIFA 1989 Standard Trading Conditions were

2.11

44. Taylor LJ, in *Circle Freight International* v. *Medeast Gulf Exports,* above, fn. 42, at p. 433. *Cf Keeton Sons & Co Ltd* v. *Carl Prior Ltd*, above, fn. 40 and *Sterling Hydraulics Ltd* v. *Dichtomatik Ltd* [2006] EWHC 2004 (QB), [2007] 1 Lloyd's Rep 8.

45. *Von Traubenburg* v. *Davies Turner* [1951] 2 Lloyd's Rep 462.

46. As in *Circle Freight International* v. *Medeast Gulf Exports*, above, fn. 42. See also *Lacey's Footwear (Wholesale) Ltd* v. *Bowler International Freight Ltd,* above fn. 41. In *Frans Maas (UK) Ltd* v. *Samsung Electronics (UK) Ltd* [2004] EWHC 1502, [2004] 2 Lloyd's Rep 251, Gross J (at p. 256) indicated that the manifestly uncommercial conclusion that no standard terms applied was not one he would come to unless driven to it.

47. *Poseidon Freight Forwarding Co Ltd* v. *Davies Turner Southern Ltd* [1996] 2 Lloyd's Rep 388 (CA). In contrast with *Keeton Sons & Co Ltd* v. *Carl Prior Ltd*, the terms in question were neither identified nor said to be available on request, see Leggatt LJ, at p. 393.

48. QBD, 18 June 1997, unreported.

49. 18 February 1998, unreported.

50. Leeds District Registry Mercantile Court, 21 October 2002, summarised by David Martin-Clark (www.onlinedmc.co.uk).

incorporated by the reference made to them in quotation telexes sent by the forwarder to the customer.[51]

2.12 The BIFA Conditions and the former IFF Conditions are not so widely adopted as to make notice of their terms automatic as a result of trade usage and they certainly cannot be incorporated by usage if the forwarder has never used them or brought them to the attention of anyone.[52] Their effective incorporation may also depend on whether the forwarder has in fact been brought into a direct legal relationship with the customer,[53] either as a gratuitous or contractual agent, or as a performer of the service.[54] In this respect a course of dealing may be established whereby the forwarder is considered to have agreed to accept employment proffered to him by the customer on the terms of the trading conditions until the forwarder gives notice that the relationship is to be brought to an end.[55]

2.13 The BIFA preliminary clause could be made clearer by indicating that the conditions relate to a variety of services so that individual clauses may not be relevant to the particular service being provided. Clauses appearing in the general terms, however, normally indicate that they apply to a variety of services,[56] and also apply the conditions to gratuitous services.[57] Clauses of this type are discussed further below.

2.14 It is common to restrict the authority of an employee from agreeing with the customer any alteration of the terms.[58] A similar clause was held to be effective to negate the authority of an auctioneer to make representations in *Overbrooke Estates* v. *Glencombe Properties*,[59] and was not caught by section 3 of the Misrepresentation Act 1967. It will also be relevant to any "battle of the forms".[60] The clause may be ineffective, however, unless the customer knows or should have known of it before the contract was made, otherwise the forwarder may be bound by an apparent

51. No appeal on this point was made to the Court of Appeal.

52. *Salsi* v. *Jetspeed* [1977] 2 Lloyd's Rep 57, distinguishing *British Crane Hire Corp Ltd* v. *Ipswich Plant Hire Ltd* [1975] 1 QB 303; *cf Elof Hansson Agency Ltd* v. *Victoria Motor Haulage Co Ltd* (1938) 54 TLR 666, where the court rejected implied incorporation of a later (and more restrictive version) of the London Lighterage Clause which had not been generally accepted nor judicially recognised. Apart from the issue of implied incorporation, which might perhaps require strict evidence that a term or set of conditions are so well known that the parties must be taken to have contracted on them, the usual or common nature of the term or conditions will be relevant to issues of reasonableness in respect of choices made by the forwarder or for the operation of the Unfair Contract Terms Act 1977, see, respectively: *Swiss Bank Corp and Others* v. *Brink's MAT Ltd and Others* [1986] 1 QB 853, [1986] 2 Lloyd's Rep 79 at p. 98 and *Schenkers Ltd* v. *Overland Shoes Ltd* [1998] 1 Lloyd's Rep 498.

53. *Von Traubenburg*, above, fn. 45.

54. See 2C.4.

55. *Pringle of Scotland* Ltd v. *Continental Express Ltd* [1962] 2 Lloyd's Rep 80 at p. 86.

56. As does BIFA, cl. 2(A), Geologistics GTC, cl. 1 and TT CLUB 400, cl. 2(a).

57. See 2.19.

58. See Geologistics GTC, cl. 1, TT CLUB 400, cl. 2(c).

59. [1974] 1 WLR 1335.

60. See *Butler Machine Tool Co Ltd* v. *Ex-Cell-O Corp* (*England*) *Ltd* [1979] 1 WLR 401, and *British Road Services Ltd* v. *Arthur V. Crutchley & Co Ltd* [1968] 1 Lloyd's Rep 271. In a "battle of the forms", the idea that victory goes to the party who fires the last shot (the traditional offer and acceptance approach) depends upon whether the last shot sufficiently incorporates that party's terms so as to provide adequate notice that a counter offer is being made with the effect of negating the terms of the other party, see *Sterling Hydraulics Ltd* v. *Dichtomatik Ltd* [2006] EWHC 2004 (QB), [2007] 1 Lloyd's Rep 8; *Tekdata Interconnections Ltd* v. *Amphenol Ltd* [2009] EWCA Civ 1209, [2010] 1 Lloyd's Rep 357.

authority in his employee to vary the terms of the contract.[61] In the American decision of *Amdahl Corp* v. *Profit Freight Systems Inc*,[62] this clause in LEP[63] Conditions was used to support the conclusion that the forwarder was unable to alter the limitation of liability in his trading conditions by reference to a different limitation contained in a bill of lading issued by the sea carrier. This was notwithstanding a further clause in the trading conditions granting authority to the forwarder to sign and accept in the customer's name any documents relating to said shipment and forward this shipment in accordance with the conditions of carriage and tariffs of the carriers employed.

2.15 Some conditions may indicate that the use of the customer's own forms is not to derogate from the conditions.[64] This would be ineffective if the rules of offer and acceptance are applied in such a way as to make the client's terms the governing conditions as in *British Road Services Ltd* v. *Arthur V. Crutchley & Co Ltd*.[65] That is unless the notice given of the forwarder's terms is such as to impose a duty on the customer to give specific notice to the forwarder of his own terms,[66] or is otherwise sufficient to affect the apparent authority of the forwarder's employee. Note also the possibility mentioned in that case of either reconciling the terms or scrapping contradictory terms and replacing them by a reasonable implication.[67]

2.16 Difficulties can arise if, having issued one document containing trading conditions to his customer, the forwarder issues a later document (usually a carriage document such as a bill of lading) with conflicting conditions. TT CLUB 400, clause 2(B) makes it clear that where the subsequent document is issued by the forwarder as a carrier the conditions in this document have priority over the general

61. *Cf Slim* v. *G.N. Ry* (1854) 14 CB 647, where the failure of the consignor to follow the prescribed procedure for delivery to the carrier meant that, although they were delivered into the possession of the carrier's servant, the carrier did not receive the goods under a contract of a carriage and were not responsible for their loss. Compare, however, *Datec Electronic Holdings Ltd* v. *United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325, [2007] 2 Lloyd's Rep 114, where no issue of the employee's authority arose. Despite the fact that the contract contained a term which stated that UPS did not offer carriage of packages which failed to comply with certain restrictions including a requirement that any package should not exceed $50,000 in value, this did not prevent a contract of carriage from existing when packages exceeding that amount were unknowingly accepted for carriage. Had UPS exercised its right to refuse to carry at the outset no contract of carriage would have arisen (*per* Lord Hope [9]).

62. [1995] AMC 2694 (9th Cir. 1995).

63. These appeared later as Geologistics GTC.

64. E.g. Geologistics GTC.

65. [1968] 1 Lloyd's Rep 271, see Lord Pearson at pp. 281–282.

66. See Lord Denning MR in *Butler Machine Tool Co Ltd* v. *Ex-Cell-O Corp* (*England*) *Ltd* [1979] 1 WLR 401 at p. 405.

67. See Lord Denning at p. 405. *Cf Transmotors Ltd* v. *Robertson, Buckley* [1970] 1 Lloyd's Rep 224, *Johnson Matthey Bankers Ltd* v. *State Trading Corp of India* [1984] 1 Lloyd's Rep 427 and see also *Tekdata Interconnections Ltd* v. *Amphenol Ltd* [2009] EWCA Civ 1209, [2010] 1 Lloyd's Rep 357 where it was considered that in a battle of forms case the traditional offer and acceptance analysis had to be adopted unless the documents passing between the parties and their conduct showed that their common intention was that some other terms were intended to prevail. It would be difficult to displace the traditional analysis unless it could be said that there was a clear course of dealing between the parties. *Cf*, *GHSP Inc* v. *AB Electronic Ltd* [2010] EWHC 1828 (Comm), [2011] 1 Lloyd's Rep 432. See further *Treitel*, p. 19, and E.J. Jacobs, "The Battle of the Forms: Standard Term Contracts in Comparative Perspective", (1985) 34 ICLQ 297.

conditions.[68] The absence of such a clause will produce a difficulty.[69] So long as the court does not regard the issue of the second document as simply too late to affect the contract,[70] one possibility might be to give preference to the carriage document as the one most relevant to the transport.[71] Alternatively the courts might apply the provisions of the last document to be issued.[72] The more likely approach would regard those provisions in the later document which conflicted with the general conditions as amounting to a variation or exclusion of them.[73] This would not necessarily deprive the remaining conditions in the earlier document of their effect. In *Ocarina Marine Ltd* v. *Marcard Stein & Co,*[74] Rix J considered[75] the jurisdiction clause in a "tailor-made" loan agreement to be incompatible with the equivalent provision in the general business conditions so that the former clause was to be taken as varying or even excluding the latter.[76] There might not be any real issue of inconsistency where it is possible, for example, to treat an exclusion in a carriage document as relating only to transport and not to the forwarder's wider functions.

68. *Cf* the 2002 P&O Ferrymasters General Conditions, cll. 2.1.2 and 2.2., which gave varied priorities to different conditions.

69. Ramberg, *The Law of Freight Forwarding*, 1993, p. 43 suggests that stipulations in an FBL supersede the freight forwarder's general conditions if in conflict. This is said to follow from express stipulations in the FBL. It is not entirely clear to which express stipulations the author refers. The FBL indicates on its face that goods and instructions are accepted subject to the conditions. This does not expressly indicate that it overrides other conditions although this might be regarded as its meaning.

70. There might be a sufficient course of dealing which effectively incorporates both documents.

71. *Cf Chas Davis* (*Metal Brokers*) *Ltd* v. *Gilyott and Scott and Pickering Road Haulage Ltd* [1975] 2 Lloyd's Rep 422 where a "battle of the forms" was in issue. Compare *Frans Maas (UK) Ltd* v. *Samsung Electronic Ltd* [2004] EWHC 1502 (Comm), [2004] 2 Lloyd's Rep 251, where the defendant sought to apply different terms to forwarding or storage services. An important consideration for preferring the view that BIFA rather than UKWA terms applied was that the goods were stolen from a custom's approved "Enhanced Remote Transit Shed" i.e. a short transit lounge rather than a true storage warehouse.

72. A Canadian example of this is *Canastrand Industries Ltd* v. *The Lara S.* [1993] 2 FC 553; see Tetley, "Canadian maritime legislation and decisions 1993–1994" [1995] LMCLQ 88.

73. See, however, *T Comedy (UK) Ltd* v. *Easy Managed Transport Ltd* [2007] EWHC 611 (Comm), [2007] 2 Lloyd's Rep 397 where a general agreement between the parties setting out terms of carriage but making no reference to RHA conditions was not varied by the issue of delivery notes and invoices which did. The judge considered that it cannot be inferred from standard form statements made by one party on invoices and delivery notes that the other party was agreeing to vary an existing agreement as opposed to where there is no existing agreement. Compare the approach in a different context: where different jurisdiction clauses appear in different documents in a complex derivatives transaction it is the clauses (in this case a jurisdiction clause) in the agreements which are at the commercial centre of the transaction which the parties must have intended to apply rather than "boiler plate" clauses (including a contradictory jurisdiction clause) in other documents primarily intended to deal with technical banking disputes, Lord Collins of Mapesbury in *UBS AG* v. *HSH Nordbank* [2009] EWCA Civ 585, [2009] 2 Lloyd's Rep 272 at [95]. Where contradictory jurisdiction and arbitration clauses appear in the same document the jurisdiction clause may well be taken to be applicable to the supervisory jurisdiction over the arbitration, *Tri-Mg Intra Asia Airlines* v. *Norse Air Charter Ltd* [2009] SGHC 13, [2009] 1 Lloyd's Rep 258 (High Court of Singapore), *Paul Smith Ltd* v. *H & S International Holding Inc* [1991] 2 Lloyd's Rep 127.

74. [1994] 2 Lloyd's Rep 524.

75. At p. 529.

76. Compare the discussion of similar issues raised in respect of documents used in carriage by sea in Gaskell *et al.*, at 2F. See also the point made at 2.6, above, in respect of BIFA Conditions. In *Atlanska Plovidba* v. *Consignaciones Asturianas SA (The Lapad)* [2004] EWHC 1273 (Comm), [2004] 2 Lloyd's Rep 109, the contract of carriage by sea was accepted as being contained in the booking note notwithstanding the later issue of a bill of lading. The arbitration clause in the booking note could thereby be applied regardless of any difficulty presented by the incorporation clause in the bill.

A useful comparison can be drawn with an American decision in *Zenith Electronics Corp* v. *Panalpina Inc*,[77] where the forwarder failed to present the carriage document to the bank and was held to be unable to rely on the time limit in the bill of lading (protecting the carrier) issued by its own in-house NVOCC.

2.17 Similar difficulties can arise if the standard conditions incorporate general institutional rules to apply alongside the conditions.[78] The FIATA Model Rules make clear by clause 1.2 that if incorporated they take precedence over other conflicting terms unless such terms increase the responsibility or obligations of the freight forwarder. In *Rhône Poulenc Rorer Ltd* v. *Trans Global Group Ltd*,[79] a conflict clause gave precedence to an umbrella agreement over BIFA conditions and Colman J rejected an approach involving complete rejection of a clause, where, despite differences in detail and substance, this clause and the clause in the agreement could be read or applied together.[80] Effect must be given to both unless and to the extent that there is an inconsistency. A further possibility is the use of standard trading conditions to incorporate by reference the conditions in use by another operator. This will arise where the forwarder has undertaken responsibility for the performance of the operation to the customer,[81] but is keen to protect himself in circumstances where his subcontractor uses particularly restrictive conditions. This is similar to the use made of incorporation by reference in some combined transport documents.[82] The consequences of such incorporation, especially where they are particularly restrictive, may need to be brought home to the customer in order to ensure their effective incorporation into the contract,[83] and to satisfy the reasonableness test in UCTA where this is applicable to the contract.[84] Any authority to incorporate the conditions of other operators is likely to be restricted where these conditions conflict with express terms in the general trading conditions unless a different relationship between them is made clear.[85]

2.18 Where a clause states that "Goods are accepted only upon the conditions printed at back . . . " this does not always imply physical acceptance of the goods, but may be interpreted as agreement to deal with the goods in the ways agreed which may involve calling forward of goods as opposed to physical receipt.[86] It can, however, include taking of possession, and the fact that one or more terms apply only when the forwarder acts as an agent does not mean that other terms cannot be applied

77. [1996] AMC 622 (7th Cir. 1995).

78. A further possibility might be the incorporation of the other party's terms which conflict with written terms. In *Indian Oil Corp* v. *Vanol Inc ("Indian Oil")* [1991] 2 Lloyd's Rep 634 (reversed on appeal for different reasons [1992] 2 Lloyd's Rep 563), a specific clause in a written agreement was held to override the incorporated clause.

79. QBD, 18 June 1997, unreported.

80. Some reservations were expressed by Waller LJ in the Court of Appeal (18 February 1998, unreported) in respect of claims related to the umbrella agreement which were outside the services which had always previously been supplied in relation to individual ad hoc transactions.

81. See 2C.4.

82. See 4G.3.2.

83. See the cases cited in 2.10. *Cf Ocean Chemical Transport Inc* v. *Exnor Craggs Ltd* [2000] 1 Lloyd's Rep 446.

84. *Cf* Brooke LJ, in *Lacey's Footwear (Wholesale) Ltd* v. *Bowler International Freight Ltd* [1997] 2 Lloyd's Rep 369, at p. 383. See further 2C.2.2.

85. *Cf Amdahl Corp* v. *Profit Freight Systems Inc* [1995] AMC 2694 (9th Cir. 1995).

86. See *Pringle of Scotland* v. *Continental Express* [1962] 2 Lloyd's Rep 80 at p. 88.

when the forwarder is acting in another capacity.[87] Where a form is clearly divided between different activities it will be difficult to persuade a court that a clause covering one activity can provide protection in relation to another.[88]

2C STANDARD TERMS OF CONTRACT

2C.1 DEFINITIONS AND APPLICATION

2.19 **BIFA 2005A clause 1, BIFA 2000 clause 1 ("owner"), BIFA 2005A clause 2A, FIATA Model Rules for Freight Forwarding Services clause 2.1, Example Contract, clause 1.1f) and clause 1.1h), TT CLUB 600, clause 1 Definitions & Interpretation (Logistics Centre, Logistics Document).**[89]

1 In these conditions the following words shall have the following meanings:—

"Company"	the BIFA Member trading under these Conditions
"Consignee"	the Person to whom the goods are consigned
"Customer"	any person at whose request or on whose behalf the Company undertakes any business or provides advice, information or services[90]
"Direct Representative"	the Company acting in the name of and on behalf of the Customer and/or Owner with H.M. Revenue and Customs ("HMRC") as defined by Council Regulation 2193/92 or as amended[91]
"Goods"	the cargo to which any business under these conditions relates
"Person"	natural person(s) or any body or bodies corporate
"SDR"	are Special Drawing Rights as defined by the International Monetary Fund[92]
"Transport Unit"	packing case, pallets, container, trailer, tanker, or any other device used whatsoever for and in connection with the carriage of Goods by land, sea or air
"Owner"	the Owner of the Goods or Transport Unit and any other Person who is or may become interested in them[93]

87. *L. Harris* (*Harella*) *Ltd* v. *Continental Express Ltd* [1961] 1 Lloyd's Rep 251 at p. 256.

88. *Cf Lufty Ltd* v. *Canadian Pacific Ry Co* (*The Alex*) [1974] 1 Lloyd's Rep 106 (Federal Ct. Canada). See further 2C.1.1.

89. See also HAFFA, (Hong Kong Association of Freight Forwarding and Logistics) Form of Trading Conditions (www.haffa.co.hk) definitions of owner and services. TT Talk (24 March 2009, No.117) indicates that these conditions are not a fully fledged set of logistics conditions. Complex contract logistics agreements may well require additional terms.

90. This clause seeks to identify the forwarder's contracting party and is considered within a general discussion of with whom the contract is made below at 2C.1.2.

91. This links with cl. 7 which makes BIFA a Direct Representative for customs purposes. The regulations indicated distinguish direct representation where the representative acts in the name of and on behalf of another person (and so is not personally liable for customs duties) and indirect representation where the representative acts in their own name but on behalf of another person.

92. See fn. 1180.

93. Various clauses in the BIFA Conditions refer to or purport to affect the rights of the owner of the goods who is defined in this clause, see especially cl. 4 of the 1989 Conditions, see 2.33. The definition of owner may also be used to define the liability of the customer for breach of warranty of authority. The

1. In these conditions
The "Owner" means the Owner of the goods (including any packaging, containers, or equipment) to which any business concluded under these Conditions relates and any other person who is or may become interested in them.
2. (A) Subject to Sub-Paragraph (B) below,[94] all and any activities of the Company in the course of business whether gratuitous or not are undertaken subject to these Conditions.
2.1 Freight Forwarding Services means services of any kind relating to the carriage, consolidation, storage, handling, packing or distribution of the Goods as well as ancillary and advisory services in connection therewith, including but not limited to customs and fiscal matters, declaring the Goods for official purposes, procuring insurance of the Goods and collecting or procuring payment or documents relating to the Goods.
1.1f) "Freight Forwarding Services" shall mean the planning and control of those Logistics Activities required in the movement of Goods from the Point of Origin to the Consignee. The Freight Forwarding Services shall also include all those administrative, ancillary and advisory services in conjunction with the movement of goods including, but not limited to, customs and fiscal matters, declarations and exchange controls, procurement of insurance and the collecting of payments for either goods or Logistics Activities.
1.1h) "Logistics Activity" shall mean the tasks undertaken by the Service Providers involved in the movement of the Goods, including collection, unloading, acceptance, storage, stock control, order handling, de-stuffing, consolidation, palletisation, preparing for shipment, loading, assembly, labelling, invoicing, shipping documentation, exchange control information, provision of customs information, delivery and the provision of shipment tracking and tracing details.

1. DEFINITIONS & INTERPRETATION
The definitions and rules of interpretation in this clause apply in this Agreement.
1.1 "Logistics Centre" means premises, including but not limited to an office, a warehouse or a distribution centre, from which the Logistics Provider provides the Services;
"Logistics Document" means a bill of lading, sea waybill, air waybill, road consignment note, shipping note, courier note, warehousing receipt note, storage note or any similar document containing or evidencing conditions of contract;

2C.1.1 Forwarding and logistics activities

BIFA clause 2A makes only general reference to the type of activity or business to be undertaken by the forwarder apart from ensuring that the terms cover activity which is gratuitous as well as for reward. This eschews any attempt to define forwarding activity as such so that any work done by the company can be subject to the conditions provided that they are successfully incorporated. There is some danger in seeking to define the range of forwarding or logistical activities that may be undertaken. Given that trading conditions are designed for use over a range of contracts such a definition could work negatively on the application of a set of *2.20*

effectiveness of such clauses is discussed below at 2C.3. BIFA 2000, cl. 1 is unclear as to whether the owner of a container is included when such owner is not also the owner of the goods contained in it since the word container might be considered to qualify the word "goods" rather than the word "owner" (*cf.* TT CLUB 400, cl. 1(G), see above.) Similarly the word "equipment" may be considered as referring to equipment carried as goods rather than equipment used in connection with carriage. BIFA 2005A seems more clearly to separate the owner of the goods from the owner of the transport unit. This links with the introduction of a definition of goods to mean cargo. Clause 1 of both BIFA 2000 and BIFA 2005A refer to a "person who . . . may become interested in them [the goods]" which may be too vague unless content can be given to it by reference to persons who have a legal or equitable relationship to the goods at some relevant point of time (*cf* TT CLUB 400, cl. 1(j)).

94. See 2C.2.

conditions if their scope of application is considered to be confined to a particular range of activities. That is, unless they are applied expressly to the particular activities envisaged by an individual contract rather than incorporated generally.[95] In such a case a court may be expected to apply them unless it regards the attempt to involve an inherent contradiction. Where different sets of conditions are designed to apply to different types of activity, it may be necessary to seek some means of differentiating them. For example the Netherlands Association for Forwarding and Logistics (FENEX) provides different conditions for each of these groups of activity. Their forwarding conditions are generally expressed to apply to any form of service which the forwarder shall perform.[96] The separate terms and conditions for value-added logistics contain a definition of logistics activities.[97] Since they are linked particularly to activities taking place at an agreed place[98] this can help to distinguish them from general forwarding activities. Other traditional forwarding associations have, however, sought to reflect the development of logistics services by specific reference to typical activities, such as inventory control and management, within general forwarding conditions.[99]

2C.1.2 The contracting parties

2.21 The BIFA clause defining the customer[100] seeks to identify the forwarder's contracting party to whom the conditions, in general, are addressed. It envisages that the person requesting the service may be acting for himself or as an agent. Where goods are being transmitted by a consignor to a consignee owner of the goods under a contract of carriage by land it is usually presumed at common law that the consignee is the carrier's contracting party.[101] Where the relationship is one of bailee/bailor it seems that the bailee is the contracting party at least where the bailee retains his status as bailee and continues to enjoy the immediate right to

95. It can be expected that for contract logistics the services would be detailed in the contract or attached via an appendix. Typical activities are those indicated in the clauses reproduced above. See further, Jané and de Ochoa, 2.4.4.1.

96. Fenex Forwarding Conditions 2004, cl. 1.1.

97. Terms and Conditions for Value Added Logistics 1995. These refer to activities such as unloading, acceptance, storage, delivery, stock control, order handling, order picking, preparing for shipment, loading, invoicing, assembling, labelling, exchange and control of information with regard to goods.

98. Which is natural for many logistics contracts where storage and distribution is centred on a warehouse or "logistics centre". This is not necessarily one belonging to the operator, the customer having made premises available, a possibility envisaged e.g., in TT CLUB 600, cl. 5. This clause provides for access to such premises and for availability of facilities. The definition of a logistics centre is reproduced above at 2.19.

99. As in HAFFA, cl. 1. TT CLUB 600 provides a definition of value-added services which includes but is not limited to procurement on behalf of the customer, stock and inventory management, picking, packing, assembly, labelling, container management, order processing, order expediting, processing, document production, customs process management, contract management and Information Systems management. This links with cl. 7.2 which requires the customer, in respect of such services, to provide all necessary procedures, instructions and manuals. This is presumably distinguishable from core activities linked to storage and distribution.

100. See above, 2.19.

101. *Dawes* v. *Peck* (1799) 8 TR 330, Glass & Cashmore, p. 3, Cashmore, p. 91, Palmer (2nd edn), p. 963. This applies where a seller/buyer relationship exists as between consignor and consignee.

possession.[102] Clearer proof of agency seems to have been required in the forwarding cases of *Universal Shipping and Forwarding Co Ltd* v. *Commercial and Industrial Co Ltd*,[103] and *E.W. Taylor* v. *Bell*[104] where McNair J,[105] required proof that the sender was acting ostensibly and actually as agent.[106] In *F.H. Bertling* v. *Tube Developments Ltd*,[107] a forwarder received instructions from a buyer who was responsible for the transport arrangements under the sale contract. In addition to making the transport arrangements the forwarder, as customary, also organised the shipping documentation required for the purposes of a letter of credit. To this end the forwarder received a copy letter of credit from the seller. It was held that this did not raise any implication that the forwarder was accepting the seller as its principal. The seller could reasonably assume that the forwarder would be prepared to arrange the shipping documentation in compliance with the letter of credit and receipt of the copy letter of credit implied merely a request to do so and not an instruction from the seller which would make him liable to pay the carriage charges.

2.22 The BIFA clause identifies both the requester and the person on whose behalf the request is made as potential customers. It appears to do so in the alternative rather than to envisage both as being the customer although this may not be an impossible construction.[108] At common law the contracting party normally would have to be one or the other but could be both, where there is an undisclosed agency or where the agent is deemed to have contracted personally in addition to his principal. Even where no agency is involved it might be possible for a forwarder to have two principals. In *F.H. Bertling* v. *Tube Developments Ltd*,[109] it was noted that whilst this is no doubt possible and perhaps not unlikely where for convenience a single freight forwarder is used by a buyer and seller for discrete stages in circumstances where the buyer and seller have divided responsibility for transport, it is *prima facie* improbable where only one party, viz. the buyer, has responsibility for transport. That is, unless for some reason the buyer and seller accept joint and several liability to the forwarder.

2.23 Arguably the BIFA clause, or its equivalent in other conditions, could not affect the application of the law to determine, in itself, who is in fact the principal contracting party. Presumably, however, it could affect whether, for example, a personal liability has been undertaken by an agent or a warranty has been given[110] and whether the conditions are in their terms applicable to persons who are otherwise held to be bound by them without being a directly contracting party, as

102. Compare *Freeman* v. *Birch* (1833) 3 QB 492, 114 ER 596, *G.W. Ry Co* v. *Bagge* (1885) 15 QBD, 625, with *R.* v. *Kay* (1857) Dears & B. 231, 169 ER 988, and Palmer (2nd edn), p. 965.

103. (1919) 1 Ll L Rep 635.

104. [1968] 2 Lloyd's Rep 63.

105. At p. 70.

106. *Cf* Palmer, (2nd edn), p. 1096, n. 18; see further *Cenargo Shipping Ltd* v. *Henry Butcher & Co* (*A Partnership*), CA, 23 January 1990, unreported.

107. [1999] 2 Lloyd's Rep 55 (Scotland, Court of Sessions, Commercial Court).

108. *Cf K/S A/S Seateam & Co* v. *Iraq National Oil Co* (*The Sevonia Team*) [1983] 2 Lloyd's Rep 640 at p. 643, *cf* also the FIATA Model Rules, cl. 2.4, which defines the customer as any person having rights or obligations under the contract of Freight Forwarding Services concluded with a Freight Forwarder or as a result of his activity in connection with such services.

109. Above, fn. 107.

110. As in cl. 3 of BIFA 2005A, see below 2.33.

in the case where an owner of goods is bound by a bailment on terms.[111] Some conditions incorporate the "customer" into the general definition of "owners" to whom the terms of the conditions are addressed[112] and include as "owners" consignors, senders, shippers, consignees, and receivers of goods and their servants and agents and each of them. This more robust approach may well be more effective in attaching the conditions to those who are, in law, bound by them although such width can produce difficulties of interpretation which may prove to be self-defeating.[113] Geologistics GTC are addressed to the customer without definition. TT CLUB 400, clause 1(e) defines the customer in similar terms to the BIFA clause.

2C.2 COMPULSORY LEGISLATION

2.24 **BIFA 2005A, clause 2(B), P & O Ferrymasters General Conditions 2011, clause 2.3.**

2(B) If any legislation, to include regulations and directives, is compulsorily applicable to any business undertaken, these conditions shall, as regards such business, be read as subject to such legislation, and nothing in these conditions shall be construed as a surrender by the Company of any of its rights or immunities or as an increase of any of its responsibilities or liabilities under such legislation, and if any part of these conditions be repugnant to such legislation to any extent, such part shall as regards such business be overridden to that extent and no further.

2.3 If any International Convention (including CMR) applies and such Convention does not contain any provisions relating to an aspect of the contract or an issue between the Company and the Customer, then, insofar as any of these Conditions do not derogate from such Convention, these Conditions shall apply to that aspect or issue.

2C.2.1 Regimes of liability

2.25 BIFA 2005A clause 2(B) recognises the possibility that there may be legislation governing a particular operation which may restrict the freedom of the parties to contract in respect of the liabilities arising from the operation.[114] This is especially the case if the forwarder provides services related to international carriage subject to a carriage liability regime which may apply to the forwarder if he supplies the service

111. *Morris* v. *C.W. Martin & Sons Ltd* [1966] 1 QB 716 at p. 729, [1965] 2 Lloyd's Rep 63 at p. 72; *Johnson Matthey Ltd* v. *Constantine Terminals Ltd* [1976] 2 Lloyd's Rep 215; *Singer Co (UK) Ltd* v. *Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 and *Spectra International plc* v. *Hayesoak Ltd* [1997] 1 Lloyd's Rep 153 (reversed on different grounds [1998] 1 Lloyd's Rep 162 (CA)). See further the discussion at 2C.3.

112. In bills of lading it is more common to address the conditions to the "Merchant" who is normally defined in equally wide terms, see further 4.90.

113. See *Shell Chemicals* v. *P&O* [1993] 1 Lloyd's Rep 114 (as affirmed by the Court of Appeal [1995] 1 Lloyd's Rep 297. *Cf* in the context of a definition of merchant clause (see 4.90), *Australia Yallow & Agri-Commodities Pty Ltd* v. *MISC* [2001] NSWCA 16, (2001) 50 NSWLR 576.

114. See also Geologistics GTC, cl. 28 (in much the same terms as the 1981 edn of the IFF Conditions), TT CLUB 400, cl. 35.

himself or is considered to have contracted to provide it albeit through subcontractors.[115] Such regimes contain provisions either preventing the carrier from reducing his responsibilities,[116] or preventing the parties from derogating from the provisions.[117] Non-compliance results in the offending stipulation being null and void. It is, however, usually provided that this does not involve the nullity of other provisions in the contract.[118] The fact that such provisions are contained in an "umbrella contract" in the context of a more long-term relationship will not necessarily safeguard them from attack.[119] Clause 2(B) of BIFA 2005A refers in general to compulsory rules. Some conditions may make more specific references for which care will be needed to ensure that they are up-dated as appropriate.[120]

2C.2.2 The Unfair Contract Terms Act 1977

Also relevant is the possible application of UCTA[121] which, where applicable, submits many of the terms contained in the conditions to the reasonableness test as defined in section 11 of the Act. To determine whether the test is to be applied, the contract must fall within the scope of the Act and the term to be considered must be a term regulated by the provisions of the Act. By section 26 the Act will not apply to an international supply contract, which includes circumstances where possession of goods passes and the contract is made by parties whose places of business are in the territories of different states. Consequently an English forwarder contracting with a foreign customer may be able to avoid the operation of the Act provided that he takes possession of the goods.[122] In the unlikely circumstance that a foreign forwarder contracts under BIFA Conditions, section 27 might also be available to exclude the operation of the Act since clause 28 of the conditions,[123] would likely represent a proper law only by choice of the parties. Furthermore the exception in respect of carriage of goods by ship or hovercraft in Schedule 1 to the Act would *2.26*

115. The most relevant are the Hague-Visby Rules, (applied under the Carriage of Goods by Sea Act 1971); the CMR Convention (applied under the Carriage of Goods by Road Act 1965); and the Warsaw Regimes and Montreal Convention 1999 (applied under the Carriage by Air Act 1961). See 1.29. In respect of carriage by rail and the application of the COTIF Convention see further 4B.11.1.

116. As do the Hague-Visby Rules in Art. III, r. 8 and the Montreal Convention, Art. 26.

117. As does CMR, Art. 41.

118. E.g. Art. 41, CMR, Art. 26, Montreal Convention.

119. *Cf Gefco UK Ltd* v. *Mason* [1998] 2 Lloyd's Rep 585 where the CMR Convention was held to be applicable to such a contract covering a series of transports.

120. TT Talk no. 93 reported a decision of the Landgericht Karlsruhe (11 July 2006) where the carrier's conditions applied the limits of the Warsaw Convention which the court took to lead through to the Convention's provision enabling the limits of liability to be broken in the case of reckless conduct.

121. See generally *Treitel*, 7–049 *et seq*., Palmer 38–044 *et seq*.

122. Further requirements are that either: (a) the goods in question are, at the time of the conclusion of the contract, in the course of carriage, or will be carried, from the territory of one State to the territory of another; or (b) the acts constituting the offer and acceptance have been done in the territories of different States; or (c) the contract provides for the goods to be delivered to the territory of a State other than that within whose territory those acts were done. See *Amiri Flight Authority* v. *BAE Systems plc* [2003] 2 Lloyd's Rep 767, *Balmoral Group Ltd* v. *Borealis (UK) Ltd* [2006] 2 Lloyd's Rep 629, *Trident Turboprop (Dublin) Ltd* v. *First Flight Couriers Ltd* [2009] EWCA Civ 290, [2009] 1 Lloyd's Rep 702. In this last case s. 26 was held to extend to liability for misrepresentation and affected the application of s. 3 of the Misrepresentation Act 1967.

123. See 2.313.

apply where the forwarder acts as a principal in respect of such a contract[124] and the customer is not a consumer.[125] A further exclusion is made in respect of insurance contracts in Schedule 1. This does not apply, however, to an agreement to arrange insurance within the terms of clause 11.[126] Additionally, by section 29(1) of UCTA, obligations imposed and defences provided by an international liability regime such as the CMR Convention cannot be challenged under it.[127]

2.27 Where the forwarder's contract falls within UCTA, any clause which seeks to exclude or restrict liability for negligence, as further defined in section 13, will fall within section 2 and will either be rendered void if it covers death or personal injury or subject to the test of reasonableness in respect of other loss or damage. Other excluding or restrictive clauses, as defined in sections 3 and 13, will be subject to the test of reasonableness under section 3. That is where either the forwarder's customer is a consumer or is dealing on the forwarder's written standard terms of business. There can be little doubt that the BIFA terms and other similar trading terms are "written standard terms of business"[128] and they will constitute the forwarder's written standard terms if they "invariably or at least usually contract on them".[129] Where, however, a forwarder or logistics service provider is operating on the basis of negotiated terms these are unlikely to be regarded as standard terms of business,[130] unless the negotiations have had little influence on the adopted terms.[131]

2.28 By reason of section 11(5) the forwarder will have the burden of proving the reasonableness of a term subjected to the test of reasonableness[132] the test under that subsection being that "the term shall have been a fair and reasonable one to be

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124. See 2C.4.

125. See UCTA, s. 12.

126. See 2.178.

127. See Clarke, para. 92b, and see in respect of special agreement and the Warsaw Convention and the application of s. 29(2) of UCTA, Shawcross & Beaumont, (vii) 158.

128. *Cf McCrone* v. *Boots Farm Sales Ltd*, 1981 SLT 103 at p. 105, and see Jacobs, pp. 109–112.

129. See *British Fermentation Products Ltd* v. *Compare Reavell Ltd* [1999] 2 All ER (Comm) 389 at p. 401, see *Treitel*, p. 272, 7–067, n. 358.

130. *The Flammar Pride* [1990] 1 Lloyd's Rep 434 at p. 438, see *Treitel*, p. 253, n. 88. *Cf Hadley Design Associates Ltd* v. *The Lord Mayor and Citizens of the City of Westminster* [2003] EWHC 1617 (TCC), [2004] TCLR 1, where His Honour Judge Richard Seymour QC usefully stated (at [83]) " . . . it is a question of fact whether the relevant contract between the parties was on the terms of those 'written standard terms of business'. That might well be a question of degree. If the only agreed contract terms are those of 'written standard terms of business' the conclusion that the parties dealt on the 'written standard terms of business' of the relevant party may be obvious. It is unlikely to be enough to avoid that conclusion that, apart from the 'written standard terms of business', some term was specially negotiated for the purposes of the particular contract. However, the role in the context of possibly voluminous documentation of a pre-prepared document setting out 'written standard terms of business' may be so small in relation to the whole, or the modifications to a pre-prepared document setting out 'written standard terms of business' may be so significant, that it may be an abuse of language to describe the resulting contract as a deal on the 'written standard terms of business' of one or other of the parties." See also *Ferryways NV* v. *Associated British Ports* [2008] EWHC 225 (Comm), [2008] 1 Lloyd's Rep 639.

131. *St. Albans City & District Council* v. *International Computers Ltd* [1996] 4 All ER 481, i.e. if the negotiations have left the terms in question effectively untouched, see *Treitel*, previous footnote. In this case the judge at first instance found there to be an inequality of bargaining power in view of the fact that few companies were able to supply the customer's requirements in respect of the computer database and these companies contracted on similar terms.

132. See *Landcatch Ltd* v. *Marine Harvest Ltd* 1985 SLT 478 and *Overseas Medical Supplies Ltd* v. *Orient Transport Services* [1999] 2 Lloyd's Rep 273.

included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made". The courts may consider a wide range of factors in determining whether a clause satisfies the test,[133] and although not technically applicable to contracts such as forwarding, the matters referred to in the guidelines contained in Schedule 2 to UCTA, where relevant, are also likely to be taken into account.[134] At this point note can be taken of the importance of notice of the term[135] sought to be relied on having been given to the customer.[136] Other factors relevant to the test of reasonableness are considered further below as they arise in respect of particular clauses.[137] At this point, however, the important decision of the Court of Appeal in *Schenkers Ltd* v. *Overland Shoes Ltd*[138] can be noted. Evidence was acknowledged that the current BIFA conditions are the product of the combined efforts of nearly all those associated with the shipping industry and seek to balance the interests of all parties. The view was also expressed that, in a situation in which there was no significant inequality of bargaining position, the customs of the trade were an important factor.

2C.2.3 Directive on Unfair Terms in Consumer Contracts

Apart from UCTA, regulations giving effect to the EC Council Directive on Unfair Terms in Consumer Contracts[139] came into effect on 1 July 1995.[140] These will be relevant where the forwarder, as a supplier of services,[141] deals with a consumer. The provisions of the Directive will stand alongside those of UCTA so that the application of each of them will need to be considered.[142] While there is similarity between the UCTA test of reasonableness and the Directive's concept of unfairness,[143] there are contractual provisions which will be subject to control under the Directive which are not currently controlled by UCTA, e.g. price variation clauses.[144] In accordance with Article 3(3) the Annex to the Regulations contains an 2.29

133. See generally, Jacobs, pp. 139–171.

134. See *Singer Co (UK) Ltd and Another* v. *Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 at p. 169, *cf Stag Line Ltd* v. *Tyne Shiprepair Group Ltd and Others* (*The Zinnia*) [1984] 2 Lloyd's Rep 211 at p. 222, see further, *Overseas Medical Supplies* above fn. 132.

135. Notwithstanding that, in the course of long and substantial dealings the customer fails to put his mind to the term, see *Schenkers*, below, fn. 138.

136. See "guideline" (c) in Schedule 2. For this purpose the customer is the party who directly contracts, albeit the contract bears on the movement of goods belonging to a third party, as where the terms are contained in a transferable document, see *Sonicare International Ltd* v. *East Anglia Freight Terminal Ltd* [1997] 2 Lloyd's Rep 48 (CLCC Bus. List).

137. See especially in respect of limitation of liability, 2C.23, below. See further *Keeton Sons & Co Ltd* v. *Carl Prior Ltd* [1986] BTLC 30). *Cf Monarch Airlines Ltd* v. *London Luton Airport Ltd* [1998] 1 Lloyd's Rep 403.

138. [1998] 1 Lloyd's Rep 498.

139. 5 April 1993, 93/13/EEC.

140. 1994 SI 94/3159, see now 1999 SI 99/2083.

141. See Art. 2(c).

142. See further, Brownsword and Howells, "The Implementation of the E.C. Directive on Unfair Terms in Consumer Contracts—Some Unresolved Questions" [1995] JBL 243 and generally *Treitel*, pp. 288–307, 7–095 *et seq*, Palmer, 38–061 *et seq*.

143. See the Preamble and Art. 3(1).

144. See Annex 1(l).

indicative list of terms which may be regarded as unfair. In these respects, where UCTA provides greater protection to the consumer, Article 8 of the Directive would appear to permit such protection to be retained.[145]

2C.2.4 Paramount clauses

2.30 It is sometimes a requirement of liability regimes that the document issued by the carrier contains a "paramount clause", i.e. a statement that the carriage is subject to the provisions of the Convention[146] along with a penalty for non-compliance.[147] It is submitted that BIFA clause 2(B) would not satisfy such a requirement as it does not apply the relevant conventions to the contract but is merely acknowledging that they might apply and seeking to regulate their effect.[148] The clause might be effective, however, in ensuring that where a liability regime provides a defence that would not otherwise be available under the conditions, such as the negligent navigation and management defence in Article IV, rule 2, of the Hague Rules, or a limitation more favourable than the conditions,[149] such defence or limitation will be preserved in favour of the forwarder notwithstanding the terms of the remaining conditions. This is because of the reference to the company retaining its rights or immunities under the relevant legislation. Clause 2(B) also indicates that should any business be subject to such compulsory rules then clauses offending such rules shall be overridden as regards such business. This suggests that such clauses will be ineffective to control liability even if the issue is not resolved under such rules, provided that the "business" is subject to it. Even without such a suggestion it is possible that courts may take such an approach and negate offending clauses even if the precise issue of liability of the forwarder is not strictly governed by the rules. Thus in respect of the CMR Convention, Hirst J in *Eastern Kayam Carpets Ltd* v. *Eastern United Freight Ltd*,[150] expressed the view that Article 41 prevented the application of IFF Conditions despite the fact that the forwarder was liable under a "cash against documents" arrangement which he had already held was not governed by CMR.[151] Although his view was expressed in terms that are probably too wide,[152] it has been argued[153] that given that CMR applies to "every contract for the carriage of goods by road" then, "the fact that any particular claim arising under such a contract might fall outside the particular provisions of the Convention does not effect [*sic*] the fact that the contract of carriage is still governed by the Convention

145. See further, Duffy, "Unfair Contract Terms and the EC Draft Directive" [1993] JBL 67.

146. E.g. CMR, Art. 6(1)(k) and Warsaw Convention, Art. 8(c) (*cf*, however, the Montreal Convention 1999). See also the notice requirement in the Warsaw Convention as amended by the Hague Protocol dicussed at 3.78.

147. See CMR, Art. 7(3) and Warsaw Convention, Art. 9 (*cf*, however, the Montreal Convention 1999).

148. *Cf* TT CLUB 400, cl. 35.

149. See 2C.23.

150. QBD, 6 December 1983, unreported.

151. See further, 2C.13.

152. It should not be all the conditions which are affected but only those which conflict with CMR.

153. By A. Messent, in *Cargo Claims Analysis*, September 1984, p. 113.

in so far as its other provisions may be applicable".[154] A clause in the same terms as clause 2.3 of the P&O Ferrymasters General Conditions reproduced above might provide encouragement to a court inclined to take a less wide view of CMR in this respect.

2C.2.5 Severance

2.31 BIFA clause 2(B) clearly seeks to invite severance of offending clauses or parts of such clauses by application of the blue pencil test.[155] In respect of UCTA, terms or notices caught by sections 2 or 3 of the Act are ineffective "except in so far as" the term satisfies the test of reasonableness. In *George Mitchell* v. *Finney Lock Seeds*[156] Lord Bridge,[157] considered that the words "to the extent that" in the Supply of Goods (Implied Terms) Act 1973 do not empower the court to rewrite the clause so as to make it more reasonable. On the other hand in *R.W. Green* v. *Cade Bros. Farm*,[158] the blue pencil was wielded to cut out the offending part of a clause leaving the remaining part to take effect.[159] The Court of Appeal made clear in *Stewart Gill Ltd* v. *Horatio Myer & Co Ltd*,[160] that the policy and purpose of UCTA is for the reasonableness of the whole term to be considered and that it is not consistent with this to use the blue pencil test to excise the most offensive parts. This confirms the importance of ensuring that terms are clearly separated, as are the current BIFA Conditions, and not lumped together in composite clauses. The difficulty does arise, as with some BIFA Conditions, where clauses are split into paragraphs. In light of the comments in *Stewart Gill*, above, it may not be possible to treat specific paragraphs as severable. In *Stewart Gill* the court was not concerned with an invitation in the nature of BIFA clause 2B and, rather than refer to terms or provisions being void,[161] refers to any part of the conditions which on a liberal reading might include part of a condition.[162] Even more explicit is a clause which provides that if a condition would be enforceable if amended, it will be treated as so amended.[163]

2.32 In respect of the Hague Rules, McNair J at first instance in *G.H. Renton* v. *Palmyra Trading Corp*,[164] appeared to suggest that a clause of a type exemplified by BIFA clause 2(B) might be effective to promote severance where the Rules are

154. See also *Shell Chemicals* v. *P&O* [1993] 1 Lloyd's Rep 114, *cf Noble* v. *R.H. Group Ltd and Another* (CA, 5 February 1993). See further Hill and Messent, para. 12.5, and Johansson, "The Scope and the Liability of the CMR—Is there a Need for Changes?", 2002 Transportrecht 385 at p. 391.

155. *Cf* the older FERRYMASTERS Conditions in cl. 11 which expressly provided that its provisions are severable. Clause 1.4 of the HAFFA Conditions make clear the severability of the conditions.

156. [1983] 3 AC 803 at p. 817, [1983] 2 Lloyd's Rep 272.

157. At p. 278.

158. [1978] 1 Lloyd's Rep 602.

159. See Yates and Hawkins, p. 48.

160. [1992] 1 QB 600, *per* Stuart-Smith LJ at p. 608.

161. *Cf* cl. 11.2 of the P&O Ferries Freight Terms and Conditions of Carriage 2009.

162. *Cf* cl. 25.1 of Condor Logistics Conditions of Carriage and/or Warehousing 2009.

163. See further the approach taken in DB Schenkers GCOC which requires, in cl. 19.1, the parties to negotiate in good faith to agree a mutually satisfactory provision, achieving as nearly as possible the same commercial effect, if a court, tribunal or other competent body has found a condition to be wholly or partly illegal, invalid or unenforceable.

164. [1956] 1 QB 462 at p. 476, [1955] 2 Lloyd's Rep 301 at p. 314.

incorporated by contract but not where they are compulsorily applicable. Severance of offending parts of a clause took place, however, in *Svenska Traktor Akt.* v. *Maritime Agencies*,[165] and in *Unicoopjapan* v. *Ion Shipping*,[166] despite the fact that Article III, rule 8, states that "Any Clause . . . shall be null and void and of no effect".[167]

2C.3 AUTHORITY CONDITIONS

2.33 **BIFA 2005A, clause 3 and BIFA 1989, clause 4**

3. The Customer warrants that he is either the Owner, or the authorised agent of the Owner and, also, that he is accepting these conditions not only for himself, but also as agent for and on behalf of the Owner.[168]

4. In authorising the Customer to enter into any Contract with the Company and/or in accepting any document issued by the Company in connection with such Contract, the Owner and Consignee accept these Conditions for themselves and their Agents and for any parties on whose behalf they or their Agents may act, and in particular, but without prejudice to the generality of this Clause, they accept that the Company shall have the right to enforce against them jointly and severally any liability of the Customer under these Conditions or to recover from them any sums to be paid by the Customer which upon proper demand have not been paid.

2C.3.1 Express and implied warranties of authority

2.34 Two customer warranties are provided for in clause 3 of BIFA 2005A: a warranty of authority and a warranty that the conditions are accepted both by the customer and as agent for the owner.[169] The object of the clause is to enable the forwarder to have recourse against the customer if the forwarder is unable to rely on his conditions whether facing a claim from a person interested in the goods or in attempting to exercise a lien. An example is where goods are despatched by a bailee of goods, damaged, and the owner of the goods claims for the damage. Since, at least historically,[170] there would be no privity of contract between the forwarder and the owner, the forwarder might be unable to rely on his conditions to exclude or limit a possible claim for negligence. He would thus seek to exercise a recourse right against the customer for having warranted that he has the authority of the owner to dispatch the goods via the forwarder and that the conditions are accepted by the

165. [1953] 2 QB 295, [1953] 2 Lloyd's Rep 124.

166. [1971] 1 Lloyd's Rep 541. See also Gaskell *et al.*, para. 2.60.

167. *Cf* CMR, Art. 41 which uses the possibly more neutral word "stipulation".

168. Besides this clause, other customer warranties are provided by cl. 17. See below. Similar "authority" clauses are Geologistics GTC, cl. 3 and TT CLUB 400, cl. 5. *Cf* RHA Conditions 2009, cl. 2(1).

169. Compare cl. 3 of the Freightliner Conditions discussed at 4.10.

170. The developments in the field of bailment on terms and the passing of the Contracts (Rights of Third Parties) Act 1999 (see Merkin, ed., *Privity of Contract* (2000)), have reduced significantly the need for this type of recourse provision. Nevertheless there might yet be occasion for reliance on it.

owner.[171] If the customer is the owner or has the authority of the owner[172] the warranties are satisfied. In *Sonicare International Ltd* v. *East Anglia Freight Terminal Ltd*,[173] this type of warranty was held to be a continuing one. In this case the words "on behalf of the owner" were construed as meaning on behalf of the owner from time to time. Since attachment of the express warranty links to the authority of the owner the definition of owner will affect its width.[174]

2.35 An implied warranty of agency at common law can arise only if an agent professes agency.[175] The effect of the clause is to create an express warranty whether agency is professed or not. Actual knowledge of the absence of authority should, however, as in the case of an implied warranty, defeat the right to rely on the warranty, if only on the basis that the printed clause contradicts the reality of the agreement actually made.

2.36 The same might be true where the forwarder should know that there is a doubt as to the customer's authority to bind the owner to the conditions. An example would be where it is well known that the owner is a large commercial enterprise unlikely to have agreed to any conditions in circumstances where it has hired out goods which are being returned to it by its customer. A further consequence of a liability based on warranty is that the agent's liability depends on the extent to which recovery would have been possible against the principal had there been authority. If, therefore, the forwarder would have had a claim against the principal but for the lack of authority of the agent, but in practice such a claim would have been unenforceable due to, for example, the insolvency of the principal, no substantial recovery could be made against the agent. The circumstances in which this can arise must be very limited and would most likely be resolved by basing a claim on the agent's personal liability, which would be available where the agency is not disclosed. Personal liability, in the absence of a breach of warranty, would not help the forwarder who is unable to use the conditions against the owner and in that case a recourse claim against the customer would be best based on one of the indemnities granted by clause 20.[176]

2.37 Furthermore, it may be arguable that where there is both a requester and a person on whose behalf the business is undertaken,[177] within BIFA clause 1,[178] then it is the latter person who is the customer and thereby the giver of the warranty.[179] The difficulty therefore is that on finding the principal to be customer there may be no recourse against an agent who in the terms of clause 3 is not the customer and therefore gives no warranty. This might be resolved either by confining clause 1 to

171. This ties in with the indemnity given in cl. 20, see, 2.249.
172. Whether to create privity of contract or sufficient to bind the owner under a bailment on terms, see Palmer, p. 1259, paras 23–013 *et seq*. The existence of apparent authority should also defeat liability as is the case with the implied warranty of authority, *Rainbow* v. *Howkins* [1904] 1 KB 215, since the absence of actual authority would produce no loss.
173. [1997] 2 Lloyd's Rep 48 (CLCC Bus. List).
174. See the definitions of owner given at 2C.1.
175. *Collen* v. *Wright,* (1857) 8 E&B 647.
176. See 2.249.
177. Where there is both an agent, whether authorised or not, and a principal.
178. See 2.19.
179. *A fortiori* at law where the agent is in fact authorised.

where the agency is disclosed,[180] or by interpreting clause 1 to include both the agent and the principal as the customer[181] or by treating the conditions as addressed to a "customer" who may be the agent but accepting that the law might also deem the principal authorising him to be a contracting party but not exclusively as the "customer".

2C.3.2 Authority of the owner

2.38 Clause 4 of BIFA 1989 Conditions which was deleted from the 2000 edition seeks to tie the owner and the consignee in addition to the customer to the conditions. It therefore provides additional parties to which claims for the forwarder's charges or other reimbursement can be addressed. The last sentence indicates that the forwarder will address the demand initially to the customer. Although the persons indicated also agree to accept the conditions on behalf of others such as their agents no express warranty seems to be given in that respect. Such "acceptance" therefore might therefore be ineffective yet without any further liability.

2.39 So far as action based on the liability of the customer is concerned, the success of the clause depends upon the customer in fact being authorised by the parties indicated to contract on their behalf or such parties otherwise being bound by the terms. The clause itself recognises that there will either be authority running from the owner to the customer or that the owner accepts a document.[182] In the absence of authority it is difficult to see how the owner could be bound to the terms unless the conditions are incorporated into a document which confers contractual rights on a person other than the original contracting party. An example would be a bill of lading which is within the terms of the Carriage of Goods by Sea Act 1992 and transferred in such a way as to satisfy section 2 of that Act and thereby transfer the contract of carriage evidenced by the bill of lading.[183]

2.40 Alternatively the requirements necessary to create an implied contract may be satisfied.[184] Since the clause does not seek to confer a benefit on the persons indicated the Contracts (Rights of Third Parties) Act 1999 could not be employed to enforce it. Privity of contract, through one of the two ways just indicated or by a collateral contract, would be necessary to enable a liability, e.g. to pay freight to be enforced.[185] If, however, an owner were seeking to enforce a liability against the

180. In which case the forwarder will get the benefit of the implied warranty at common law.

181. As well as giving a warranty the agent would also accept a personal liability by accepting the conditions for himself in the terms of cl. 3.

182. On its own terms, therefore, the clause implies that if neither is applicable the owner or consignee cannot be bound.

183. See, generally, *Carver on Bills of Lading*, ch. 5.

184. See *Brandt* v. *Liverpool, Brazil and River Plate S.N. Co* [1924] 1 KB 575; *The Aramis* [1989] 1 Lloyd's Rep 213. *Cf The Captain Gregos (No. 2)* [1990] 2 Lloyd's Rep 395; *The Gudermes* [1991] 1 Lloyd's Rep 456. See further *Rights of Suit in Respect of Carriage of Goods by Sea*, The Law Commission (No. 196) and the Scottish Law Commission (No. 130), 1991. See also in respect of legal assignment under s. 136(1) of the Law of Property Act 1925, *Kaukomarkkinat O/Y* v. *"Elbe" Transport-Union GmbH (The "Kelo")* [1985] 2 Lloyd's Rep 85 and N. Curwen, "The Problems of Transferring Carriage Rights: An Equitable Solution" [1992] JBL 245.

185. If the case is within s. 2 of the Carriage of Goods by Sea Act 1992, the requirements of s. 3 of that Act would also need to be satisfied.

forwarder on the basis of a bailment on terms there might be an argument that reciprocity requires the owner to accept a possible liability along with it. A decision of the Court of Appeal suggests that a bailee is not permitted to pick and choose those terms which are most favourable to him but rather that all the terms on which the assumption of liability is based and which the owner consents to must be applied.[186] The same might arguably be true of the owner also.

2.41 The result that more than one person is liable to the forwarder could be effected at common law on agency principles, the agent being liable either on a personal contract or on the basis of a warranty of authority. Clause 4 clearly envisages that the customer will be an agent and the owner the principal. Since it might be possible to regard the owner as the customer there may be some difficulty in applying the clause.

2.42 Since the customer and the owner will be in an agent/principal relationship the dual personal liabilities could mean that the doctrine of election is applicable. The reference in the clause, however, to their liability being joint and several may be sufficient to displace the doctrine by removing the normal construction that the personal liabilities of principal and agent on the same obligation are alternative.[187] An alternative argument might state that the clause is intended to create a collateral contract with the principal thus creating an independent obligation, but it is hard to see how a collateral promise on the part of a principal can be construed from the mere printed conditions when it is the agent who actually makes the contract. Other technical consequences of a joint and several liability, such as the effect of a release of one of the parties releasing the others[188] would, however, apply.

2.43 Where the forwarder seeks to rely on the clause to obtain the protection of the conditions or to exercise a right granted by them, the wording of this clause may prove problematic. This is because, whilst the owner is deemed to accept the conditions, he does not accept them *qua* customer. Consequently where a term refers only to the customer,[189] there will be difficulty in applying it to other parties. This will not be the case in respect of any liability of the customer under the conditions since the owner is expressly placed under the same liability.

2C.4 STATUS OF THE FORWARDER

BIFA 2005A, clause 4A and clause 6(B), BIFA 1989, clauses 5(B), 5(C) and 6, DAMCO Standard Trading Conditions 2009, clauses 10 and 11, FIATA Multimodal Transport Bill of Lading (FBL)1992, clause 2. *2.44*

4. (A) Subject to clauses 11 and 12 below, the Company shall be entitled to procure any or all of its services as an agent, or, to provide those services as a principal.
6. (B) The Company shall, on demand by the Customer, provide evidence of any contract entered into as agent for the Customer. Insofar as the Company may be in default of the

186. *Sandeman Coprimar SA* v. *TTI* [2003] EWCA Civ 113, [2003] 1 All ER (Comm) 504, see at [65].
187. See *Bowstead and Reynolds on Agency*, Art. 82.
188. *Per Nicholson* v. *Revill* (1836) 4 A&E 675.
189. E.g. BIFA, cl. 11, see 2.178.

obligation to provide such evidence, it shall be deemed to have contracted with the Customer as a principal for the performance of the Customer's instructions.[190]

5. (B) The offer and acceptance of an inclusive price for the accomplishment of any service or services shall not itself determine whether any such service is or services are to be arranged by the Company acting as Agent or to be provided by the Company acting as a Contracting Principal.[191]
5. (C) When acting as an Agent the Company does not make or purport to make any Contract with the Customer for the carriage, storage, packing, or handling of any goods nor for any other physical service in relation to them and acts solely on behalf of the Customer in securing services by establishing Contracts with Third Parties so that direct contractual relationships are established between the Customer and such Third Parties.[192]
6 When and to the extent that the Company has contracted as Principal for the performance of any of its services, it undertakes to perform and/or in its own name to procure the performance of those services, and subject always to the totality of these Conditions and in particular to Clauses 26–29 hereof accepts liability for loss of or damage to goods taken into its charge occurring between the time when it takes the goods into its charge and the time when the Company is entitled to call upon the Customer, Consignee or Owner to take delivery of the goods.[193]

10. All Services are provided by the Company as agent, except in the following circumstances where the Company acts as principal:[194]
(a) to the extent that the Company expressly agrees in writing to act as a principal; or
(b) where the Company is held by a court of competent jurisdiction to have acted as principal.
11. Without prejudice to the generality of clause 10:

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190. This clause places an onus on the forwarder to give details of arrangements on demand or risk being considered a principal although his intention may be to act as agent. The extent to which the customer is kept informed of arrangements made on his behalf is a relevant factor in determining the status of the forwarder, see below 2.73.

191. The relevance of the method of charging to the issue of status is considered generally at 2.72. Clause 5(B), which has been deleted from the 2000 edition, seeks to exclude this as a factor so as to give the forwarder a free choice as to his charging method without the danger of unwittingly taking on a responsibility for performance (see also DAMCO, cl. 11(a) and TT CLUB 400, cl. 4 (a)). Nevertheless in *Granville Oils & Chemicals Ltd* v. *Davies Turner & Co Ltd*, (Leeds District Registry Mercantile Court, 21 October 2002 (summarised by David Martin-Clark, www.onlinedmc.co.uk)), despite the fact that BIFA 1989 terms were incorporated, Judge Behrens used the method of charging as one of the factors in deciding that the forwarder had contracted as principal (no appeal to the Court of Appeal was made on this point). The prices quoted by the forwarder, although broken down into the constituent services, included a mark-up on the prices quoted to the forwarder by their agents which were not disclosed to the customer. In choosing an inclusive price, however, the forwarder runs a risk that if he is held to be acting truly as an agent he could fall foul of the rule that forbids the making of a secret profit if the profit in the charge goes beyond what could be considered to be a reasonable commission. However, the Court of Appeal in *Western Digital Corp* v. *British Airways Plc* [2000] 2 Lloyd's Rep 142 saw the equivalent of cl. 5(B) as allowing for this possibility and not necessarily inconsistent with agency (see p. 148). *Cf* further, BIFA, cl. 9, 2.166, below).

192. This clause from the 1989 edition spells out the consequence of the forwarder acting as an agent. The existence of agency is determined by other means. The latter part of the clause makes clear that agency is meant in the proper sense. Clause 6 was its counterpart making clear that when the forwarder has agreed to act as a principal it undertakes responsibility for the service whether it performs it physically itself or engages another party to effect it, such other party then being a subcontractor of the forwarder (*cf* TT CLUB 400, cl. 42 and DAMCO STC, cl. 14), see further 2.52. Contrast the approach taken by cl. 23 of the 1981 IFF Conditions discussed below, 2.62. The liability of the forwarder is subjected to cll. 24–27 which apply a uniform liability in contrast to cl. 7.3 of the FIATA Model Rules which applies the applicable law or agreed or usual conditions (but subject to the standard limits of liability in cl. 8.3) of subcontractors to transport or other services provided by them.

193. See previous footnote.

194. See below fns 201 and 282.

(a) the charging by the Company of fixed Charges for any Services shall not in itself determine or be evidence that the Company is acting as an agent or a principal in respect of such Services;[195]
(b) the Company acts as an agent where the Company procures a bill of lading, waybill or other document containing or evidencing a contract of carriage between a Person, other than the Company, and the Customer; and
(c) the Company acts as the Customer's agent and never as a principal when dealing with Authorities on behalf of the Customer in relation to customs requirements, taxes, licenses, consular documents, certificates of origin, inspection certificates, documentation management, and other similar services.

2. Issuance of this FBL[196]
2.1 By Issuance of this FBL the Freight Forwarder
a) undertakes to perform and/in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL;
b) assumes liability as set out in these conditions.
2.2 Subject to the conditions of this FBL the Freight Forwarder shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or any other person of whose services he makes use for the performance of the contract evidenced by this FBL as if such acts and omissions were his own.

2C.4.1 Introduction to the roles of the forwarder

When carrying out the instructions of its customer the company may be acting in one of several roles. In the few early cases which sought to express a view, the courts have reflected a traditional idea that the role of a forwarder is that of an agent.[197] Even so, at that time since forwarders might also engage in collection and delivery services organised around arrangements for primary movement by sea or rail, the forwarder's role might extend beyond mere agency and involve the forwarder coming into possession of the goods at least for part of the transit.[198] Clearly, as this example shows, the forwarder might take different roles at different stages of a transport. Further, as noted earlier, the trend has long been towards forwarders taking on greater responsibilities due to the changing nature of modern transportation. In indicating an agency role the courts were mainly concerned to distinguish the role from that of a carrier particularly with a view to determining the level of responsibility undertaken. This will often be a crucial issue especially where, in taking on a responsibility beyond that of an agent, the forwarder is found to be subject to a compulsory regime of liability.[199] A separate though connected issue arises from the ambiguity inherent in the concept of agency. An agent in the strict sense at common law is a person empowered to affect his principal's legal relations.[200] In civil law countries the concept of indirect representation is more

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195. See fn. 191.
196. See below text to fn. 316.
197. *Jones* v. *European & General Express Co Ltd* (1920) 4 Ll L Rep 127, *C.A. Pisani & Co* v. *Brown Jenkinson & Co Ltd* (1939) 64 Ll L Rep 340 at p. 342. See further Hill p. 15, Bugden, generally, ch. 1, esp. at para. 1–14, and Bristow, "Freight Forwarder: Principal or Agent? What Difference does it Make?" (1999) ABLR 196.
198. Contrary to the view of Rowlatt J in *Jones*, above fn. 197.
199. See 2.25.
200. *Bowstead*, para. 1–018.

commonly accepted. While the internal relationship remains posited on agency principles, in the external relationship the agent acts as a principal.

2.46 This is readily applied to forwarders whose role is often seen as one of commission rather than strict agency. In English law neither this possibility nor the distinction between the level of responsibility and the creation of legal relations has been clearly developed. Whilst there might be a clear commercial distinction between physically supplying a service and being engaged to procure it from a third party, the precise legal distinctions which might need to be made are more difficult. As will become apparent from the discussion the tendency is to distinguish, in basic terms, the forwarder acting as an agent and acting as a principal. This distinction has developed over time and appears to conflate both of the issues identified above and thus to disguise further issues that need more subtle discrimination. Thus when considered to act as an agent the forwarder will commonly be taken to create privity of contract between his principal and a third party, as well as assuming the duties normally associated with an agency role. When acting as a principal, however, the forwarder may be assumed not to have affected the principal's legal relations with third parties and to have undertaken a higher level of responsibility. At the least this will be understood as involving responsibility for the performance of the third parties engaged by the forwarder. It does not follow necessarily that this does or should require the forwarder to be regarded as having the full responsibility normally attached to such a third party, most usually as a carrier, but it is commonly taken to so follow. Nor does this distinction acknowledge the more subtle possibility of indirect representation. The different possibilities are explored in greater detail below after a few further preliminary points.

2.47 Trading conditions in use in British practice tend to acknowledge this basic distinction between acting as an agent or principal and in some cases to provide for the forwarder to have a choice between them. BIFA, clause 4(A), purports to give the forwarder such a choice[201] and implies that how the forwarder has exercised that choice is to be determined *ex post facto*. These or similar conditions may be used by companies marketing logistics services consequently giving a similar choice in respect of such services.[202] As discussed below the courts use a variety of criteria to determine the role that the forwarder has contracted to perform. The application of these criteria[203] may show that the forwarder has, in fact, contracted to perform in

201. Compare TT CLUB 400, cl. 3 which indicates that the forwarder acts as an agent except in certain circumstances. Clauses 10 and 11 of the DAMCO STC reproduced at 2.44 provide a commercial example of this approach.

202. As did the former P&O Nedlloyd Logistics STC, cl. 3(A) which provided for this liberty unless specifically agreed in writing. Compare the *Example Contract for Third Party Logistics*, which in cl. 8 provides for the liability of the forwarder in respect of loss or damage to the goods whether through its own or its servants or agents acts or omissions or that of a Service Provider. The Fenex Terms and Conditions for Value Added Logistics (cl. 8) provides for a similar liability. TT CLUB 600, cl. 16 provides for the liability of the Logistics Provider to be liable to the customer as a principal and requires the customer to assist in pusuing claims against third parties. It seems also that many companies marketing logistics services built around haulage or warehousing in the UK and basing their conditions on RHA or UKWA will tend to take on liability as a principal.

203. Which can produce difficulties in analysis. In *Vastframe Camera Ltd* v. *Birkart Globistics Ltd*, a decision of the Hong Kong High Court [2005] HKC 117, a forwarder issued a bill of lading for a consignment of novelty cameras with a "shrek" insignia on them sent from Hong Kong to France. The goods had been sold to a buyer in France and were to be delivered only against production of the bill of

a particular way so that a free choice is not possible, applying *J. Evans & Son (Portsmouth) Ltd* v. *Andrea Merzario Ltd.*[204] Some of these factors (e.g. the method of charging) may also assist in determining whether the forwarder has, in fact, contracted to act for the shipper or is really the agent of the performing carrier as in *James* v. *Europe West Indies Lines (UK) Ltd.*[205]

2.48 As indicated in *Garnham, Harris & Elton* v. *Alfred W. Ellis Transport*,[206] such printed conditions do not necessarily constitute the whole contract and as stated further in that case (in the context of RHA Conditions) they are not drafted for a particular contract but designed for a variety of contracts. Furthermore, if the forwarder has, in fact, been found to have agreed to perform in a particular way then the choice given in the printed condition might well be caught by section 3 of UCTA. It may be possible, however, for the clause to be used to encourage the view that the contract is open and to be determined simply by the choice made by the forwarder. In English law a contracting party is still free to agree the extent of the service he is prepared to contract for and will only be regulated or constrained (whether by UCTA or by a compulsory regime of liability) if he seeks to reduce the level of liability that attaches to the service that he has, in fact, agreed to perform or has led the other party into believing that he has agreed to perform.[207]

2.49 If the forwarder is found to have contracted in a particular way it may still be necessary to go further and determine whether the actual mode of performance is within the scope of the contract. Thus if the forwarder has agreed to accept responsibility for the performance of a service the question may still arise whether the forwarder is restricted to physically performing the service himself or may subcontract. Similar criteria to that applied to carriers by road may well be applied,[208] although any knowledge that the customer has[209] that the company is a forwarder could be a strong indicator that, as its role is normally to *procure* third party services, it is implied that it can do so. On the other hand, if the forwarder is contracting purely as an agent, the question might arise as to whether he may choose to perform some part of the operation himself. In *Immediate Transportation Co Ltd* v. *Speller, Willis & Co*,[210] while held free so to act, the forwarder was not entitled to charge so as to make a profit over and above the least cost to get the work

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lading. The forwarder shipped them with the Mitsui Line and received a non-negotiable waybill naming the forwarder as Shipper and consigned to a French company which had a cooperation agreement with the forwarder. The French company obtained the goods but then delivered them to the buyer without production of the forwarder's bill of lading. The buyer then refused to pay for the goods. The court held the forwarder liable for the misdelivery. The forwarder had claimed it was acting only as an agent whereas the court decided it was liable as a carrier. However, it is arguable that even as an agent it should have been liable as the French company could have been regarded as a sub-agent rather than a completely independent third party.

204. [1976] 1 WLR 1078, [1976] 2 Lloyd's Rep 165.

205. CA, 8 October 1997, unreported.

206. [1967] WLR 940 at p. 945, [1967] 2 Lloyd's Rep 22 at p. 27.

207. See *Claridge, Holt & Co Ltd* v. *King & Ramsay* (1920) 3 Ll L Rep 197 and see *Treitel*, pp. 273–4, 7–068—069. See also (in respect of the Hague Rules) *Pyrene* v. *Scindia Navigation* [1954] 2 QB 402, [1954] 1 Lloyd's Rep 321.

208. See *Garnham Harris*, fn. 206, above; *cf John Carter* v. *Hanson Haulage* [1965] 1 QB 495, [1965] 1 Lloyd's Rep 49; *Homecraft Weavers Ltd* v. *George Ewer & Co Ltd* (1945) 78 Ll L Rep 496.

209. Perhaps through the marketing of the service.

210. (1920) 2 Ll L Rep 645.

done. In the Australian decision of *Carrington Slipways Pty Ltd (The Cape Comorin)*,[211] a forwarder, authorised to secure shipping space and to obtain a bill of lading as an agent was said[212] to be unauthorised to contract as a principal for the carriage of goods. In particular the forwarder was not entitled to make a secret profit by contracting as a principal with its customer at one freight rate and subcontracting at a lower rate.

2.50 The discretion granted by clauses such as BIFA clause 4(A) may be sufficient to give freedom to the forwarder to effect services himself and to charge for it especially as clause 5(B) indicates that an inclusive price is not necessarily indicative of acting as a principal. Further clauses give liberties when acting as an agent or principal,[213] but logically these apply only once the choice to act in a particular capacity has been made. The issue which arises here is really one of conflict of interest and normally an agent is constrained by fiduciary duties to act in the principal's interest.[214] Some clauses seek specifically to negate the effect of such a duty.[215] It has been suggested that in the usual nature of the relationship of the freight forwarder to his customer, very little in the way of fiduciary duties would be owed.[216] Nevertheless, the position is not entirely clear. Forwarders will often wish to be free to provide services themselves with a view to direct profit, or to use closely associated companies, or to provide services on the basis of a network of close alliances with other companies which might not operate on a strict agency basis. This possibility is enhanced with the wider role that may be taken in providing logistics services. As noted in Chapter 1,[217] some logistics operators seek to distance themselves from a mother company in order to appear to be maintaining an independent role. It should not perhaps be assumed that forwarders and others are free to act without regard to the need to inform the customer of an interest or without regard to the customer's interests. Nor does it necessarily follow, although it may be arguable, that there is a strong implication that the discretion awarded by BIFA clause 4(A) gives such freedom to the forwarder. Clause 5 is stronger but, as noted, logically applies only after the choice to act as a principal has been made. However, and on the other hand, in the more modern context of logistics contracts, the nature of such contracts may reveal a greater focus on the result produced by the agreed package of services leaving the forwarder with a wide degree of discretion provided that the requisite performance level is satisfied.

2.51 The more usual question is to determine the level of responsibility that the forwarder has undertaken. BIFA clause 4(B) and clauses 11 and 12 seek to influence or determine the answer to this question. The role they play will be discussed further below but it is necessary to outline in abstract the varying possibilities to lend depth to the points made above. This is important not least

211. (1991) 24 NSWLR 745 (CA NSW).
212. At p. 753.
213. See below, 2C.6 and 2C.7.
214. See generally, *Bowstead*, Art. 43, paras 6–032 *et seq*. See also Bugden p. 49, 2.44 *et seq*.
215. BIFA, cl. 9 permitting the forwarder to retain brokerages etc., see below 2.166.
216. Bugden, in the 1st edn (1999), p. 38, after citing Lord Wilberforce in *New Zealand Netherlands Society "Oranje" Inc* v. *Kuys* [1973] 1 WLR 1126, at pp. 1129–1130, where it is indicated that the precise scope of such duty must be moulded to the nature of the relationship between principal and agent.
217. 1.25.

because the conditions may not be incorporated in respect of the particular transaction but also because a court may well consider the common law position first before considering the conditions and, perhaps, be led to the conclusion that the contract is wider than the printed conditions.[218]

2C.4.2 The different roles in detail

2.52 (i) A forwarder may have placed himself in the position of a principal in relation to his client.[219] This will clearly be the case if he actually performs an operation himself or through his servants. As subcontracting is usually a possibility, a forwarder may be considered to have undertaken to perform by himself or by a subcontractor. This is commonly the case in respect of carriage by road where a forwarder is providing a collection or delivery service as part of a more complex movement[220] and is classified as a carrier although operating through a subcontractor.[221]

2.53 In more complex movements it is common to classify the forwarder as a carrying or transportation contractor undertaking an obligation personally to procure that the goods are carried.[222] In such situations where the forwarder is understood to have accepted responsibility for performance of the operation he may be said to have agreed to effect carriage rather than arrange it.[223]

2.54 Where the forwarder is considered to have undertaken to effect carriage he is likely thereby to be classified as a carrier. Classification as a carrier will often subject the forwarder to compulsory regimes of liability applicable to carriers, especially contracting carriers. This is especially the case in respect of the CMR Convention.[224] Once subjected to such a regime any attempt to reduce the forwarder's liability, for example to that of an agent, by means of trading conditions will fail. The forwarder is likely to be classified as a carrier for these purposes whenever the position is that he is understood to have contracted personally to procure the whole of the relevant carriage.

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218. See *Garnham Harris*, fn. 206, above. See also *Eastern Kayam Carpets Ltd* v. *Eastern United Freight Ltd*, QBD, 6 December 1983, unreported.

219. See Hill, p. 155.

220. Whether organised by the forwarder or linking to a pre-arranged operation.

221. See *L. Harris (Harella) Ltd* v. *Continental Express and Burns Transit Ltd* [1961] 1 Lloyd's Rep 251, *Colverd & Co Ltd* v. *Anglo Overseas Transport Co Ltd* [1961] 2 Lloyd's Rep 352, *cf Date & Cocke* v. *G.W. Sheldon & Co (London) Ltd* (1921) 7 Ll L Rep 53.

222. See *Salsi* v. *Jetspeed Air Services* [1977] 2 Lloyd's Rep 57 at p. 60; *Landauer & Co* v. *Smits & Co* (1921) 6 Ll L Rep 577 at p. 579; *Lynch Bros.* v. *Edwards & Fase* (1921) 6 Ll L Rep 371; *J. Evans & Son (Portsmouth) Ltd* v. *Andrea Merzario Ltd* [1976] 1 WLR 1078 at p. 1082, [1976] 2 Lloyd's Rep 165 at p. 168, and [1975] 1 Lloyd's Rep 162 (QBD) at p. 168. See further Holloway, "Troubled Waters: The Liability of a Freight Forwarder as a Principal under Anglo-Canadian Law" (1986) 17 JMLC 243 and also Hill, "Forwarding and Sub-contracting Complications" [1976] LMCLQ 63.

223. See *per* Beattie J, *EMI (New Zealand) Ltd* v. *Wm Holyman & Sons Pty Ltd and Another (The Maheno)* [1977] 1 Lloyd's Rep 1 at p. 4, [1976] 2 NZLR 567 at p. 572 (New Zealand Sup Ct).

224. See e.g. *Ulster Swift* v. *Taunton Meat Haulage* [1977] 1 WLR 625, [1977] 1 Lloyd's Rep 346. See further Clarke, para. 10a, and Hill and Messent, paras 1.13 *et seq*. In respect of carriage by air, see Shawcross & Beaumont, vii (65), and "The Freight Forwarder as an Air Carrier", D. Schoner [1980] 1 *Air Law* 2.

2.55 There exists, however, the possibility of finding that the forwarder is a substitutional bailee.[225] This does not fit the more usual simple contrast which is made between the forwarder acting as principal performing or effecting carriage and as agent creating privity of contract between the forwarder's customer and the performing carrier. The conclusion that tends to follow from this contrast is that a finding that the forwarder is not an agent creating privity of contract, or that the forwarder is acting as a principal, means that the forwarder has agreed to effect carriage.[226] Evans J in *M. Bardiger Ltd* v. *Halberg Spedition Aps*,[227] however, indicated that there is nothing in principle which compels the conclusion that unless the forwarder contracts as a carrier he must thereby be authorised to act as an agent, with corresponding duties as to remuneration and to account. This suggests that a forwarder can take a position as a principal, and presumably thereby not effect the creation of privity of contract between his customer and a carrier without thereby being considered to have taken on the responsibility of a carrier. His undertaking is not to carry the goods nor assume the liabilities of a carrier, but to make suitable arrangements for the carriage at his own expense. In *Aqualon (UK) Ltd* v. *Nilsson International B.V.,*[228] Mance J accepted that it was possible for a contractor to undertake such an intermediate role but this did not mean that such a role was either likely or lightly to be inferred. A finding that a contracting party was intended to fulfil an intermediate role of this nature must be supported by evidence demonstrating clearly that this was the intention.[229]

2.56 Before leaving this first possibility, it should be noted that complex movements can involve the forwarder having a role covering a variety of modes of transport. This can produce the effect that, whilst the overall role of the forwarder is to act as a principal, the intention may be to create privity of contract in respect of a particular mode. This is especially true where carriage by sea is involved because of the prominent role of bills of lading.[230]

2.57 (ii) The forwarder may contract in the more traditional role of being an agent, i.e. contracting to arrange carriage.[231] This is commonly associated with a finding that privity of contract exists between the customer and the actual carrier.[232] On the other hand a finding that the forwarder contracts as a principal towards his customer leads normally to the conclusion that no privity of contract exists between the forwarder's customer and the actual carrier.[233] It has been suggested that there is no

225. See further below and *cf Kala Ltd* v. *International Freight Services (UK) Ltd*, QBD, 7 June 1988, unreported (*cf Inco Europe Ltd* v. *First Choice Distribution* [1999] 1 WLR 270, [1999] 1 All ER 820) and *M. Bardiger Ltd* v. *Halberg Spedition Aps*, QBD, 26 October 1990, unreported.

226. See e.g. *Hair and Skin Trading Co Ltd* v. *Norman Airfreight Carriers Ltd* [1974] 1 Lloyd's Rep 443; *Tetroc Ltd* v. *Cross-Con (International) Ltd* [1981] 1 Lloyd's Rep 192; *Elektronska Industrija Oour TVA* v. *Transped Oour Kintinentalna Spedicna* [1986] 1 Lloyd's Rep 49.

227. Above, fn. 225.

228. [1994] 1 Lloyd's Rep 669.

229. Such an intermediate role may be what was contemplated by the Court of Appeal in *Inco Europe Ltd* v. *First Choice Distribution*, see below, 2.65.

230. See e.g. *Coli Shipping (UK) Ltd* v. *Andrea Merzario Ltd* [2002] 1 Lloyd's Rep 608.

231. See *The Maheno*, fn. 223.

232. See e.g. in respect of CMR, *Moto Vespa SA* v. *M.A.T. (Britannia) Express* [1979] 1 Lloyd's Rep 175. In this case the customer was held entitled to sue as an undisclosed principal.

233. See e.g. *Lee Cooper Ltd* v. *C.H. Jeakins & Sons Ltd* [1967] 2 QB 1 [1964] 1 Lloyd's Rep 300.

reason for these to be exclusive alternatives.[234] This view receives support from the decision of the New South Wales Court of Appeal in *Carrington Slipways Pty Ltd* v. *Patrick Operations Pty Ltd (The Cape Comorin)*.[235] The absence of privity seems, however, to be the natural assumption and appears to be made in the current BIFA Conditions. Nevertheless as in (iii) below it is perfectly possible on principles of agency for a forwarder to give a guarantee to his principal whilst additionally having authority to create privity of contract between his customer and the actual carrier. Conversely it is possible for a forwarder, as an agent, to create privity but additionally to accept a personal responsibility to the actual carrier. This is clearly recognised in some circumstances.[236] Nevertheless a forwarder's acceptance of responsibility towards a third party without disclosing agency will tend to militate against a finding that privity of contract has been established.[237]

The common situation where the forwarder is acting as agent may be stated to be *2.58* that of the forwarder acting as agent for the customer when engaged to arrange sections of a transit. He may, however, be employed in the capacity of agent for an actual operator, as where the forwarder is also a ship's agent.[238] In relation to a movement of goods, therefore, the forwarder may act as agent for the customer in respect of one segment and agent for a carrier in respect of another segment or for different parts of the process of preparation for shipment.[239] Terminal operations in modern shipping often involve the terminal operator acting in part on behalf of shipowner and on behalf of the shipowner's customer.[240] A further common arrangement is for the forwarder to perform or effect a period of land carriage as a principal, for delivery to or collection from a carrier by air or sea, such air or sea carriage either being arranged by the forwarder or under other arrangements.[241] Such arrangements can give rise to problems of demarcation. An illustration from the US is *Pacific Tall Ships Co* v. *Kuehne and Nagel Inc*.[242] A forwarder's negligent advice to a shipper to fumigate a cargo was held to fall within an agreement between the forwarder and the shipowner for the forwarder to "solicit and secure conventional and containerised cargo for transport by the Principal". This created the

234. Palmer, p. 1312, 23–058, in the sense of an intermerdiary having continuing responsibility for a subcontractor alongside the existence of a contract between the owner and the subcontractor.

235. 14 November 1991, unreported. See further below and [1992] 1 LMCLQ 32.

236. See, e.g., *Anglo Overseas Transport Co Ltd* v. *Titan Industrial Corp (UK) Ltd* [1959] 2 Lloyd's Rep 152, see, below, 2.261. *Cf TICC Ltd* v. *COSCO (UK) Ltd* [2001] EWCA Civ, 1862, [2002] CLC 346, (2001 WL 1476256 (CA)). *Cf* also *Coli Shipping (UK) Ltd* v. *Andrea Merzario* [2002] 1 Lloyd's Rep 608, where one forwarder was held to have accepted a personal responsibility to the forwarder instrumental in effecting the carriage, in respect of vehicle demurrage. Their relationship was that of principals and no privity of contract was established between the first forwarder's customer and the second forwarder. The fact that parallel privity of contract existed between the customer (as shipper) and the shipowner did not affect the second forwarder's title to sue the first. A further possibility is for the forwarder's role to be simply that of channelling payment to transport suppliers as in *Maersk Air Ltd* v. *Expeditors International (UK) Ltd* [2003] 1 Lloyd's Rep 391.

237. See below 2.75 and 2.78.

238. *Cf*, however, *Center Optical*, below, 2.94.

239. See *Heskell* v. *Continental Express Ltd and Another* (1950) 83 Ll L Rep 438. *Cf* in respect of landing: *C.A. Pisani & Co Ltd* v. *Brown Jenkinson & Co Ltd* (1939) 64 Ll L Rep 340.

240. See e.g. *Neptune Orient Lines Ltd* v. *J.V.C. (UK) Ltd (The Chevalier Roze)* [1983] 2 Lloyd's Rep 438.

241. See *L. Harris* and *The Maheno*, fn. 223, above.

242. [2000] AMC 866 (ND Ill. Eastern Div).

possibility of liability of the shipowner to the shipper since the advice related to the shipowner's obligation to ensure that containers shipped on its vessel complied with US Customs regulations.

2.59 The possibility that the forwarder may take differing roles in the course of a whole movement of goods may naturally be seen as involving substitutional or springing bailment, as opposed to sub-bailment or quasi-bailment.[243] The forwarder who has undertaken to perform throughout the transit retains his responsibility (whether as a bailee or quasi-bailor).[244] The forwarder who acts as bailee for part of the transit and then hands the goods to another under arrangements made by the forwarder or otherwise may well be considered to have relinquished his liability for the remainder of the transit. It appears to be possible for this to be true even where no privity of contract is established between the customer and the substituted bailee.[245] Even if a continuous liability is relinquished the disposition to the secondary bailee must nevertheless be authorised and the secondary bailee must be chosen with reasonable care.[246] A similar issue can arise in respect of bills of lading, especially in the context of through transport.[247]

2.60 The position might be explained on the basis that a bailee cannot normally expect to divest himself of his responsibility towards the goods unless proper arrangements for their continuing custody have been made and his contract is likely to be construed accordingly.[248] That is, unless the duty has been clearly excluded.[249] Such a duty is clearly applicable where the forwarder acts as an agent in the normal sense.[250] Recent authority seems to confirm that it is implied also where the forwarder is acting as a principal in the sense accepted in *Bardiger*.[251] In *East West Corp* v. *DKBS 1912*,[252] Mance LJ[253] accepted that it was clear in principle that, even in circumstances where a bailee is authorised to subcontract on the basis that he will thereafter have no personal responsibility, the cessation of his responsibility may depend not merely on his making a subcontract of the authorised kind but also upon his exercising due care in the selection of the subcontractor. This included a duty to

243. See Palmer, p. 1247, 23–006, n. 39.

244. See below, 2.103.

245. See *Bardiger*, fn. 225, above, and Palmer, p. 1247, 23–006, who there cites *The Maheno* [1976] 2 NZLR 566 and *Swiss Bank Corp* v. *Brink's-MAT Ltd* [1986] QB 853, [1986] 2 Lloyd's Rep 79, although in the former case Beattie J (at p. 574) clearly envisages the forwarder as acting as agent for the customer in respect of the sea carrier.

246. Palmer, p. 1303, 23–051, (this statement made in the 2nd edn, p. 1346 was cited by Mance LJ in *East West Corp* v. *DKBS 1912* [2003] EWCA Civ 83, [2003] 1 All ER (Comm) 525 at 549). Palmer cites *Garnham, Harris*, fn. 206, above, and *James Buchanan & Co Ltd* v. *Hay's Transport Services Ltd* [1972] 2 Lloyd's Rep 535, both cases involving admitted carriers subcontracting part of the operation, the basis of liability used by the judge in the latter case being unnecessary (in respect of the customer) in light of the non-delegable duty of a bailee or quasi-bailee, see *Metaalhandel J.A. Magnus BV* v. *Ardfields Transport Ltd* [1988] 1 Lloyd's Rep 197. See also *B.R.S. Ltd* v. *Arthur V. Crutchley & Co Ltd* [1968] 1 All ER 811, [1968] 1 Lloyd's Rep 271 (and see Mance LJ in *East West Corp*, above).

247. See 3.33.

248. *Cf Port Jackson Stevedoring Pty Ltd* v. *Salmon and Spraggon (Australia) Pty Ltd (The New York Star)* [1981] 1 WLR 138 at p. 147, [1980] 2 Lloyd's Rep 317 at p. 324.

249. See below, fn. 256.

250. See generally, 2C.5.4.

251. See above, fn. 225.

252. [2003] EWCA Civ 83, [2003] 1 All ER (Comm) 525.

253. At p. 549 and citing Palmer (2nd edn), at p. 1346.

ensure that any sub-bailment that is made reflects the basis of the bailment arrangement which the bailee has, by voluntarily taking possession, accepted. The principle was applied in the context of a bailee (or sub-bailee) not in a contractual relationship with a bailor. Such a duty may be doubted, or simply not be applicable to the same extent, where the transfer to the secondary bailee is under arrangements made by the customer or as directed by him.[254]

2.61 A substitutional bailment might well be created contractually, in effect by means of trading conditions where, for example, the forwarder contracts to be liable only where the goods are in his actual custody and control as, for example, was the case under clause 13(i), 1974 edition, IFF Conditions. Here the forwarder might be considered to be acting as a principal towards his customer but, whilst agreeing to effect transport by others, he does not agree to accept contractual responsibility for its performance. However, such conditions might be considered equally consistent with the view that the forwarder has, by undertaking to effect transport whether by himself or others, accepted a contractual responsibility as a carrier but subject to the protection that his trading conditions give him as in *Troy* v. *Eastern Company of Warehouses*.[255] Such contractual terms would give way to a compulsory regime of liability and might be expected to be subjected to application of the test of reasonableness in UCTA.[256] In *Keeton Sons and Co Ltd* v. *Carl Prior Ltd*,[257] however, the Court of Appeal accepted the reasonableness of a clause excluding the liability of the forwarder except where the goods were damaged whilst in the forwarder's custody. The court emphasised the fact that the forwarder's customer knew that the forwarder contracted on terms which included exclusion clauses, were content to assume that they would be in common form without examining them and that they would look, in the event of any damage, to their insurers. The court did not engage in an analysis of the undertaking of the forwarder. Such an analysis might well be thought relevant in view of the risk to which a forwarder's customer may be exposed if there is no contractual redress against those performing the carriage.

2.62 Some trading conditions seek to point a court towards a finding in favour of a substitutional bailment by indicating that a forwarder may contract as a principal but without undertaking liability as a carrier.[258] This can be linked with a view that the nature of the forwarding trade does not require there to be an implied term that a forwarder will accept a responsibility for the acts of those performing carriage.[259] Whilst this possibility was accepted in *Bardiger*,[260] it may be doubted whether this

254. *Cf Butterworth* v. *Brownlow* (1865) 19 CBNS 409, 144 ER 845.

255. (1921) 8 Ll L Rep 17.

256. As would more clearly be the case where the forwarder seeks to exclude the duty of care in respect of the selection of the subcontractor.

257. [1986] BTLC 30.

258. See cl. 23 of the 1981 edn of IFF Conditions and cll. 2 and 3 of FIATA FCT. See also the clause referred to in *Bardiger*, fn. 225, above.

259. See Hill, p. 159 and Palmer, p. 1312, 23–058. This is based in part on a view of *Harris*, fn. 221 above, although in that case it was clear that the forwarder was contracting as a carrier but was protected by his exclusion clause (the apparent distinction with *Colverd*, above, being really due to an atypical application in this latter case of the principles of vicarious liability, *cf* Palmer, pp. 497–8, 7–033—7–034).

260. Above, fn. 225.

will be the case in most cases.[261] Unlike the commission merchant[262] there does not appear to be the same commercial recognition of the forwarder's contract as being one of commission. Rather the forwarder is more likely to be viewed as an independent retailer of wholesale carriage service.[263] Indeed, in *Bardiger*, the contract does not appear to have been viewed as one of commission in the usual sense since there was considered to be no duty to account on the part of the forwarder.[264]

2.63 In *Bardiger*,[265] Evans J was prepared to accept that a forwarder organising a groupage service was not operating under a true agency. He considered that in determining the relevant status weight is to be given to the nature of the business of the contracting party to the knowledge of the other party. Here the fact that it was not contemplated that the forwarder would carry the goods and the relationship of the forwarder to the selling organisation were material. Unlike the use made of the contract of commission on the continent[266] the absence of a clear understanding of this leads to the possibility that the implications of such an arrangement will not be understood by those contracting with forwarders. The lack of a contractual link with the performing carrier may leave the customer exposed to risks not fully appreciated especially where the protection of compulsory regimes of liability is expected to be available. It is noteworthy that in *Bardiger* it was considered that the forwarder's customer as sender would still have the rights available to him under the CMR Convention against the performing carrier, even in the absence of a contractual relationship with that carrier, by virtue of section 14(2) of the Carriage of Goods by Road Act 1965. It would seem doubtful that section 14(2) was intended to create statutory contractual links except as a matter of interpretation of the Convention. It is doubtful that the plaintiff could have contractual rights as sender without some contractual link[267] but since he was named as consignee this would have provided the necessary contractual link for the purposes of the Convention. In *Aqualon (UK) Ltd* v. *Nilsson International B.V.*[268] Mance J expressed doubts about the view of Evans J in *Bardiger* in similar terms.[269]

2.64 Furthermore the need to support the application of such compulsory rules and to safeguard against the evasion of them may tend to militate against a finding that the forwarder has not undertaken a responsibility as a carrier.[270] The growing acceptance in this country of the professional quality to be expected of the forwarder's role embodied in the concept of his being a transportation contractor appears to be reflected in the current BIFA Conditions which appear to accept the more basic distinction between the forwarder acting as an agent in the usual sense and acting

261. See the view of Mance J in *Aqualon* noted above at 2.55.
262. See Schmitthoff, p. 770.
263. See *The Freight Forwarder: A Report on the Working Party on Forwarders*, NEDO, 1970, p. 1 and Hill, p. 64.
264. *Cf Bowstead*, p. 10, 1–020, and see further Reynolds (1978) 94 LQR 224.
265. Above fn. 225.
266. See Hill, pp. 50 *et seq.*
267. See Clarke, para. 41a(i).
268. Above, fn. 228.
269. See further *Hill and Messent*, para. 1.41.
270. See Glass, "CMR: Putting Practice into Theory" [1984] LMCLQ 30.

as a principal in the sense of accepting a continuing liability in respect of the goods.

2.65 Nevertheless, whilst not entirely clear, a recent decision of the Court of Appeal might suggest that an intermediate position in the role of a forwarder can be recognised. In *Inco Europe Ltd* v. *First Choice Distribution*,[271] it was held that the plaintiffs had failed to prove that forwarders operating on Fenex general conditions[272] were contracting as carriers. The evidence showed no more than that they were acting as forwarders. It was noted that the trading conditions were intended to be governed by Dutch law and that the tenor of them is that the forwarder is primarily intended to be an agent. It was unclear whether the court regarded this agency in the usual sense of creating privity of contract between the forwarder's customer and the physical carrier. Under Dutch law no privity of contract is created, but the forwarder's customer has the protection of a right of assignment under the New Civil Code[273] which is reproduced in Clause 16(4) of the Fenex conditions.

2.66 (iii) The forwarder may act as an agent but warrant a particular part of the performance, e.g. that carriage could be carried out at a certain rate per ton.[274]

2C.4.3 Criteria determining status

2.67 The criteria used by the courts to determine the status of the forwarder can now be considered and trading conditions considered in light of them. It has been said that the matter is one of impression.[275] It may be said that some of the criteria used by the courts are directed at finding the intentions of the parties and some are used as a means of discovering the actual role adopted by the forwarder. Furthermore the criteria may be confused in that it may be unclear as to which question they are directed. This may be a simple contrast between agency and responsibility as a carrier. Alternatively they are capable of being relevant to the more complex questions of whether the forwarder has contracted as a principal but without accepting responsibility as a carrier or even has contracted as a carrier but is also acting as agent in making the shipment.[276]

The criteria can be analysed as follows:[277]

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271. [1999] 1 WLR 270, [1999] 1 All ER 820.

272. The conditions of the Netherlands Association for Forwarding and Logistics.

273. NBW, s. 8.2.3.3–2.

274. *Harlow & Jones* v. *P.J. Walker Shipping & Transport* [1986] 2 Lloyd's Rep 141.

275. *Hair and Skin Trading Co* v. *Norman Airfreight Carriers* [1974] 1 Lloyd's Rep 443 at p. 445, *Tetroc* v. *Cross-Con* (*International*) [1981] 1 Lloyd's Rep 192 at p. 198.

276. As appears to have been contemplated by the Court of Appeal in *Cho Yang Shipping Co Ltd* v. *Coral (UK) Ltd* [1997] 2 Lloyd's Rep 641.

277. Note their use in other contexts, e.g. in respect of whether a towage contract was made by a party acting as a principal or as an agent: *Lukoil-Kaliningradmorneft plc* v. *Tata Ltd and Global Marine Transportation Inc* [1999] 2 Lloyd's Rep 129. Compare the criteria listed by Mance J in *Aqualon (UK) Ltd* v. *Vallana Shipping Corp* [1994] 1 Lloyd's Rep 669 at p. 674 in the context of the CMR Convention. He indicates: (a) the terms of the contract and the nature of the instructions given; (b) any description used or adopted in relation to the contracting party's role; (c) the course of dealing; (d) the nature and basis of charging; and (e) the nature and terms of any CMR note issued.

2.68 *(a) The terms of the contract and the language used surrounding the transaction*

The printed terms may be considered to be sufficiently clear as in *Victoria Fur* v. *Roadline*,[278] where a clause stated that British Airways acted only as agents in respect of on-carriage by road. BIFA Conditions currently make a basic distinction between the forwarder acting as an agent and as a principal and some clauses are expressly applicable to one activity or the other.[279] Clauses 11 and 12 of the current BIFA Conditions, however, make clear that in the case of insurance,[280] and delivery of goods against documents,[281] the forwarder agrees to act only as an agent.[282]

2.69 Whilst not necessarily conclusive, such clear clauses may be a powerful consideration in favour of agency.[283] In *Center Optical (Hong Kong) Ltd* v. *Jardine Transport Services (China) Ltd*,[284] however, a forwarder who was held to have acted as a carrier[285] in respect of carriage by sea from Shanghai to Miami, was unable to establish that an agent effecting delivery of the goods without production of a bill of lading was acting on behalf of the customer rather than the forwarder. A clause in the contract of carriage stated that "the merchant constitutes the carrier as the merchant's agent to enter into contracts on behalf of the merchant with others for transport, storage, handling or any other service in respect of the goods . . . subsequent to discharge". This clause was held to be contradicted by evidence of a profit-sharing arrangement between the forwarder and the agent along with other evidence that the agent was regarded as the agent of the forwarder. It may, perhaps, be suggested that such a clear clause provides a presumption of agency unless contradicted by the facts. The mere fact that trading conditions refer to the forwarder generally as an "agency" or as forwarding agents is not in itself a sufficient indication of agency.[286] The trading terms will be treated as neutral, indicating that sometimes the forwarder acts as a principal and sometimes as an agent.[287] In *Elektronska Industrija Oour TVA and Another* v. *Transped Oour Kintinenyalna Spedicna and Others*,[288] it was noted in the context of the CMR Convention, however, that the 1974 IFF Conditions (as do current conditions) contemplate a potential liability as bailees or carriers which suggests that such terms are even more neutral. Contrast also *Marston Excelsior* v. *Arbuckle, Smith & Co*,[289] where Phillimore LJ, in referring to the forwarder's notepaper which described them as, *inter alia*, forwarding agents, said that there was not a word there to suggest that they act as carriers. It may be

278. [1981] 1 Lloyd's Rep 443.
279. The 1984 Conditions, Geologistics GTC and TT CLUB 400 Conditions divide the conditions up into sections containing common conditions and sections dealing specifically with the situation where the forwarder is acting as an agent and where he is acting as a principal.
280. See 2.178.
281. See 2.187.
282. *Cf* TT CLUB 400, cl. 4(D), DAMCO STC, cl. 11(b) reproduced at 2.44.
283. *Cf* TT CLUB 400, cl. 3, which suggests a presumption of agency, but see cl. 18.
284. [2001] 2 Lloyd's Rep 698 (HK HC).
285. See below, 2.94.
286. *L. Harris (Harella) Ltd* v. *Continental Express and Burns Transit Ltd* [1961] 1 Lloyd's Rep 251 and *Lee Cooper Ltd* v. *C.H. Jeakins & Sons Ltd* [1967] 2 QB 1. See also *Tetroc Ltd* v. *Cross-Con (International) Ltd* [1981] 1 Lloyd's Rep 192 at p. 196.
287. *Singer* v. *Tees & Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 at p. 167.
288. [1986] 1 Lloyd's Rep 49 at p. 52.
289. [1971] 2 Lloyd's Rep 306 at p. 311.

clear from the terms of some forwarders and many logistics operators that they anticipate a principal or carrier liability.[290] There may even be a direct statement to this effect either in a transport document itself,[291] or in the standard trading conditions making reference to such a document.[292]

2.70 Apart from the printed terms, the language used surrounding the creation of the transaction is relevant. For example, requesting that the forwarder "arrange carriage" might be more indicative than requesting him to "carry" the goods but this in itself was not treated as a strong factor in *Tetroc* v. *Cross-Con (International) Ltd.*[293] Nevertheless the whole of the correspondence between customer and forwarder may be sufficient to point one way or the other.[294] The language used by a party when dealing with a dispute arising out of a transaction may provide evidence of capacity as in *Texas Instruments Ltd* v. *Nasan (Europe) Ltd*,[295] where a party's reference to himself as "carrier" was an admission of responsibility as "first carrier" under the CMR Convention.

2.71 In addition to the evidence provided by terms and language used directly in respect of the particular transaction there may be indirect evidence of the status assumed by the forwarder in light of the impression given by advertising or promotional material. Geologistics GTC, clause 2(iv) provides for liability as a principal where the company holds itself out as the operator of a regular line or service. This performs a similar function to where the forwarder issues a "carrier" document[296] but might also direct attention to promotional material advertising a scheduled service. The way the forwarder has advertised or promoted his service has figured in case-law to a limited extent to date.[297] This should be an important factor in determining the customer's reasonable belief as to the forwarder's capacity. This belief ought to be central since the question of an "agent's" status ought to be determined by the objective intention surrounding the grant of authority by the principal.[298] The nature of the forwarder's business to the knowledge of the customer was emphasised in *M. Bardiger Ltd* v. *Halberg Spedition Aps*.[299] Geologistics GTC, clause 2(iv), emphasises the "holding out" by the forwarder,[300] and

290. See fn. 6.
291. As in cl. 2 of the FIATA Multimodal Transport BL (FBL), reproduced above at 2.44.
292. By reference, e.g., to the issue of a bill of lading as carrier.
293. [1981] 1 Lloyd's Rep 192 at p. 196. *Cf Inco Europe Ltd* v. *First Choice Distribution* [1999] 1 WLR 270, [1999] 1 All ER 820.
294. *Marson Excelsior* v. *Arbuckle, Smith & Co* [1971] 2 Lloyd's Rep 306 at p. 309.
295. [1991] 1 Lloyd's Rep 146.
296. See 2. *Cf* TT CLUB 400, cl. 2(B).
297. See *Landauer* v. *Smits*, (1921) 6 Ll L Rep 577 at p. 578, *Luigi Riva di Fernando* v. *Simon Smits Co. Ltd* (1920) 2 Ll L Rep 279, and *Claridge, Holt & Co* v. *King & Ramsay* (1920) 3 Ll L Rep 297.
298. *Cf Singer* v. *Tees & Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164, at p. 167, where it was stated that "this is an issue to be resolved on the documents, and in the light of objective features of the transaction". Presumably, however, on analogy with sailing schedules, promotional material could be viewed as part of the contract and oral evidence, if available, is clearly admissible, see *Tetroc* v. *Cross-Con*, fn. 286, above, *cf Weis* v. *Northern Traffic* (1919) 1 Ll L Rep 241.
299. QBD, 26 October 1990, unreported.
300. *Cf* NSAB 1985 discussed by Ramberg, p. 78.

suggests that contradictory terms in the forwarder's other documentation can be ignored.[301]

2.72 *(b) The method of charging adopted by the forwarder*

In *Colley* v. *Brewer's Wharf & Transport*,[302] charging an inclusive rate rather than indicating actual cost and adding commission was held to indicate that the forwarder was acting as a principal. This has not always been taken as a particularly strong factor. In *Texas Instruments Ltd* v. *Nasan (Europe) Ltd*,[303] the fact that the forwarder charged an all-in rate was only one factor among others to be considered and did not lead to the conclusion that the forwarder was not acting as an agent although it would be more usual for an agent to pass on the charge to the customer. Furthermore, in *M. Bardiger Ltd* v. *Halberg Spedition Aps*,[304] the existence of fixed rates did not lead to the conclusion that the forwarder had undertaken a responsibility as a contracting carrier. On the other hand the use of a fixed charge may well be a factor in leading a court to consider that the forwarder's customer anticipates that he is paying for a package of services under which he contemplates that the forwarder will subcontract the performance of the carriage if he is unable to do it himself.[305] In choosing to charge an inclusive price, however, the forwarder runs a risk that if he is held to be acting truly as an agent he could fall foul of the rule that forbids the making of a secret profit if the profit in the charge goes beyond what could be considered to be a reasonable commission.[306]

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301. The clause does, however, create an exception where the company procures a carriage document which evidences a contract of carriage between the customer and the carrier issuing such document. By cl. 2(v), in any other case, the company purports to be an agent only if it enters into contracts with other parties for carriage, etc., which are capable of being enforced by the customer as principal. This applies whether or not the customer is named or disclosed as principal. (*Cf* TT CLUB 400, cl. 4(C) and DAMCO STC, cl. 11(b) reproduced at 2.44). This clause appears to be circular since the question whether the contract with the third party is capable of being enforced by the customer seems to depend on whether or not the forwarder is an agent. Nevertheless, it seems that a forwarder can make a contract of carriage with the customer on the one hand and make the shipment on his behalf on the other, naming him as shipper and party to the contract of carriage (See *Cho Yang Shipping* v. *Coral (UK)* [1997] 2 Lloyd's Rep 641, esp. at p. 646). In this situation such clauses will be of use in removing an inference of carrier liability. It may be of particular assistance in cases where the customer has a right in law to enforce the contract regardless of agency, e.g. a consignee under the CMR Convention or the endorsee of a bill of lading under the Carriage of Goods by Sea Act 1992. If the intention is to focus on the document issued by the third party TT CLUB, cl. 4(C) may be of more use. Even more direct is cl. 7.1 of the FIATA Model Rules which provides that the freight forwarder shall not be deemed liable as carrier if the customer has received a transport document issued by a person other than the freight forwarder and does not within a reasonable time maintain that the freight forwarder is nevertheless liable as Carrier.

302. (1921) 9 Ll L Rep 5.

303. [1991] 1 Lloyd's Rep 146. *Cf Inco Europe Ltd* v. *First Choice Distribution* [1999] 1 WLR 270, [1999] 1 All ER 820 where an invoice which referred to "Truck-Freight" was regarded as neutral.

304. QBD, 16 October 1990, unreported.

305. *Tetroc Ltd* v. *Cross-Con (International) Ltd* [1981] 1 Lloyd's Rep 192, *Elektronska Industrija Oour TVA* v. *Transped Oour Kintinentalna Spedicna* [1986] 1 Lloyd's Rep 49, *Singer Co (UK) Ltd* v. *Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164.

306. *Immediate Transportation Co Ltd* v. *Speller, Willis & Co* (1920) 2 Ll L Rep 645, (*cf* BIFA, cl. 9, 2.166, below). See, however, fn. 191 above.

(c) The extent to which the customer is kept informed of arrangements made on his behalf 2.73

The courts have at times emphasised the extent of the knowledge of the forwarder's customer about arrangements made on his behalf. The fact that the customer had been given little information about the carriers involved in an international road movement was an important factor in *Tetroc* v. *Cross-Con*[307] in determining that the defendant carrier was acting as a principal and thus liable as a CMR carrier. This factor may be reinforced by clauses such as clause 5(B) of BIFA 1989 Conditions. Other clauses may seek to place an onus on the forwarder to give details of arrangements on demand or risk being considered a principal although his intention may be to act as agent.

(d) The usual course of business of the forwarder 2.74

The courts take into account whether the forwarder has acted previously as "forwarder" or principal[308] or, similarly, whether his standard terms recognise the possibility of his acting as a principal.[309]

(e) The forwarder's relationship with the physical performer of the service 2.75

The fact that the forwarder has a standing arrangement with such person may well indicate subcontracting rather than agency.[310] In *Granville Oils & Chemicals Ltd* v. *Davies Turner & Co Ltd*,[311] Judge Behrens included the fact that the forwarders accepted that they were personally responsible for the costs incurred by their agents and the ocean carrier as a factor in finding that they were acting as principals. No appeal was made to the Court of Appeal on this point but it might be noted that the fact that a forwarder takes on such a responsibility is not necessarily contradictive of an agency role.[312] Obviously there can be no doubt if the forwarder physically performs the carriage using his own employees utilising his own or hired means of transport.[313] The extent to which the forwarder owns such means of transport or

307. [1981] 1 Lloyd's Rep 192.

308. *Marston Excelsior* v. *Arbuckle Smith* [1971] 2 Lloyd's Rep 306, *Elektronska Industrija Oour TVA and Another* v. *Transped Oour Kintinenyalna Spedicna and Others* [1986] 1 Lloyd's Rep 49.

309. *Elektronska Industrija Oour TVA and Another* v. *Transped Oour Kintinenyalna Spedicna and Others*, previous footnote, referring to the standard trading conditions of the Institute of Freight Forwarders 1974.

310. *Lee Cooper* v. *Jeakins*, above, *John Rigby (Haulage) Ltd* v. *Reliance Marine Insurance* [1956] 2 QB 468, [1956] 2 Lloyd's Rep 10. Compare *Hair & Skin Trading* v. *Norman Airfreight Carriers* [1974] 1 Lloyd's Rep 443.

311. Leeds District Registry Mercantile Court, 21 October 2002. See also *Center Optical*, fn. 284, above.

312. A distinction is perhaps possible between situations where the understanding is that a known agent takes on such personal responsibility possibly on the basis of trade custom and where it is simply a normal incident of the relationship entered into by the forwarder whereby the contractor looks to the forwarder for payment.

313. Geologistics GTC, cl. 2(iii) and TT CLUB 400, cl. 3(a), indicate that the forwarder is a principal when he physically performs a particular task. Whilst seemingly to be stating the obvious they might support an inference the other way when the forwarder does not physically perform.

other equipment may be a relevant factor,[314] especially in respect of the impression it may create as to the nature of the forwarder's business.[315]

2.76 *(f) The nature of the documents produced and the use made of them by the parties*

The forwarder may himself issue a document strongly suggestive of the capacity of the performer such as an FBL or other combined transport bill of lading.[316] He may, for example, sign a transport document in such a way as to indicate a particular capacity or the actual performer may do so.

2.77 As indicated at 2.3, one document may be issued by the forwarder and another by the performer such as a carrier. In the context of the CMR Convention, a CMR consignment note issued to the customer and indicating the actual carrier as "carrier" was not treated as a strong factor in *Elektronska* v. *Transped*,[317] since the consignment note was issued after the contract was made and had been filled in by the driver who was unlikely to realise the legal implications of his insertions. On the other hand in *Texas Instruments Ltd* v. *Nasan (Europe) Ltd*,[318] the evidence of the driver was accepted that he had authority from the carriers to indicate them as carriers on the CMR consignment note. Forwarders, in that case, were indicated as senders but there was a further indication that sending was by order of the forwarder's customer thus confirming that they were agents rather than carriers. In *Kala Ltd* v. *International Freight Services (UK) Ltd*,[319] the forwarder signed a CMR consignment note as sender. Although no issue was raised in respect of CMR it is noteworthy that the forwarders were considered not to be carriers but more than mere forwarding agents. In *Inco Europe Ltd* v. *First Choice Distribution*,[320] the forwarder was named as sender in the CMR consignment note which was considered to be contradictory of the plaintiffs' case that the forwarder was a carrier or was accepting the obligations of a carrier as opposed to those of a forwarder.

2.78 In *Singer Co (UK) Ltd* v. *Tees and Hartlepool Port Authority*,[321] it was accepted that the acceptance by the forwarder of responsibility to the port authority for port charges, as recorded by the shipping note, was one factor among others leading to the conclusion that the forwarder was acting as a principal and not as an agent. In *Freight Systems Ltd* v. *Korea Shipping Corp* (*The Korea Wonis-Sun*),[322] the fact that the forwarder had a time/volume contract with the carrier by sea would have negated an inference of agency. However, the fact that the forwarder's indication on the carrier's bill of lading that the shipment was on behalf of the forwarder's customer was sufficient to constitute the forwarder as agent for the customer.

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314. TT CLUB 400, cl. 4(b) seeks to remove the supply of equipment by the forwarder from the range of factors to be considered.
315. *Cf Bardiger*, above 2.55.
316. See 2.86. See also, below, 2.87.
317. Fn. 305, above.
318. Fn. 295, above.
319. QBD, 7 June 1988.
320. [1999] 1 WLR 270, [1999] 1 All ER 820.
321. [1988] 2 Lloyd's Rep 164.
322. 21 November 1990, Hong Kong (reported in LMLN No. 290 and presumably reporting a decision of the High Court of Hong Kong).

Arguably, however, such facts might raise an inference that the forwarder both accepted responsibility as a carrier whilst making the shipment on behalf of the customer as in *Cho Yang Shipping Co Ltd* v. *Coral (UK) Ltd.*[323] On the other hand, Henry J in *Emery Air Freight Corp* v. *Nerine Nurseries Ltd*,[324] found it difficult to see how the plaintiff could be a party to a contract of carriage with the air freight agent in that case and also a party to a concurrent contract with a contracting air carrier to effect the same carriage. 2.79

Cases concerning carriage by sea have produced varying results. In *Langley, Beldon & Gaunt* v. *Morley*,[325] it was said that it was exceptional for a forwarder to put himself into the position of a carrier and that this was not achieved solely by placing his name as sender on the consignment note.[326] Even though this might be more expected where a forwarder provides groupage services,[327] in *The Maheno*[328] the forwarder of goods consolidated into the shipowner's container who issued his own document was held to be an agent. Here the degree of control (or lack of it) that the forwarder himself had over the movement of the goods, especially through the document he had issued, was emphasised. In a Canadian decision a freight forwarder was held by the Federal Court to be liable as a carrier for short delivery and damage to goods transported from Bulgaria to Canada under a through bill of lading issued by it. The factors emphasised by the court were: the plaintiff was unaware of the contract between the freight forwarder and the sub carriers; the wording of the bill of lading suggested that the freight forwarder was acting as the carrier; the freight forwarder's charges were "all-inclusive", and no evidence was adduced of any prior course of dealings between the plaintiff and the freight forwarder.[329] 2.80

2C.4.4 The significance of bills of lading

The question as to how the forwarder's contract is to be classified, in the context of carriage by sea, is often linked with whether the document issued by a forwarder can be regarded as a bill of lading. The relevance to liability is related to the issue of whether the Hague Rules apply to govern the document since the application of the Hague Rules depend upon the contract of carriage being "covered by a bill of lading 2.81

323. [1997] 2 Lloyd's Rep 641. See below 2.92.
324. [1997] 3 NZLR 723 at p. 725.
325. [1965] 1 Lloyd's Rep 297 at p. 306.
326. See also *Platzhoff* v. *Lebean* (1865) 4 F&F 545 and see *Scrutton*, p. 55, *cf* however, Bristow (above fn. 197) who suggests that such a conclusion may be possible where the forwarder takes the role of a principal in respect of a charterparty, citing *The Virgo* [1976] 2 Lloyd's Rep 135 and *The Sun Happiness* [1984] Lloyd's Rep 381.
327. *Cf Eastern Kayam Carpets Ltd* v. *Eastern United Freight*, High Court, 6 December 1983, unreported.
328. [1977] 1 Lloyd's Rep 81. *Cf Landauer* v. *Smits* (1921) 6 Ll L Rep 577, and *Emilio Clot & Co* v. *Compagnie Commerciale du Nord SA* (1921) 8 Ll L Rep 380.
329. *Bentex Fashions Inc* v. *Cargonaut Canada Inc* (1995) 95 FTR 192 in Tetley, "Canada Maritime Legislation and Decisions, 1996–1997" (1998) LMCLQ 265 at p. 273. *Cf Canusa Systems Ltd* v. *The Conmar Ambassador* (1998) 146 FTR 314 and contrast *Brereton* v. *KLC Freight Services Ltd* (1997) 105 OAC 149 (Ontario, CJ Gen Div), see Tetley, "Canadian Maritime Legislation and Decisions 1997–1998" (1999) LMCLQ 278 at pp. 288 and 289.

or similar document of title".[330] This is really a separate question from the nature of the forwarder's contract. The two questions are linked however. A finding that a document is not a bill of lading may well be a strong indication to the court that the forwarder does not intend to contract to carry. Further, such a finding will mean that the forwarder can contract out of the compulsory application of the Rules regardless of whether the contract is classified as a contract of carriage. This appears to have been the case in *The Maurice Desgagnes,*[331] where the conclusion that the forwarder's document was not a bill of lading under the Canadian Carriage of Goods by Water Act 1970 meant that the forwarder was not liable for goods which arrived damaged after a period of carriage by sea. The fact that the document was not signed was the crucial factor in this determination.

2.82 For the purposes of the Rules it seems to have been the view that the requirement is that the "bill of lading" should be a negotiable instrument, the endorsement and delivery of which may affect the property in the goods shipped,[332] which is the case with a bill falling within the custom of merchants acknowledged in *Lickbarrow* v. *Mason*.[333] More recently, however, the decision in the *Rafaela S*[334] has cast doubt on the idea that negotiability is central to the concept of a bill of lading and that this attribute is a necessary condition for the application of the Hague Rules. The court decided that a straight bill of lading counted as a bill of lading for this purpose. It was accepted that the travaux préparatoires demonstrated no clear intention to exclude straight bills,[335] and that even though not negotiable, in the sense of being generally transferable, a straight bill of lading could still be regarded as a document of title. It could be regarded as such since it was accepted that production of a straight bill of lading is necessary to obtain delivery of the goods.[336]

2.83 This view may be thought to run contrary to a more traditional approach which tends to align the concept of a document of title with general transferability.[337] The custom of merchants was the foundation for the shipped order bill of lading to be regarded as a symbol of the goods[338] and its transfer a means by which constructive possession can be transferred. The difficulty is to determine whether this can be done by the wording of the document alone.[339] The fact that a document states that its presentation is required before delivery will be given up does not necessarily

330. Article I(b).

331. [1977] 1 Lloyd's Rep 290, see further De Wit, paras 6.37–6.40 and Bugden, 6–03; see also, generally, S. Nossal, "The Legal Status of Freight Forwarders' Bills of Lading," (1995) HKLJ 78.

332. *Per* Andrews LCJ, *Hugh Mack & Co Ltd* v. *Burns & Laird Lines Ltd* (1944) 77 Ll L Rep 377 at p. 383 (Court of Appeal of Northern Ireland).

333. (1794) 5 TR 683.

334. [2005] UKHL 11, [2005] 2 AC 423. See further, *Carver on Bills of Lading*, 6–003.

335. See Lord Bingham at [19].

336. At [20].

337. E.g. Tettenborn, "Transferable and negotiable documents of title—a redefinition?" [1991] LMCLQ 538.

338. *Kum* v. *Wah Tat Bank Ltd* [1971] AC 439 at p. 446.

339. For Bools, at p. 185, if it can be shown, either by mercantile usage or the document itself, that the issuer, who is the holder of the goods, intends only to deliver to the presenter and that transferors intend to give up and transferees intend to take control of the goods, then the document will be a document of title.

make it a document of title in the common law sense.[340] It might be regarded as merely a token of an authority to receive possession,[341] and might not necessarily bind either the shipper or the carrier so far as the consignee is concerned. There may yet remain a doubt as to whether, in the absence of mercantile custom, a straight bill of lading can achieve the effects that could otherwise be produced by an attornment which both binds the carrier and may estop the shipper. Possibly the decision represents a division between the concept of a document of title sufficient to attract the application of the Hague Rules and the operation of the concept in other areas of the law. Quite apart from that, and even if there is this suggested divergence, the difficulty might remain that whilst a bill of lading issued by or at least recognised by a shipowner as controlling delivery can thereby be a document of title for the purpose of the Hague Rules, this might not be the case where the document does not control delivery from a shipowner. The need for this association may well be necessary for other purposes also.

It may be possible to argue that an alternative view is possible. Although a forwarder's document might not be used to control the movement of the goods out of the possession of an underlying carrier it might well be used to control the final delivery to the receiver, for example at a final stage of the journey where the goods have come back into the possession or control of the forwarder before final delivery. It is suggested that so long as the document displays an intention to accept contractual liability for the period of carriage by sea and is ultimately controlling delivery it could be regarded as a bill of lading at least for the purposes of the Hague Rules. It is the factor of controlling delivery which provides sufficient analogy with the traditional bill of lading as it is most likely to bring the forwarder into contact with a third party.[342] Support can be found in the decision of the Federal Court of Australia in *Comalco Aluminium Ltd* v. *Mogal Freight Services Pty Ltd.*[343] A consignment note issued by a forwarder for a door-to-door transport was held to be a bill of lading[344] for the purposes of application of the Hague Rules. Although called a consignment note, the document was held to satisfy the three essential features of a bill of lading: it evidenced receipt of the goods; evidenced a contract of affreightment for the carriage of the goods made by the forwarder and was a document of title. It satisfied the last requirement since the box headed "Consignee–Receiver" was filled out "to order" and there was an indication of a Notify Party. This is the time-honoured way of filling out a negotiable bill of lading and these matters pointed to an intention by the parties to make the consignment note a document of title. Apart from the forwarder's document there was also an ocean bill of lading under which the goods, having been stuffed into a container by the forwarder, were consigned to the forwarder's agent. The goods were, however, to be

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340. See Treitel, "The legal Status of Straight Bills of Lading" (2003) 119 LQR 608, especially at p. 621.

341. *Official Assignee of Madras* v. *Mercantile Bank of India* [1935] AC 53 at p. 59.

342. The need to protect third parties was seen by Rix LJ in the Court of Appeal judgment in *The Rafaela S* [2003] EWCA Civ 556, [2003] 2 Lloyd's Rep 113 affirmed [2005] UKHL 11, [2005] 2 AC 423 at [59] as a prime motive behind the adoption of the Rules.

343. (1993) 113 ALR 677. See M. Davies (1993) 21 ABLR 377 and S. Hetherington [1993] LMCLQ 313.

344. Or at least a similar document of title.

unstuffed from the container and delivered by the forwarder to the receivers. Delivery was to be made, therefore, against the forwarder's bill of lading.[345]

2.85 For the application of other regimes applicable to carriage by sea, such as the Hamburg Rules and, in prospect the Rotterdam Rules, it is the contractual intention rather than the technical nature of the document that becomes the relevant requirement. The absence of intention, as where a forwarder or other operator acts only as an agent during any ocean carriage, will surely prevent these regimes from applying to that operator. Even if the document issued by the forwarder or other operator is called a bill of lading, the lack of intention will also make it unlikely that, quite apart from liability regimes such as the Hague Rules, the Carriage of Goods by Sea Act 1992 could apply to enable there to be any transfer of contractual rights by means of that document even if the operator has contracted as carrier for non-sea stages of the transport. Nevertheless, it might be possible for there to be a sufficient tie between the forwarder's document and the carriage by sea contract made by the underlying carrier to enable the former to count as a bill of lading for the purpose of enabling the underlying contract to fall within the Hague Rules or the rights under it transferred under the Carriage of Goods by Sea Act 1992.[346]

2.86 More generally, the issue by the forwarder of a document entitled a bill of lading has been seen as a manifestation of the intention to act as an independent contracting party notwithstanding that the bill purports to exclude virtually all liability as in *Troy* v. *The Eastern Company of Warehouses*,[347] and *Midland Rubber Co* v. *Robert Park & Co.*[348] These cases contrast with others where the issue of such a bill has not been considered to amount to such an undertaking such as *A. Gagniere* v. *Eastern Company of Warehouses*,[349] and *Emilio Clot*.[350] As has been noted, the issue of an FBL[351] is likely to be a stronger manifestation of intention to contract as a carrier than the issue of a "House" bill of lading. Even so, in the New Zealand carriage by air case of *Emery Air Freight Corp* v. *Nerine Nurseries Ltd*,[352] a "House Waybill" was held to evidence a contract of carriage. Its description as a "waybill" and the authorisation to employ "third parties" were emphasised as well as the fact that although it made provision for a master waybill number, the waybill number was the forwarder's number which the air carrier in turn adopted on its own waybill. The use of a "House" bill might fit with an argument that the forwarder is contracting merely to procure carriage by sea but without undertaking a responsibility as a contracting carrier. Accordingly, although entitled a bill of lading, this document should not amount to a contract of carriage, unless clearly evincing this intention, and is not to be considered as being within the Hague or Hague-Visby

345. *Cf Carrington Slipways,* 2.91, where there was never a time when the forwarder's bill would have controlled delivery from the person in possession of the goods.
346. See 3.10 and 3.37.
347. (1921) 8 Ll L Rep 17.
348. (1922) 11 Ll L Rep 119.
349. (1920) 7 Ll L Rep 188.
350. See fn. 328 above
351. See 2.76.
352. [1997] 3 NZLR 723.

Rules.[353] Certainly there may be indications in the documents which reveal an agency role rather than an intention to undertake a carrier liability as in *Kim Meller Imports Pty Ltd* v. *Eurolevant SpA & Ors*,[354] where the forwarder was held to be an agent having issued a bill of lading with no terms stated on it and having indicated himself as the shipper on both his own and the defendant carrier's bill of lading.

In the US the development of the concept of the non-vessel-operating common carrier (NVOCC) would seem to have helped to promote the idea that a forwarder can assume the responsibilities of a Hague Rules carrier so that the bill of lading issued by him falls within the rules as applied by the Carriage of Goods by Sea Act 1936.[355] In *Sabah* v. *Harbel Tapper*,[356] a forwarder was held to be a carrier when he issued the bill of lading and was named as carrier in it and charged a fixed amount for carrying the cargo. In *Shonac Corp* v. *Maersk Inc*[357] the forwarder was held to be a carrier having, on the face of the bill of lading, executed it as the "carrier". This outweighed the description of the forwarder as "Shipper/Exporter" in the upper right-hand corner of the bill. The conclusion was supported by references in the bill of lading to the $500 per package limitation, the carrier definition clause and other conditions referable to the liability of the carrier. Compare *Prima US Inc* v. *Panalpina Inc*,[358] where the court saw the job of an NVOCC as being to consolidate cargoes from numerous shippers into larger groups for shipment by an ocean carrier. An NVOCC issues a bill of lading to each shipper. A freight forwarder simply facilitates the movement of cargo to the ocean vessel and does not issue a bill of lading. The defendant, who neither issued a bill of lading nor consolidated cargo was simply a freight forwarder to arrange transportation and even the statement made to the claimant that their shipment would "receive door to door our close care and supervision" did not make them liable as a carrier for the negligence of stevedores engaged by them to move the goods to a "flat-rack" container in preparation for ocean carriage. Note further that the US courts have held a forwarder not to have contracted as carrier even where he issued a "bill of lading" on criteria similar to those used in English decisions, as in *JC Penney Co Inc* v. *American Express Co Inc and American Export Lines Inc*,[359] and *Zima Corp* v. *Roman Pazinsky*.[360] Nevertheless, even in American law it would still appear to be necessary

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353. A comparison may be made with *Evans* v. *Merzario*, (2.47, above) where no bill of lading was issued by the forwarder but one was accepted by the forwarder's agent from the shipowner. No issue in respect of the Rules was raised but it is noteworthy that Roskill LJ described the forwarders as forwarding contractors rather than as carriers ([1976] 1 WLR 1078 at p. 1082, [1976] 2 Lloyd's Rep 165 at p. 168). Nevertheless their continuing responsibility was made clear by his statement that their work was performed through subcontractors and his description of the shipowners as subcontractors.

354. NSW Sup Ct, 6 February 1989, unreported.

355. *Halm Industries* v. *Timur Star*, [1985] AMC 391 (SDNY), *Prussman* v. *M/V Nathaniel* [1988] AMC 297 (SDNY), see also *I.N.A.* v. *American Argosy* [1984] AMC 1547 (2d Cir.), see further De Wit, para. 1.29.

356. [2000] AMC 163 (5th Cir. 1999).

357. [2001] AMC 1924 (SD Ohio (Eastern Div)).

358. [2000] AMC 2897 (2d Cir.).

359. [1952] AMC 901 (SDNY): previous role as agent (above, 2.74 factor (d)); no element of profit in consolidation of goods (below, 2.72).

360. [1980] AMC 1552 (SDNY): knowledge of shipper as to ship (see, 2.73), no consolidation, no element of profit beyond commission (see 2.72).

that for the purposes of COGSA the document should be a "document of title".[361] More generally, in *James N Kirby Pty Ltd* v. *Norfolk Southern Railway Co*,[362] the Court of Appeals for the 11th circuit recognised that by issuing an FBL a forwarder assumes the role of carrier.

2.88 Regardless of how the forwarder's document is regarded, there may yet be the difficulty that it does not provide a remedy against the carrier actually performing the transport or other person in actual possession of the goods. In *The Brij*,[363] a freight forwarder issued a bill of lading to the claimant. The goods were, however, delivered to a third party named as consignee in a bill of lading issued by the ocean carrier to the forwarder as shipper. The bills of lading issued by the ocean carrier were never meant to be used but were kept in a drawer by the forwarder. For the court this fact meant that the plaintiff was not party to the contract with the ocean carrier and so its contractual claim failed. This fact also led the court to the view that although the words "or order" were present in it, the bill was a straight bill so that delivery without requiring its presentation gave rise to no liability in tort. For Rix LJ, in the Court of Appeal decision in *The Rafaella S*,[364] the intention as to use involved a different question than the proper construction of the bill. This intention, however, might have made it possible to show that, at least subjectively, the carrier had not contracted to comply with the normal requirements as to delivery under the bill.[365]

2.89 The decision in *The Brij* compares with *Sonicare International Ltd* v. *East Anglia Freight Terminal Ltd*[366] where the forwarder's Combined Transport Bill of Lading ultimately controlled delivery, the goods having been consigned to the forwarder's agent under the ocean bill of lading and the shipowner's control in respect of the terminal warehouse having been transferred to this agent by means of nomination of a Unique Consignment Number. As one among several alternatives, Judge Hallgarten QC accepted that the transfer of the Combined Transport Bill of Lading amounted to a transfer of the bailment with the party in possession at the time of the loss, the terminal warehouse. Since this bill of lading was not issued by them and did not represent a document by which they undertook to deliver the goods, it is, with respect, hard to see how it could have been used to establish a relationship between themselves and the transferee of the bill of lading.

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361. See *The Aegis Spirit* [1977] 1 Lloyd's Rep 93 at p. 97 (District Court, Western District of Washington). See also *J.C.B. Sales Ltd* v. *M.V. Seijin* [1996] AMC 1507 (SDNY), affmd.

362. [2002] AMC 2113 (11th Cir., reversed on different grounds 543 US 14, [2004] AMC 2705), citing Ramberg, *The Law of Freight Forwarding and the 1992 FIATA Multimodal Transport Bill of Lading*, at p. 7. *Kirby* was followed in *Mitsui Marine & Fire Insurance Co Ltd* v. *Hanjin Shipping Co Ltd* [2004] AMC 577 (Georgia, State Court of Chatham County), in respect of a Mitsui bill of lading issued by an NVOCC, in light of the terms of the bill and the lack of control and supervision exercised by the customer over the NVOCC's functioning, see p. 586. See further, in relation to control, *The National Shipping Co of Saudi Arabia* v. *Diversified Freight Logistics Inc* [2004] AMC 188, where the forwarder was held to have acted as an independent contractor in booking shipment of an oil rig with an ocean carrier. *Cf* further, *Weintraub* v. *ETA Transportation*, SDNY 28 August 2003 (see www.onlinedmc.co.uk).

363. [2001] 1 Lloyd's Rep 431 (HKHC, Ct. of First Instance).

364. [2003] EWCA Civ 556, [2004] QB 702 at [107] affirmed [2005] UKHL 11, [2005] 2 AC 423.

365. Its release or use by the forwarder might then have raised difficult issues of estoppel.

366. [1997] 2 Lloyd's Rep 48 (CLCC Bus. List).

2.90 These cases get to the heart of issues concerning the functions of a bill of lading and it is suggested that the extent to which the forwarder or other contracting carrier's document provides a link to the underlying carrier or possessor is crucially relevant to them. In the paradigm case of a standard bill of lading the custom of merchants recognised that by its transfer property could be transferred. The importance of this recognition was that the transfer was to be binding on the person in possession and thereby a basis for regarding the holder of the bill as being in constructive possession of the goods. Since in this paradigm case the goods were in the possession of a shipowner, it was precisely this person who needed to be bound. Forwarders and other operators might well obtain the possession or control of the goods prior to the actual shipment of the goods. A combined transport bill, for example, will commonly be "received for shipment" and, as such, does not fall strictly within the custom of merchants found in *Lickbarrow* v. *Mason*,[367] quite apart from the fact that both land and sea carriage might be covered.[368] There may be a case for saying that a custom can now be proved in respect of such documents given their wider recognition and use in providing a basis for trade financing, or that simply using the language of negotiability can achieve the effect.[369] However, unless it is clear that the document is binding on all those coming into possession of the goods, the holder of the document cannot be sure of being in constructive possession throughout the transit or that there is no other document in circulation which gives effective control of the goods. Further, even the fact that there is a contractual tie to a person who is in effective control of the goods may not be sufficient, especially where it is sought to use the document to transfer that tie to others.[370] There may well be a crucial difference therefore between where those in possession will recognise the forwarder's document and make delivery on the basis of it as opposed to where they will do so only on the basis of their own document.[371]

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367. Fn. 333. *Cf The Marlborough Hill* v. *Cowan & Sons* [1921] 1 AC 92, *Hugh Mack & Co Ltd* v. *Burns & Laird Lines Ltd* (1944) 77 Ll L Rep 377 at p. 383, *Ishag* v. *Allied Bank International* [1981] 1 Lloyd's Rep 92, *Carver on Bills of Lading*, para. 6–002, De Wit, paras 6.11–6.12. See also Debattista, para. 3–12, *cf* Benjamin, para. 21–083 and note the recoginition of "received for shipment" bills in s. 1(2)(b) of the carriage of Goods by Sea Act 1992 (and see Law Com. Report, below, fn. 339).

368. See further De Wit, paras 6.27–6.40. Even more difficult will be where no sea carriage is envisaged but a combined transport document is issued in negotiable form. See generally, Ramberg, "The multimodal Transport Document" in Schmitthoff and Goode, p. 1, S. Nossal, "The Legal Status of Freight Forwarder's Bills of Lading" (1995) HKLJ 78, Bugden, ch. 6.

369. *Cf* Debattista, para. 3–12, *Scrutton*, Art. 196, *Benjamin*, 21–083. See further, the Law Commission and the Scottish Law Commission Report on *Rights of Suit in Respect of Carriage of Goods by Sea* (Law Com, No. 196, Scot Law Com, No. 130), para. 2.49. It is suggested in *Carver on Bills of Lading*, para. 6–002, that a custom must be proved since this is the only way that documents can become documents of title at common law, *cf* Bools fn. 339 above. Further, it is argued that there is a practical difference in that once goods have been shipped it becomes impossible or extremely difficult for the shipper or consignee to deal with them physically. The alternative of marking the bill of lading as shipped is noted. However, in the context of modern container transport, this physical difference may be more apparent than real, and the practical inconvenience of marking up a bill of lading with the exact time of shipment may be considerable.

370. And indeed may be contrary to the interests of the person in control who may have rights to maintain in respect of the person in possession. The discussion of the French decision of the Cour de Cassation (31 March 1987, (1988) DMF 451) by De Wit, paras 6.41–6.43, is especially instructive.

371. Thus a clearer case for recognition would be the case of a time charterer's bill against which delivery will be made by the shipowner, as in *The Okehampton* [1913] P. 173. There may be little doubt that such a bill falls within the custom.

In the latter case, it would seem unsafe to regard the forwarder's document as being a document of title, at least for any period that the goods are in possession of a person without knowledge of or recognition of the forwarder's document.[372] Once the goods come back into the possession of the forwarder it might then be possible to construe the forwarder's document as carrying the means of transferring constructive possession.

2.91 Two further cases can be noted as relevant to these issues. In *Carrington Slipways Pty Ltd* v. *Patrick Operations Pty Ltd (The Cape Comorin)*,[373] it was held that a freight forwarder's bill of lading was not a bill of lading within the Bills of Lading Act 1855 or its New South Wales equivalent. It could not be used to pass property in the goods.[374] This was despite the fact that it evidenced a contract of affreightment with the forwarder's customer.[375] The Court of Appeal was not concerned with the application of the Hague Rules although at first instance the Hague Rules were applied in respect of the liability of the forwarder towards his customer. Rather it was concerned with whether a stevedore could rely on the bill of lading issued by the time charterer.[376] The forwarder had issued an order bill of lading which was in fact the document required under the letter of credit. A separate ocean bill of lading was issued by the time charterer to the forwarder's agent and the goods were consigned, under the ocean bill of lading, to the forwarder. Delivery of the goods was obtained via the ocean bill of lading which was exchanged by the forwarder on receipt of the forwarder's bill. Although the forwarder's bill appeared to be an ocean bill, it was, in fact, a house bill of lading.[377] Clearly the court had great difficulty in regarding

372. During the period of sea carriage the forwarder's control over the goods is maintained by possession of the ocean carrier's bill of lading. It is the forwarder who is in constructive possession of the goods. It might be possible to regard the forwarder as the shipper's agent so as to regard the shipper as being in constructive possession. This is, however, unlikely. The person in possession will not have the duties of a bailee towards the shipper without sufficient notice of his interest, see *The Pioneer Container* [1994] 2 AC 324, at p. 342, and will in any case be free to obey the forwarder unless and until the shipper intervenes. It may therefore be impossible to regard the contractual rights that the shipper has against the forwarder as amounting to possessory rights against the person in possession. Any transfer made by the shipper of the forwarder's document, even if it could be regarded as a transfer of the agency, unless acknowledged by the bailee is unlikely to transfer any real possessory rights to the transferee (and, it may be suggested, could not be a means by which contractual rights, e.g. under the Carriage of Goods by Sea Act 1992, could be transferred). If the person in possession, e.g. the ocean carrier, issues his own transferable document it is this document which this person will regard as the key to the goods. It may be argued that the situation is not unlike where a shipowner has placed the goods into the hands of a wharfinger under a stop for freight. The bill of lading can continue to be a document of title even though the goods are no longer on a ship, *Charles Barber* v. *William Meyerstein* (1869–70) LR 4 HL 317. In that case, however, it was clear that it was the bill of lading that was the means by which the wharfinger would satisfy himself that he was delivering to the right person, see p. 332, *cf Glyn Mills Currie & Co* v. *East and West India Dock Co* (1881–82) LR 7 App Cas 591 (HL).

373. (1991) 24 NSWLR 745 (New South Wales Court of Appeal).

374. *Per* Handley JA, at p. 752. Compare *Selected Machinery Imports Pty Ltd* v. *A Hartrodt Italiana Srl*, Sup Ct of Victoria, 23 June 1989, unreported, where the forwarder's bill rather than the shipowner's was used under the documentary credit. In *The Cape Comorin* some doubt was expressed about the title to sue of the consignee since it did not have the ocean bill of lading in its hands at the time of discharge.

375. See S. Hetherington, "Freight Forwarders and House Bills of Lading" [1992] LMCLQ 32.

376. Although the forwarder's bill amounted to a contract of affreightment the forwarder was also regarded as an agent in obtaining the ocean bill so that reliance could be placed on the Himalaya clause contained in it.

377. See *per* Handley JA, at p. 753.

the forwarder's bill as a document of title in the fullest sense. In *Luigi Riva Di Fernando* v. *Simon Smits Co Ltd*,[378] a company which advertised themselves as steamship agents having a regular line of steamers issued a document which the court held to be a bill of lading although the goods were never shipped because the defendants were unable to charter the ships needed to run their "regular line." The defendants were held liable to the holder of the "bill of lading" for non-shipment of and conversion of the goods. It is not entirely clear what the relationship of the defendant, the bill of lading, and the shipowner would have been had the goods been shipped, but the fact of non-shipment does not seem to have been an obstacle in regarding the document as a document of title.

Where the forwarder, however, names the customer as shipper in the ocean carrier's bill of lading, with authority to do so, the customer will clearly become a party to the contract evidenced by the bill of lading but without necessarily becoming liable for freight. This was the case in *Cho Yang Shipping Co Ltd* v. *Coral (UK) Ltd*,[379] where a chain of forwarders led from the customer to the shipowner who issued a freight prepaid bill of lading, the customer being identified as shipper. The issue of a freight prepaid bill of lading reflected the practice of an association, which included the shipowner and the sub-forwarder, whereby credit for freight was made available to the forwarder. Whilst normally the issue of a freight prepaid bill of lading would not preclude the shipper from being liable for the freight, nevertheless, the customer was held not liable to pay it. The Court of Appeal found no authority from the customer to make him liable to pay the freight agreed between the shipowner and the sub-forwarder. Each party had acted as principal. Nevertheless Evans LJ[380] considered the customer to have been rightly named as shipper and as contracting party to the bill of lading contract. Furthermore Hobhouse LJ,[381] considered that the contracts between customer and forwarder and between forwarder and sub-forwarder were not mere booking contracts. They were contracts for the carriage of certain numbers of containers during stated periods from German ports to Gulf ports at stated freights. A useful comparison can be made with the complex case of *Coli Shipping (UK) Ltd* v. *Andrea Merzario*,[382] where the shipper, the shipper's forwarder and the forwarder effecting transport on the basis of through bills of lading were all held to have contracted as principals in respect of vehicle demurrage incurred during on-carriage by road. The second forwarder had a space/slot hire arrangement with the ocean carrier. The judge considered that he was not a liner agent for the shipowner. Nevertheless the through bills of lading procured by the second forwarder bound the shipowner to the shipper. However, neither the shipper nor the shipowners were concerned with what the freight might be and ultimately the terms, as between the two forwarders as to freight and vehicle demurrage, were agreed without any necessary relationship between the rate agreed between them and those agreed by them with the other parties.

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378. (1920) 2 Ll L Rep 279.
379. [1997] 2 Lloyd's Rep 641. See further J. Trappe [1997] LMCLQ 473. Compare *Emery Air Freight Corp* v. *Nerine Nurseries Ltd* [1997] 3 NZLR 723.
380. At p. 646.
381. At pp. 643–644.
382. [2002] 1 Lloyd's Rep 608.

2.93 An interesting contrast with *Cho Yang Shipping* is provided by *TICC Ltd* v. *COSCO (UK) Ltd.*[383] Forwarders were named as shippers but the details of the freight were negotiated with the forwarders' customer named as consignee in the freight collect bill. Rix LJ was prepared to assume (although he did not need to decide) that the forwarder shippers were principal parties and that the customer, even though in other respects their principal, was to be treated as a consignee and not the shipper. The main decision was that a surcharge was not incorporated into the contract. A clause in the bill of lading incorporated the tariff and other requirements regarding charges. A fax notifying the surcharge was sent to the forwarders in Hong Kong but no notice was given to the customer in the UK. For Rix LJ,[384] on the assumption made above, the true analysis was that the customer was not so much in this respect the shippers' principal, but rather the shippers' agent for the purpose of negotiating and fixing the financial terms on which the shipments would be made.[385]

2.94 Finally, the facts of *The Brij*[386] illustrate a further dimension to the issues that can arise in respect of forwarders' bills of lading and which may be conveniently discussed at this point. It is common for such bills to be issued in a different name from that of the forwarder. This name may simply be the trading name of the forwarder itself when acting in respect of ocean transport as where it is marketing a container line. This was the case in *The Brij.*[387] Alternatively the "trading" company may be a separate entity from the forwarder. This can raise the issue as to which company contracts with the customer. In *Center Optical (Hong Kong) Ltd* v. *Jardine Transport Services (China)*,[388] bills of lading were issued on which appeared the logo of the forwarder, Jardine Transport Services and the words: "Dynamic Container Line (a Jardine Pacific Service)". The signatures on the bills of lading took the form of a stamp consisting of the forwarder's name and that of its general manager. Adjacent to the place and date of issue and the stamped signatures were the words:

As agent for the carrier
DYNAMIC CONTAINER LINE
JARDINE FREIGHT SERVICES (HK) LTD

The Line was a separate company but it had nothing to do with the carriage and the forwarder had an agency agreement with it. The judge rejected the argument that Dynamic Container Line was the carrier rather than the forwarder. He accepted argument that: the mode of signature failed to indicate that the forwarder was not contracting as carrier and not simply using the Line name as a trading name; if the forwarder was acting as an agent at all it was doing so as agent for an unnamed

383. [2001] EWCA Civ 1862, [2002] CLC 346 (2001 WL 1476256), CA.
384. Para. 25.
385. Presumably he considered that there was some contractual tie between the customer and the carrier, whether on the basis of the Carriage of Goods by Sea Act 1992 or through the definition of "merchant" in the bill of lading, which included the consignee, but this is not clear.
386. Above 2.88.
387. Compare *Coli Shipping (UK) Ltd* v. *Andrea Merzario*, above 2.92.
388. [2001] 2 Lloyd's Rep 678 (HK HC).

principal and that the non-disclosure of the principal's name leads to the liability of the alleged agent;[389] notwithstanding the profession of agency the forwarder was the real principal. The bills were accepted in evidence to be "house" bills and little credence was to be attached to the agency agreement between the forwarder and the line which provided that all profits from the freight forwarding services provided by the forwarder belonged to the forwarder who took the risk of all losses on claims. The line was no more than the barest cipher for the forwarder who was the real principal.

2C.5 RESPONSIBILITIES OF THE FORWARDER OR LOGISTICS PROVIDER

BIFA 2005A, clause 23, TT CLUB 600, clauses 4.1 and 4.2 *2.95*

23. The Company shall perform its duties with a reasonable degree of care, diligence, skill and judgement.

4.1 The parties shall in good faith cooperate to promote the smooth and efficient running of this Agreement.[390]
4.2 The Logistics Provider shall provide the Services with reasonable care, diligence, skill and judgement and use reasonable endeavours to comply with the Service Levels and shall have due regard to the interests of the Customer in exercising any discretion permitted under this Agreement.[391]

2C.5.1 Introduction—duty of care and other obligations

It is unusual to find such a positive undertaking of responsibility in forwarding conditions.[392] It was introduced into the 1984 edition of IFF Conditions and contrasts with previous conditions which were more restrictive. It must be considered alongside the exclusion in clause 24 which is largely the obverse of clause *2.96*

389. Citing *Bowstead on Agency*, 17th edn, at para. 9–014.
390. See below 2.123.
391. Rather than rely solely on a generalised standard of performance such as to use reasonable endeavours or to meet industry standards, contract logistics contracts commonly provide for service levels which identify Key Performance Indicators (KPI). Typical might be clauses which set times for goods to be prepared for despatch or completion of the delivery schedule (see further Jané and de Ochoa at 2.4.4.2). Payments or service credits might be set to compensate for failure usually balanced by a bonus regime for achieving a certain level (see further Lewis, chs 9 and 19, Kimball, ch. 7 and note *Vertex Data Science Ltd* v. *Powergen Retail Ltd* [2006] EWHC 1340 (Comm), [2006] 2 Lloyd's Rep 591, where Tomlinson J, at [38], acknowledged that it was possible that the terms of the service levels (SLAs) permit a level of performance which is objectively unsatisfactory). Arrangements for governance of the contract performance will need to be agreed (see Lewis, ch. 10) which may include appointment of a management team with a requirement to meet regularly (e.g., monthly), see TT CLUB 600, cl. 4.4. A *force majeure* clause will commonly be included to excuse failure but with the possibility for termination if such circumstances are prolonged (TT CLUB 600, cl. 24) along with a right to terminate for material breach (TT CLUB 600, cl. 3.2(a)). Such termination rights can be expected to be available for either party in respect of the default of the other. A more general right of termination may be agreed (e.g. TT CLUB 600, cl. 3.1). Given the importance of mutual confidence in the close relationship that this type of contract involves, a court may well be reluctant to grant an injunction to restrain a termination, see *Vertex*, above.
392. *Cf*, however, DAMCO STC, cl. 15.

23.[393] The intention behind clause 23 would appear to be to emphasise the current importance of ensuring the reasonableness of trading terms in light of UCTA as well as concern for a professional quality of service. It would appear to make express what would normally be implied into a contract of agency and the opportunity can be taken here to consider such duties. However, the existence of the clause may have relevance in the interpretation of other clauses which have relevance to a duty of care. Apart from this express term, a duty of care can be implied both at common law and under section 13 of the Supply of Goods and Services Act 1982. By section 16(3)(a) this does not prejudice any rule of law which imposes on the supplier of the service a stricter duty,[394] nor by section 16(3)(b) the implication of a vicarious liability derived from a non-delegable duty.[395] Apart from contractual sources of a duty of care a further source of liability is the tortious duty of care derived from the position of the forwarder who is likely to be considered to be performing professional or quasi-professional services for another who has relied on those services, as made clear by the decision of the House of Lords in *Henderson* v. *Merrett Syndicates Ltd.*[396]

2.97 Bowstead and Reynolds define the duty of care of an agent acting for reward as a duty to use such skill and care and diligence in the performance of his undertaking as is usual or necessary in or for the ordinary or proper conduct of the profession or business in which he is employed, or is reasonably necessary for the performance of the duties undertaken by him.[397] It would seem unlikely that any higher standard is intended. At common law the courts have taken into account local customs and practices, or knowledge derivable from the locality of operation, to determine whether the forwarder has breached the standard of care.[398] In so far as forwarding may be considered a profession, the following words of Cresswell J may be apt:

> "A professional person should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert".[399]

2.98 As noted above[400] apart from the obligation to exercise care, a forwarder may be subject to other duties which arise from taking a position as an agent where this is the case. These can be considered in the context of other clauses where relevant. At this point it is convenient to note a further duty which may take on particular importance in the context of contract logistics. Such contracts are more likely to involve the forwarder in obtaining confidential information which may be the subject of express provision in the contract.[401] Even in the absence of express

393. Clause 24 will, however, be discussed below at 2C.22.
394. See below, 2.104.
395. See below, 2.114, and *Metaalhandel J.A. Magnus BV* v. *Ardfields Transport Ltd* [1988] 1 Lloyd's Rep 197.
396. [1994] 2 Lloyd's Rep 468, [1994] 3 All ER 506. See also 2C.14.
397. Article 42, see also *Cliffe* v. *Hull and Netherlands S.S. Co Ltd* (1921) 6 Ll L Rep 136 at p. 137.
398. See Hill, p. 84 and especially *Gillette Industries Ltd* v. *W.H. Martin Ltd* [1966] 1 Lloyd's Rep 57 at p. 60.
399. *Henderson* v. *Merrett Syndicates Ltd (No. 2)* [1996] 1 PNLR 32.
400. See 2.50.
401. TT CLUB 600, cl. 22, OOCL Logistics Business Terms and Conditions, cl. 13.

provision the forwarder will have a duty not to exploit such information so as to profit from it. It seems that this duty may be independent of contract or even of a standing relationship. Any person who receives information which he knows or ought to know is confidential and uses that information for profit is liable whether there is a previous relationship between him and the claimant or not.[402]

2C.5.2 Gratuitous services

2.99 By reason of BIFA clause 2(A), clause 23 will also apply to situations where the forwarder provides gratuitous services so that the same duty of care will also apply to such services. Traditionally, whether in agency or bailment, a distinction has been drawn at common law between a service provided for reward and a gratuitous undertaking where loss or damage has arisen in the performance of the service or undertaking. In gratuitous bailment liability has traditionally been expressed as being for "gross neglect" rather than breach of the usual standard of care in negligence.[403] Difficulty in understanding what gross negligence is was expressed by Ormerod LJ in *Houghland* v. *R.R. Low (Luxury Coaches) Ltd.*[404] An alternative formulation or explanation of the standard involved in gross negligence is to state that the gratuitous bailee is only bound to exercise such skill as he actually has,[405] or would have exercised in respect of his own affairs, so that he escapes liability in showing that he exercised the same care as he has or would have exercised in respect of his own affairs, as in the agency cases of *Shiells* v. *Blackburne*[406] and *Wilson* v. *Brett.*[407]

2.100 This expression of the duty suggests a subjective as opposed to an objective standard. Clearly where a gratuitous bailee or agent has held himself out as possessing a particular skill or facility he will be liable for failing to employ it.[408] This introduces an objective element which may be extended by considering the possibility that the bailee or agent's situation or profession is such as to imply skill which creates an expectation that it will be employed.[409] It is now clear that such expressions mean that the standard is an objective one.[410] It is common to see the view expressed that the duty either is the same as the usual duty of care or the duty

402. See *Bowstead*, 6–076 and cases there cited.

403. *Per* Holt CJ, *Coggs* v. *Bernard* (1703) 2 Ld Raym 909 at p. 913, 92 ER 107 at 110, and *Giblin* v. *McMullen* (1868) LR 2 PC 317, see generally Palmer, pp. 572 *et seq*, 10–005 *et seq*.

404. [1962] QB 694 at p. 698.

405. *Beal* v. *South Devon Railway Co* (1864) 3 H&C 337, 159 ER 560.

406. (1789) 1 Hy Bl 159, 129 ER 94.

407. (1843) 11 M&W 113, 152 ER 737, see Fridman, p. 161, *Bowstead and Reynolds*, Art. 44.

408. *Bowstead and Reynolds*, Art. 42 (6–030), and *Chaudry* v. *Prabhakar and Another* [1989] 1 WLR 29, *per* Stuart-Smith LJ at p. 34. *Cf Mitchell* v. *Lancs and Yorks Ry* (1875) LR 10 QB 256.

409. Crossley Vaines, p. 87, approved in *Jenkins* v. *Smith* (1969) 6 DLR (3d) 309 at p. 318, see Palmer, p. 591, 10.021, see also *James Buchanan Co Ltd* v. *Hay's Transport Services Ltd* [1972] 2 Lloyd's Rep 535. In this last case Hinchcliffe J, at p. 543, expressed the duty of the gratuitous sub-bailee to be "that which a reasonable man would take of his own goods in similar circumstances". Similar expressions appear in *Port Swettenham Authority* v. *T.W. Wu & Co (M.) Sdn Bhd* [1979] AC 580 (PC), [1979] 1 Lloyd's Rep 11, *per* Lord Salmon at p. 589 and p. 14 (see further (1979) 95 LQR 335) and *China Pacific SA* v. *Food Corp of India* (*The Winson*) [1982] AC 939, [1982] 1 Lloyd's Rep 117, *per* Lord Diplock at p. 960 and p. 124.

410. Stocker LJ in *Chaudry*, [1989] 1 WLR 29 at p. 37.

is put in virtually the same terms.[411] On the other hand there is still modern authority for the view that the law exacts a lesser standard from a gratuitous bailee than a bailee for reward although the line between the two standards is a fine one, difficult to discern and impossible to define.[412] In *Garlick* v. *W. & H. Rycroft Ltd,*[413] the suggestion was made that the gratuitous bailee's duty is a passive one whereby he should take no action that would harm the goods. The present position may be simply that the determination of "fault", whether in respect of a gratuitous or contractual bailee or agent, is simply a question of determining the standard of care relevant to the circumstances and that the fact that the bailment or agency is gratuitous is simply one of the circumstances to be taken into account. Expressed in this way it may be that the gratuitous case will permit consideration of the actual skill and facilities available to the bailee or agent to be drawn in a way that might not be possible if a strictly objective standard were applied.[414]

2.101 Clause 23 could amount to an increase in the forwarder's responsibility where he provides a gratuitous service if there is a substantial difference between the duty of care attached to such services and those provided for a reward. There may be some argument about whether such an increased duty would be binding in the absence of consideration,[415] but the clause may amount to a holding out or merely confirm a duty that could naturally be expected from a professional forwarder. The general commercial context of the relationship is likely to allay any difficulty about whether a duty of care exists at all.[416] See also *Gomer & Another* v. *Pitt & Scott,*[417] for a clear case of breach of duty on the part of a forwarder performing a gratuitous service.

2C.5.3 Extent of duty

2.102 Fundamental to any contract of agency, quite apart from the duty to exercise skill and care, is the duty to perform the undertaking, unless gratuitous, as well as the duty to follow instructions and not to exceed authority.[418] Other conditions may affect this fundamental duty, but not this clause, as it is addressed to the method of performance, although it is sometimes the case that the duty to act in accordance with instructions is conflated with a duty of care.[419] A forwarder may expressly or by implication of law be held to have undertaken a performance which normally implies a stricter duty, such as that of a common carrier of goods (see below) or have

411. See Hinchcliffe J in *Buchanan*, fn. 409, at p. 543, Stuart-Smith LJ in *Chaudry*, above, fn. 408, at p. 34, and Stephenson LJ in *Garlick* v. *W. & H. Rycroft Ltd* [1982] CAT 277, (1984) 134 New LJ 60. See also to the same effect Ormerod LJ in *Houghland*, above, fn. 404, at p. 698.

412. *Port Swettenham Authority*, above, fn. 409, *per* Lord Salmon at p. 589 and p. 14.

413. Above fn. 411. See especially *per* Donaldson MR relying on the judgment of Diplock LJ in *Morris* v. *C.W. Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 Lloyd's Rep 63, see Palmer, p. 543.

414. See further Palmer, p. 591, 10–021 and see *Chaudry*, above, fn. 408, *per* Stuart-Smith LJ, at p. 34, where he considered that relevant circumstances would be the "actual skill and experience that the agent had."

415. But see Palmer, p. 59, 1–061.

416. *Cf Chaudry*, above, fn. 408, *per* May LJ at p. 38 (*cf* Stuart-Smith LJ at p. 721).

417. (1922) 12 Ll L Rep 115.

418. See *Bowstead and Reynolds*, Arts 36–39 and see below, para. 2C.6.

419. See *World Transport Agency Ltd* v. *Royte (England) Ltd* [1957] 1 Lloyd's Rep 381 and *Meddich & Meddich* v. *Cullen & Harvey* (1983) 36 SASR 542, Fridman, p. 157.

imposed on him a strict liability in tort, e.g. for conversion.[420] Should this term be construed as negating a stricter liability such as that implied into common carrier status, it may be subject to the reasonableness test under UCTA, being caught by section 3(2)(b)(i), notwithstanding the fact that it is expressed as a positive duty.

2.103 The extent of the duty of care will depend on the view taken by the courts as to the nature of the business of forwarding and the extent of the obligations undertaken by the forwarder. The conditions recognise that the forwarder may have contracted to act as an agent or to have undertaken the more onerous duties of a person who has contracted to perform a particular operation whether personally or through subcontractors.[421] The formulation used in clause 6 of the 1989 edition, whereby the forwarder, when contracting as a principal, agrees to accept liability for loss of or damage to the goods between the time of taking the goods into its charge and the time of delivery, is strongly suggestive both of a personal and a vicarious liability in respect of those procured to perform the relevant service.[422] This is made somewhat clearer in clause 2.2 of the FBL so that the issue of an FBL makes clear that the forwarder will either perform the carriage himself or undertake responsibility as a carrier.[423] The removal of clause 6 of the 1989 edition from the 2000 edition and maintained in the current conditions is not thought to involve any fundamental change.

2.104 Where the forwarder has agreed to carry the goods for all or part of a journey he may be held to have the status of common carrier and be subject to the strict liability implied into that status. Former IFF Conditions expressly denied common carrier status as, for example, did clause 2 of the 1981 Conditions. Other conditions sometimes deny this as for example clause 26 of the Geologistics GTC. Whether such a denial in a printed contract can stand against conduct consistent with operations as a common carrier may be open to doubt.[424] Such a denial would, however, be open to challenge for reasonableness under section 3 of UCTA.[425]

2.105 The test to determine common carrier status is whether the carrier held himself out to carry for all indiscriminately, whether in respect of a class or classes of goods or over definite routes or given areas, or reserved to himself a liberty to accept or reject offers for carriage.[426] Forwarders who collected goods for forwarding by rail were held liable as common carriers when goods were lost on the road in *Hellaby* v. *Weaver*.[427] Forwarders were held to be common carriers by sea in the New Zealand

420. See generally Palmer, 83 *et seq.*, 1–091 *et seq.*

421. See 2.44.

422. *Cf Spectra International plc* v. *Hayesoak Ltd* [1997] 1 Lloyd's Rep 153 (CLCC Bus. List, reversed in part on different grounds [1998] 1 Lloyd's Rep 162 (CA)).

423. See also the FIATA Model Rules, cl. 7.3.

424. See Glass & Cashmore, p. 14, Palmer, p. 1488, 27–028 and *Dar es Salaam Motor Transport* v. *Mehta* [1970] HCD 179 (Tanzania), *cf Eastman Chemical Int.* v. *NMT Trading* [1972] 2 Lloyd's Rep 25.

425. See, however, Palmer, p. 1488, 27–029, n. 212 and *The Maira* [1988] 2 Lloyd's Rep 126 at pp. 138–139 (reversed on different grounds [1990] 1 AC 637, [1990] 1 Lloyd's Rep 225 (HL)).

426. *Colley* v. *Brewers' Wharf and Transport Ltd* (1921) 9 Ll L Rep 5 at p. 7 and *Belfast Ropework* v. *Bushell* [1918] 1 KB 210 at p. 215, see Glass & Cashmore, p. 12, Palmer, p. 1485, 27–027. See also Lars Gorton, *The Concept of the Common Carrier in Anglo-American Law*, ch. 3.

427. (1851) 17 LTOS 271, see Hill, p. 17.

decision in *New Zealand Express Co Ltd* v. *Minahan*.[428] This decision contrasts with *Wilson* v. *New Zealand Express Co Ltd*,[429] where forwarders who tendered for furniture removal were held not to be common carriers.[430] In *Wilson* it was noted[431] that the forwarder did not own railways, ships or steamers. It has been suggested that strict liability may be thought too harsh a burden where the forwarder has limited means of ensuring that the goods are properly cared for in the course of their actual carriage.[432] There may be a doubt as to whether a forwarder, or other contracting carrier, who has never obtained possession of the goods can have the responsibility of a common carrier since he would not have become a bailee and must be counted a quasi-bailor.[433] There would appear to be a rule that a person who never receives possession of the goods *because* they remain the responsibility of the consignor will not be liable as a common carrier.[434] The mere fact that the forwarder does not own the vehicle will not prevent him acquiring the status of common carrier if he has hired it.[435] It seems to be accepted, however, that one cannot become a bailee without taking possession at some time;[436] rather, a quasi-bailment is involved.[437] This appears to open up the possibility that the liability in quasi-bailment is not necessarily on all fours with bailment[438] although in general the basis of liability will be the same. This type of case therefore reflects the issues of possession, bailment and the relevance of the shifting or otherwise of vicarious responsibility for the driver of a vehicle which can arise in the context of a subcontracted road carriage. These issues have not yet been fully analysed by the courts, especially in light of the recent recognition of the concept of quasi-bailment, and there are seeming contradictions in the case law. It may be said that in general unless there is a clear transfer of vicarious responsibility for the driver of a vehicle hired to a forwarder, the owner of the vehicle (who remains the employer of the driver) will become a bailee of goods placed in the vehicle, and the forwarder will be

428. [1916] NZLR 816.
429. [1923] NZLR 201.
430. On the aspect of furniture removal, contrast *Geering* v. *Stewart Transport* [1967] NZLR 802.
431. At p. 203.
432. See Holloway, at p. 251.
433. See generally Palmer, pp. 1255 *et seq.*, 23–011 *et seq.*
434. See Halsbury's *Laws*, vol. 5, Carriers, para. 303 and *East India Co* v. *Pullen* (1726) 2 Stra 690, *Walker* v. *Jackson* (1842) 10 M&W 161 and *Willoughby* v. *Horridge* (1852) 12 CB 742.
435. *Date & Cocke* v. *G.W. Sheldon & Co (London) Ltd*, (1921) 7 Ll L Rep 53. In that case the driver appears to have remained employed by the owner of the vehicle so there is the possibility that carriage was subcontracted and that the forwarder never became an actual bailee. A possible explanation, however, is that the hire represented a bailment of the vehicle and notwithstanding the fact that the driver remained the employee of the vehicle owner, the hirer acquired sufficient control of the goods within it to be constituted a bailee of it.
436. *Metaalhandel* v. *Ardfields Transport Ltd* [1988] 1 Lloyd's Rep 197 at pp. 202–203.
437. Although a person may be treated as a bailee if the delegation to a subcontractor is unauthorised as in *Edwards* v. *Newland & Co* [1950] 2 KB 534, citing *Palmer on Bailment* (1st edn, pp. 829–831, see now 3rd edn, pp. 1309–1310, para. 23–057). Quasi-bailment may sometimes be tied with substitutional bailment so as to deny a continuing responsibility of the bailor, see above 2.55 and cases cited at fn. 225.
438. E.g. in respect of burden of proof, *Metaalhandel*, at p. 202, see Palmer, pp. 1315–1316, para. 23–060, and N.E. Palmer, "Quasi-bailment" [1988] LMCLQ 34.

in the position of quasi-bailor rather than bailee.[439] It should be noted that in *Eastman Chemical International AG* v. *N.M.T. Trading Ltd and Eagle Transport*,[440] it was held that a carrier who subcontracted the whole carriage was liable as a common carrier. Furthermore the learned judge considered that the carrier and subcontractor were in a relation of principal and agent and that the principal was liable in the same way as the agent.[441]

2.106 In the context of forwarding, the nature of much forwarding business may militate against a finding of common carrier status, since a degree of regularity as to route or time is more commonly indicative of common carrier operations.[442] Furthermore a forwarding contract will often involve a package of services tailored to the individual customer, which may militate against a finding of common carriage status, such status being the more likely where carriage services are offered by the forwarder to all and sundry as a business separate from the normal forwarding activity as in *Date & Cocke*.[443]

2.107 In the absence of specific clauses governing the extent of the forwarder's duty of care the following summary of the case law can be made, it being assumed that there would not be a different result even if clause 23 were to be applied. The important question will be, rather, whether the obligation expressed in this clause has been excluded by other terms, either because there is a specific exclusion or because the degree of discretion given by a particular term is inconsistent with a duty of care, or whether the term can be read subject to the duty. Such a question can be considered in respect of specific terms. In a more general sense, however, it might be that the existence of this express duty may make it easier for a court to interpret a discretion granted by a term as being, nevertheless, subject to the general duty of care expressed in this clause, whereas, such a discretion may more readily be held to negate, perhaps, a duty of care implied by law.

2C.5.4 Summary of case law on forwarders' duty of care

2.108 (1) Hill[444] states that "A Forwarder has a duty to forward goods without delay unless he has received instructions to the contrary. He therefore has an implied authority to do so", citing *Patel* v. *Keeler & Co.*[445] An instructive case is *Wessely* v. *Rosenberg, Loewe & Co Ltd*,[446] where there was delay in collecting a package

439. *Cf L. Harris (Harella) Ltd* v. *Continental Express Ltd* [1961] 1 Lloyd's Rep 251; *A.F. Colverd & Co Ltd* v. *Anglo-Overseas Transport Co Ltd* [1961] 2 Lloyd's Rep 352; *Learoyd Bros. Ltd* v. *Pope & Sons Ltd* [1966] 2 Lloyd's Rep 142; *Bontex Knitting Works Ltd* v. *St. John's Garage* [1943] 2 All ER 690; *WLR Traders Ltd* v. *British and Northern Shipping Agency Ltd* [1955] 1 Lloyd's Rep 554. See further Palmer, pp. 494 *et seq.* 7–030 *et seq.*, and *cf* in particular, *Donovan* v. *Laing, Wharton and Down Construction Syndicate Ltd* [1893] 1 QB 629; *Abraham* v. *Bullock* (1902) 86 LT 796, especially Mathew LJ; and *Mersey Docks and Harbour Board* v. *Coggins and Griffith (Liverpool) Ltd* [1947] AC 1.

440. [1972] 2 Lloyd's Rep 25.

441. See at p. 30.

442. See *Wilson* v. *New Zealand Express Ltd,* above, at p. 206.

443. See above. See also *Colley*, above, and *Securitas (NZ) Ltd* v. *Cadbury Schweppes Hudson Ltd* [1988] 1 NZLR 340 (CA NZ).

444. P. 80.

445. [1923] AD 506.

446. (1940) 67 Ll L Rep 16.

although the forwarder was not liable since the loss had occurred before the forwarder could be at fault. The fact that customs clearance has been delayed through the detention of goods by the customs authorities does not render the forwarder liable for negligence unless this has resulted from his own act or default.[447] In respect of lighterage and warehousing operations the forwarder must do what is reasonable and with such dispatch as is reasonable in the circumstances prevailing at the time unless otherwise agreed.[448] In respect of delay see BIFA, clauses 25 and 26(B), below.

2.109 (2) " . . . a forwarder will be liable for breach of duty if he fails to ensure that both the quantity and the description of a consignment match his original instructions. Where, however, a forwarder finds a discrepancy in the description of a consignment, which can reasonably be ascribed to a cause other than the actual one, in the customary performance of his forwarding operations, he will not be liable for negligence in failing to discover the true position if nothing further occurs to put him on inquiry".[449] *George Pulman & Sons Ltd* v. *F.E. Crowe*[450] is cited by Hill as an example of the latter point, where forwarders collected the wrong goods for return to the consignor, the mistake being induced by the fact that identical packages from different consignors had been consigned to the same consignee. The only discrepancy which might have put the forwarders on inquiry was a difference in weight which the forwarders reasonably assumed was accounted for by pilferage. No other factor existed to put them on inquiry and they were held not to have been negligent. Similarly, where goods are in good condition externally on clearing through customs, a forwarder will not be liable when they are found to be damaged on arrival at an inland destination and part of their contents missing. The forwarder is not bound to weigh the package to see if it corresponds with the invoiced weight.[451]

2.110 (3) " . . . a forwarder does not customarily hold himself out as accepting responsibility for the quality of goods nor that their specification is that agreed upon by the parties to the contract of sale. This was confirmed where a forwarder was instructed by a buyer to arrange shipment of a consignment of batteries to England from Antwerp, and passed his instructions on to his sub-agent. Neither the forwarder nor his sub-agent was held responsible for the inferior quality of the batteries shipped".[452] Previous IFF trading conditions specifically excluded liability for "any loss, damage or expense arising from or in any way connected with marks, weights, numbers, brands, contents, quality or description of any goods however caused".[453] Hill states that this only appears to restate the position at common law. A forwarder may be found liable to a third party, however, on the basis of damage

447. Hill, p. 85, citing, *Donner* v. *London & Hamburg Agency* (1923) 15 Ll L Rep 63.
448. Hill, p. 86, citing *Club Speciality (Overseas) Inc* v. *United Marine* [1971] 1 Lloyd's Rep 482.
449. Hill, p. 80.
450. (1920) 3 Ll L Rep 100.
451. Hill, p. 85, citing *Jaffer Esmail & Co* v. *Sorabjee M. Hooker*, 6 EALR 35 and *Lavington Bros* v. *Cooper & Co*, *Worlds Carriers*, Mayor's Ct, 16 October 1922. *Cf George Pulman* v. *Crowe*, above, where the forwarder was aware of a discrepancy in the weight.
452. Hill, p. 81, citing *Margolis* v. *Newson Bros Ltd* (1941) 71 Ll L Rep 47.
453. E.g. cl. 13(iv), 1970 Conditions.

caused by inaccuracy in the description of the goods and will require an indemnity from the customer.[454]

(4) "It is the duty of a forwarder to give his client the fullest information regarding any loss that may occur, whether responsibility for it falls on him or on the actual carrier or other bailee. If the forwarder and the carrier concerned fail to give such information to the shipper, and as a consequence they are joined together in any resulting action by the consignor, the forwarder may forfeit any costs due to him in the case, as he is in breach of his duty to his client as an agent, in circumstances where he would not otherwise be personally liable for the loss".[455] A similar duty to inform the customer " . . . if anything arises during the conduct of that transaction which affects the goods or their value or the interest of the plaintiff in them . . . " was expressed in *G. Peereboom* v. *World Transport Agency Ltd*,[456] where forwarders failed to inform their customer as to a difficulty arising about whether his goods had in fact been shipped. The wharfinger claimed that they had been shipped whereas this was denied by the ship. Furthermore, the forwarder gave his customer a delivery order on the wharf which signified that the goods were on the wharf at that time. Where, however, the customer has entered into direct negotiations with the carrier this may relieve the forwarder of the duty to pass on further information which might have been expected to be passed on to the customer directly by the carrier.[457] A similar duty is expressed by Bowstead and Reynolds.[458] It is similar also to the duty of a bailee to protect the interests of his bailor,[459] and it is entirely independent of whether the forwarder has actual possession of the goods or not as in *G. Peereboom* v. *World Transport Agency Ltd.*[460] In this case, however, the forwarder knew of the difficulty, which was in respect of a part of the transaction in which he was directly involved in arranging the shipment of the goods. It may be suggested that a forwarder is only bound to inform his principal of matters affecting his principal's interests which are or ought to be in his knowledge in respect of the transactions which the forwarder is engaged to perform, for example after making such checks as are to be expected of him, or where the facts are such as to impose a duty of inquiry on him.[461] Furthermore, it may be correct to say that the duty only arises if it must have been apparent to the forwarder or to a reasonable person standing in his shoes that the disclosure of the relevant fact would have been of assistance to the customer.[462] 2.111

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454. See 2C.20 below.

455. Hill, p. 81, citing *Carl Osterberg* v. *Shipping & Transport Co* (1922) 13 Ll L Rep 562, where forwarders had refused to give any information about what they knew had happened to the goods for fear that the customer might sue them.

456. (1921) 6 Ll L Rep 170, *per* Roche J at p. 172.

457. *Cf TICC Ltd* v. *COSCO (UK) Ltd* [2001] EWCA Civ 1862, [2002] CLC 346, 2001 WL 1476256 (CA).

458. Article 42.

459. See *Ranson* v. *Platt* [1911] 2 KB 291; *Coldman* v. *Hill* [1919] 1 KB 433; *Heskell* v. *Continental Express* (1950) 83 Ll L Rep 438 at p. 456.

460. Fn.423, above, at p. 172.

461. See *George Pulman & Sons Ltd* v. *F.E. Crowe* (1920) 3 Ll L Rep 100 at p. 102.

462. See *Shaftesbury International Freight & Transport Ltd* v. *BKR Gesellschaft für Export und Import mbH* (CA, 29 October 1992, unreported), where the failure of the forwarder to inform the customer of the issue of an import licence in respect of his goods was in issue.

2.112 On the other hand it was accepted by Mocatta J in *Langley, Beldon & Gaunt Ltd* v. *Morley*[463] that "a forwarding agent is not *functus officio* once he has got his clients' goods loaded on a ship; he has certain other functions still to perform in relation to documentation and perhaps in relation to acting as a post-office or a filter should the shipowner require further directions as to what is to happen, and that, in any case, his duty is to do all that he reasonably can to further the safe arrival of the goods to the consignee at the destination". This was said in the context of a forwarder seeking to prevent delivery to a consignee in order to enforce a lien.[464] Unless the forwarder is engaged to effect delivery at the destination, this statement would seem to go too far if taken to impose on a forwarder a responsibility to ensure delivery especially in light of point (6), below. Nevertheless it is an implied term of a forwarding contract that a forwarder engaged to arrange the carriage of goods has a duty to put in a claim for loss in due time, at least to the extent of writing a letter to the carrier.[465] In *Aqualon (UK) Ltd* v. *Nilsson International B.V.*,[466] in the course of describing argument by counsel it was suggested that a forwarder in the position of acting as a principal in engaging a carrier, but without accepting a continuing liability towards his customer, has a duty to enforce the contract of carriage for the benefit of his customer. It would seem more likely that such a term would need to be express.[467] Where a forwarder was engaged to effect insurance and pursued the claim on the customer's behalf, Tuckey LJ in *Granville Oils & Chemicals Ltd* v. *Davies Turner & Co Ltd*[468] accepted that, in the circumstance, the forwarder owed a duty to tell the customer that they had no cover as soon as the underwriters rejected the claim.

2.113 (5) "If a forwarder is negligent in selecting a carrier he will be liable to his client for any loss that may result from such a choice".[469] In *Gillette Industries Ltd* v. *W.H. Martin Ltd*, Willmer LJ[470] accepted that, when engaging a haulier from a lorry pool, the failure by the forwarder to take some of the recommended precautions such as checking the driving licence of the driver, obtaining his name and address and communicating with the owner of the lorry was *prima facie* evidence of negligence, although the forwarder was protected by the exclusion clause in the trading conditions as formulated at that time. On the other hand, it was not negligence on

463. [1965] 1 Lloyd's Rep 297 at p. 307. *Cf Marston Excelsior Ltd* v. *Arbuckle, Smith & Co* [1971] 2 Lloyd's Rep 306 at p. 312.

464. See 2C.9, below. A natural part of the forwarder's duty is to ensure that relevant documentation is properly prepared and transmitted to the right person, see *A.R. Brown McFarlane & Co Ltd* v. *Shaw Lovell & Sons Ltd* (1921) 7 Ll L Rep 36 and *Hirdaramani* v. *OCS*, HK High Ct, 18 July 2000 (see www.onlinedmc.co.uk).

465. *Marbrook Freight* v. *KMI (London) Ltd* [1979] 2 Lloyd's Rep 341.

466. [1994] 1 Lloyd's Rep 669.

467. *Cf* the contract under consideration in *Kala Ltd* v. *International Freight Services (UK) Ltd* (QBD, 7 June 1988, unreported) where there was an express term by which the forwarder agreed to subrogate its claim against carriers etc., to the customer on request.

468. [2003] EWCA Civ 570, (2003) WL1822907 at para. 27.

469. Hill, p. 82, citing *Gillette Industries Ltd* v. *W.H. Martin Ltd* [1966] 1 Lloyd's Rep 57. Even if the selection of a contractor arises from a forwarder's negligent advice, so long as the actual selection made by the forwarder is not negligent he might succeed with the argument that the negligent advice is not the direct and proximate cause of the loss, as in the US case of *Pacific Tall Ships Co* v. *Kuehne and Nagel Inc* [2000] AMC 2250 (ND Ill. Eastern District).

470. Previous note, at p. 67.

the part of a forwarder who was handling a shipment of hides, where he could not employ an experienced contractor who specialised in hides as none was available, to employ instead a reasonably competent wharfinger who did not normally handle hides and who was over-committed in respect of other shipments, with the result that the goods were damaged.[471] A further dimension to the process of selection of a carrier or other performer is the selection of terms upon which operators contract. Any duty in this respect is considered in the context of the liberties of the forwarder.[472]

2.114 (6) A forwarder has no duty "to supervise the actions of a firm which they reasonably and properly expected would perform its normal duty competently".[473] This is subject to the possibility that the forwarder may have taken on a greater responsibility in respect of performance. It must also be distinguished from the situation where the forwarder delegates the whole or part of the exercise of his authority. In such a case he will have a non-delegable duty in respect of its exercise by another even if permitted by the contract.[474] This will, however, be a contractual responsibility only and will not normally be matched by any equivalent non-delegable duty in tort.[475]

2.115 (7) A forwarder is not obliged to take special precautions above the normal expected in the trade to guard against fraud or crime committed by a third party unless he has contractually bound himself to do so.[476]

2.116 (8) Unless a specific size of vehicle has been agreed a forwarder may not be in breach of duty in supplying a vehicle too small for the customer's needs if this is in accordance with the procedure previously agreed and understood between them,[477] although in general it is not necessary for the customer to request that which ordinary care demands.[478] The ordinary duty of care applicable to carriers for reward will apply to a forwarder who has contracted to effect carriage.[479]

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471. Hill, p. 86, citing *G.W. Sheldon & Co (London) Ltd* v. *Alfred Young & Co* (1921) 6 Ll L Rep 466.

472. See 2C.6.5.

473. *Per* Phillimore LJ, *Marston Excelsior* v. *Arbuckle Smith & Co Ltd* [1971] 2 Lloyd's Rep 306 at p. 312, see, however, below text to fn. 483. See also *Jones* v. *European & General Express Co Ltd* (1920) 4 Ll L Rep 127.

474. *Cf Henderson* v. *Merrett Syndicates Ltd (No. 1)* [1995] 2 AC 145, [1994] 2 Lloyd's Rep 468, [1995] 3 All ER 506.

475. See *Aiken* v. *Stewart Wrightson Members Agency Ltd* [1995] 2 Lloyd's Rep 618.

476. *Pringle of Scotland Ltd* v. *Continental Express Ltd* [1962] 2 Lloyd's Rep 80, Hill, p. 87.

477. *E.W. Taylor & Co (Forwarding) Ltd* v. *Bell* [1968] 2 Lloyd's Rep 63.

478. *Date & Cocke* v. *G.W. Sheldon & Co (London) Ltd* (1921) 7 Ll L Rep 53.

479. Case law involving an issue of breach of the standard of care includes: *Pye Ltd* v. *B.G. Transport Service Ltd* [1966] 2 Lloyd's Rep 300; *Mayfair Photographic Supplies (London) Ltd* v. *Baxter Hoare & Co Ltd* [1972] 1 Lloyd's Rep 410; *A.F. Colverd & Co Ltd* v. *Anglo Overseas Transport Co Ltd* [1961] 2 Lloyd's Rep 352; *Metaalhandel J.A. Magnus BV* v. *Ardfields Transport Ltd* [1988] 1 Lloyd's Rep 197; *Victoria Fur Traders Ltd* v. *Roadline (UK) Ltd* [1981] 1 Lloyd's Rep 570; *Johnson Matthey Ltd* v. *Constantine Terminals Ltd* [1976] 2 Lloyd's Rep 215; *McKinnon* v. *Acadian Lines Ltd* (1978) 81 DLR (3d) 480; *Cowper* v. *J.G. Goldner Pty Ltd* (1986) 40 SASR 457; *Securitas (NZ) Ltd* v. *Cadbury Schweppes Hudson Ltd* [1988] 1 NZLR 340; *Rick Cobby Haulage Pty Ltd* v. *Simsmetal Pty Ltd* (1986) 43 SASR 533; *Hobbs* v. *Petersham Transport Co Pty Ltd* (1971) 124 CLR 220; *Thomas National Transport (Melbourne) Pty Ltd* v. *May & Baker (Australia) Pty Ltd* (1966) 115 CLR 353; *Presvale Trading Co Ltd* v. *Sutch & Searle* [1967] 1 Lloyd's Rep 131; *Swiss Bank Corp and Others* v. *Brink's-MAT Ltd and Others* [1986] 2 Lloyd's Rep 79.

2.117 (9) In ordinary commercial transactions there is no duty on the forwarder to insure the goods or inquire whether the customer is insured.[480] However in *Eastman Chemical International AG* v. *N.M.T. Trading Ltd and Eagle Transport*,[481] it was accepted that where a contracting carrier chooses to subcontract there is an implied term that they will entrust the goods to someone who insures the goods under a goods in transit policy.[482]

2.118 (10) Although a forwarder, acting as an agent, is not liable for a breach by a carrier of the contract of carriage, where care has been exercised in the appointment, there may be a liability for breach of a duty of care where the forwarder has given a warranty which depends upon the carrier properly performing the contract of carriage. This was held in an important decision of the Court of Appeal, which repays some attention, in *Geofizika DD* v. *MMB International Ltd Greenshields Cowie & Co Ltd (Third Party) (The Green Island)*.[483] The forwarders were instructed by a seller, having contracted with a buyer on the terms CIP (Incoterms), to obtain carriage and effect insurance in respect of three ambulances to be carried by sea to Libya. The instruction was for ro-ro carriage which the forwarders understood as meaning that under deck carriage was required. The forwarders obtained the contract of carriage under the carrier's ro-ro service which the forwarders understood meant that the goods would be carried under deck. In fact a perusal of the carrier's website would have revealed that the available ships were not likely to provide a ro-ro service and that vehicles were, at least sometimes, strapped to other cargo carried on deck. The bill of lading contained the usual liberty to stow on deck[484] but the forwarders had received a confirmation note that stated "ALL VEHICLES WILL BE SHIPPED WITH 'ON DECK OPTION' this will be remarked on your original bills of lading . . . ". The forwarders understood this to mean that if there was no indication of carriage on deck in the bill of lading then the vehicles would be shipped below deck. The argument for the carrier and buyers was that this was a reference to an option that would be claimed in the bill of lading. On the strength of their understanding the forwarders gave a warranty of shipment under deck to the insurers.

2.119 In the lower court HHJ Mackie QC held in favour of the buyers and in favour of the sellers in their claim over against the forwarders. He held that, although the confirmation note was ambiguous, the carrier's interpretation of the confirmation note was correct and that there was no clear evidence (absent any expert evidence) that a reference to ro-ro was necessarily a reference to under deck stowage. The sellers were therefore liable to the buyers for failing to match the insurance with the carriage and to obtain a proper insurance which covered the loss. The sellers argued that the forwarders were liable to the sellers because of breach of the obligation to use reasonable skill and care. As a specialist freight forwarder engaged to put in

480. *W.L.R. Traders Ltd* v. *B. & N. Shipping Agency Ltd* [1955] 1 Lloyd's Rep 554 at p. 558. *Cf Von Traubenberg* v. *Davies, Turner & Co Ltd* [1951] 2 Lloyd's Rep 462.

481. [1972] 2 Lloyd's Rep 25.

482. *Cf* further, *Mason* v. *Morrow's Moving & Storage Ltd* [1978] 4 WWR 534; *Punch* v. *Savoy's Jewellers Ltd* (1986) 26 DLR (4th) 546; *Firmin and Collins Ltd* v. *Allied Shippers Ltd* [1967] 1 Lloyd's Rep 633; *Garlick* v. *W. & H. Rycroft Ltd* [1982] CAT 277, (1984) 134 New LJ 607.

483. [2010] EWCA Civ 459, [2010] 2 Lloyd's Rep 1.

484. See 4G.3.4.

place a compliant CIP contract their failure to do this amounted to an absence of the requisite skill and care. A specialist freight forwarder must be taken to know what CIP requirements are and be capable of putting relevant contracts in place as part of the obligation to exercise reasonable skill and care under BIFA terms. Further, they claimed that the forwarders' obligations imposed a further duty on them. Whilst the sellers' insurance obligation to the buyers was only to the ICC(C) minimum cover standard and that a breach of the CIP carriage obligation could not increase the CIP insurance obligation since these are distinct, the forwarder owed a broader duty to the seller to exercise reasonable skill and care. If the forwarders failed to put in place a CIP compliant contract to carry because this permitted carriage on deck, they failed to exercise reasonable skill and care by including the under deck warranty in the insurance contract. Had the warranty not been included the loss would have been covered notwithstanding breaches in relation to the contract of carriage.

2.120 This latter point was a particular point of focus in the Court of Appeal. The court rejected the interpretation of the judge in the court below and accepted the forwarders' view of the confirmation note. Consequently the carrier was in breach of an obligation to carry below deck. The sellers were not liable to the buyers for this failure but liable for failing to provide a valid insurance due to the existence of the warranty. The forwarders were liable because they were negligent in giving the warranty. For Thomas LJ[485] it was incumbent on the freight forwarders, who were in no different a position to insurance brokers, to check that the facts they were warranting were true were in fact true. Although a different conclusion was given to the meaning of the booking confirmation, the judge was still right to find that, in circumstances where they had not dealt with the carriers before, they simply could not rely upon the fact that they had arranged a contract with the carriers that, if performed in accordance with its terms, would have resulted in the matters warranted being true. The consequences of a breach of warranty are so severe, the warranty should not have been given without due care being taken to check that the cargo was under deck. This conclusion does not involve any guarantee by the freight forwarder that the carrier will perform his contract or any supervision by the freight forwarders of the carriers' obligation. It is a conclusion simply that on the facts of this case, the judge was entitled to conclude that the freight forwarders should not have given a warranty in relation to a fact without taking reasonable steps to check that that fact was accurate. Notwithstanding these breaches neither the sellers nor the forwarders were held liable to pay damages since the buyers had suffered no loss. Even if the warranty had not been given the buyers would still not have recovered for the loss under the insurance that it was the obligation of the sellers to obtain for them.

2.121 It is important to emphasise the importance of the warranty's effect in the determination of the breach of the duty of care. It might be thought that the failure to appreciate the possibility that the carrier might well stow the goods on deck combined with the failure to appreciate the ambiguity in the confirmation note might be a sufficient breach in itself but this is not the finding. Also it is not clear

485. At [44].

whether the absence of such a finding is due to its being untenable or because it would anyhow have produced no loss. Arguably the sellers might have been held liable to the buyers for negligence in the failure to obtain an effective contract with an appropriate carrier vicariously through the forwarders' negligence. There may yet still be the possibility that a forwarder might be held liable for failing to engage in simple checks so as to have some confidence that the carrier is an appropriate one for the kind of goods to be transported.

2.122 (11) It is clear that at common law where a forwarder acts as a contractual bailee the burden of proving either the absence of negligence or otherwise providing an explanation of the loss rests on him.[486] This rule appears also to apply to sub-bailees,[487] and gratuitous bailees,[488] but is less clear in respect of quasi-bailment.[489] Apart from this and especially where the forwarder is not acting as a bailee, it may be that since the BIFA Conditions, by clause 24, state exceptions to liability, then, as a matter of construction, the forwarder will be put to proof of them to escape liability in a claim for breach of contract.[490]

2C.5.5. Duty of good faith

2.123 There is no general requirement of good faith currently and generally applicable to contracts under English Law at least in respect of rendering an uncertain contract enforceable by means of an implied term to continue to negotiate in good faith.[491] Specific rules govern fraud and duties not to deceive. Some contracts involve a special duty of good faith as is the case with insurance and there are special duties applicable to fiduciaries which can apply to forwarders and logistics operators when they act as agents. The nature of logistics contracts where they involve a close interaction between the parties over time may make it more appropriate for wider duties of good faith to apply to the relationship. Unlike standard forwarding, therefore, there may be more room for the operation of fiduciary duties even in the absence of any express term. The requirement in clause 4.1 of TT CLUB 600 to cooperate in good faith to promote the smooth running of the agreement adds an extra dimension in providing an express term imposing the duty as an underlying basis for an established contract. It is referred to again in clause 15.1 where, if the logistics provider in the light of any new logistics profile or material change in the volume of services thinks it necessary, the parties will negotiate in good faith to vary

486. Palmer, pp. 52 *et seq.*, 1–053, Hill, p. 85, *Travers & Sons Ltd* v. *Cooper* [1915] 1 KB 73; *The Ruapehu* (1925) 21 Ll L Rep 310; *Wessely* v. *Rosenberg, Loewe & Co Ltd* (1940) 67 Ll L Rep 16; *Swan* v. *Salisbury Construction Co Ltd* [1966] 1 WLR 204; *W.L.R. Traders*, para. 7.2.7.27, above; *B.R.S. Ltd* v. *Arthur V. Crutchley Ltd* [1968] 1 All ER 811; *Houghland* v. *R.R. Low (Luxury Coaches) Ltd* [1962] 1 QB 694; *Euro Cellular (Distribution) plc* v. *Danzas* [2003] EWHC 3161 (Comm), [2004] 1 Lloyd's Rep 521. For a case concerning discharge of the burden, see *Coopers Payen Ltd* v. *Southampton Container Terminal Ltd* [2003] EWCA Civ 1223, [2004] 1 Lloyd's Rep 331.

487. Palmer, p. 1338, 23–077.

488. *Port Swettenham Authority* v. *T.W. Wu & Co Ltd (M.) Sdn Bhd* [1979] AC 580, [1979] 1 Lloyd's Rep 11, Palmer, p. 603, 10–030.

489. *Metaalhandel J.A. Magnus BV* v. *Ardfields Transport Ltd*, fn. 395, above.

490. *Cf Sutcliffe* v. *G.W. Ry* [1910] 1 KB 478 at p. 493. See further below and *cf* TT CLUB, cl. 27(A). Contrast Geologistics GTC, cl. 27.

491. *Walford* v. *Miles* [1992] 2 AC 128. See generally, Treitel, 2–100 *et seq.*

the charges and in clause 23.2 where the parties agree to attempt in good faith to substitute a clause held invalid or unenforceable. There is some suggestion that an express duty to negotiate in good faith might be enforceable.[492] Furthermore, the inability to agree on some terms does not necessarily make an agreement as a whole unworkable or void for uncertainty.[493] The courts may be able to add content through a reasonableness criterion, at least where the parties say simply that some patricular matter is to be agreed,[494] or when the good faith requirement is supplemented by words such as "reasonable endeavours"[495] to which some objective content might be given.

2C.6 LIBERTIES OF THE FORWARDER—AS AGENT

BIFA 2005A Clause 6(A) and BIFA 1989, clause 7 *2.124*

6.(A) When the Company acts as an agent on behalf of the Customer, the Company shall be entitled, and the Customer hereby expressly authorises the Company, to enter into all and any contracts on behalf of the Customer as may be necessary or desirable to fulfil the Customer's instructions, and whether such contracts are subject to the trading conditions of the parties with whom such contracts are made, or otherwise.[496]

7. When and to the extent that the Company in accordance with these Conditions is acting as an Agent on behalf of the Customer, the Company shall be entitled and the Customer hereby expressly authorises the Company to enter into Contracts on behalf of the Customer:—
(A) for the carriage of goods by any route or means or person;[497]

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492. See *Treitel*, at p. 62 and the dicussion of the view of Longmore LJ in *Petromec Inc* v. *Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep 161 at [121].

493. *RTS Flexible Systems Ltd* v. *Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14, [2010] 1 WLR 753 (*Treitel*, p. 57, 2–093).

494. See e.g. *MRI Trading AG* v. *Erdenet Mining Corp LLC* [2012] EWHC 1988 (Comm).

495. See e.g. *Jet2.Com Ltd* v. *Blackpool Airport Ltd* [2012] EWCA Civ 417, 2012 WL 1067776.

496. The wording of the equivalent clause in BIFA 2000 gave authority to enter such contracts as may be necessary etc and subject to the trading conditions of the other party. The introduction of the word "whether" in cl. 6(A) would seem to make clearer the emphasis on the necessity for the contract, the fact that it being subject to conditions being incidental. The previous wording would seem to give more direct authority to bind the customer to the conditions so long as the contract was necessary. More generally it can be compared with TT CLUB 400, cl. 40(A) which gives the club as an agent authority to enter into contracts on the customer's behalf and to do such acts so as to bind the customer to such contracts and acts in all respects notwithstanding any departure from the customer's instructions. *Cf* DAMCO Standard Trading Conditions which are similar but omit reference to departure from the customer's instructions. However, cl. 38(a) of these conditions entitles the Company to depart from instructions if in the reasonable opinion of the Company there is good reason to do so in the Customer's interest. Clause 19(a) of TT CLUB 400 is in the same terms. The question could arise whether cl. 19 (a) would be overridden by cl. 40(a) of these conditions if circumstances arose which brought them into conflict.

497. The reference to route etc., in BIFA 1989 was matched by cl. 8 of those conditions which also gave a liberty as to route etc. It would seem to have been clear that cl. 7 related to the agency role and cl. 8 to where the forwarder acted as principal. Clause 7 was excised as from BIFA 2000 and although cl. 8 remained (as cl. 7, see 2.124.) leaving some doubt as to whether the new cl. 7 related to the agency or principal role or both. Given that cl. 6 of BIFA 2000 (now BIFA 2005A, cl. 6(A)) dealt with agency it might be that cl. 7 of BIFA 2000 remained confined to where the forwarder acts as principal, although the intention may well have been to cover both types of role. The equivalent clause in BIFA 2005A (cl. 4(B)) now appears to be clearer in that it applies to the performance of any service and is not confined to the "handling, stowage and transportation of goods" as in cl. 7 BIFA 2000. Compare Geologistics GTC, cl. 20 which provides for a liberty in the section dealing with the company acting as a forwarding

(B) for the storage, packing, trans-shipment, loading, unloading, or handling of the goods by any person at any place and for any length of time;
(C) for the carriage or storage of goods in or on transport units as defined in Clause 19 and with other goods of whatever nature; and
(D) to do such acts as may in the opinion of the Company be reasonably necessary in the performance of its obligations in the interests of the Customer.[498]

2C.6.1 Interrelationship of clauses

2.125 The BIFA 2005A Conditions give the liberty in clause 6(A) where the forwarder acts as an agent,[499] with a liberty given in clause 5 applicable when the forwarder acts as a principal.[500] An additional liberty is given in clause 7 of BIFA 2000.[501]

2C.6.2 Discretion and instructions

2.126 BIFA 1989, clause 7, aims to give the forwarder a discretion in the performance of his mandate in respect of the matters indicated. At common law, the court would have to find the discretion in the instruction and the clause may go some way to persuade a court that the forwarder was intended to have a discretion and does not have to justify a choice by reference to a customary or previous course of dealing,[502] nor be restricted by such factors as are relevant to deviation.[503] Furthermore, in the absence of clear instructions agents, at common law, are entitled to do what is reasonable in their own interests and those of their principal.[504] It is assumed that the qualification in sub-clause (D) that the act be reasonable in the interests of the customer does not relate back to the liberties granted by sub-clauses (A) to (C). Clause 6(A) of the current conditions refers to contracts which are necessary or desirable rather than reasonable. It may be arguable that this clause is limited to the making of types of contract in general rather than providing a discretion in respect of the form such contracts might take (e.g. as to means, route, etc) and clause 4(B) of the current conditions might be necessary to expand the discretion.[505]

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agent (*cf* further, Geologistics GTC, cl. 9 which is contained in the general section) and TT CLUB 400 which provides for a similar liberty by cl. 18 in the general section (and note the liberty in cl. 40(a) applicable to the forwarder as an agent, see above fn. 496).

498. This could provide authority for an act for which the forwarder would otherwise need express or implied authority to justify, especially when seeking an indemnity for expenses in relation to it, i.e. it would enable the act to be viewed as forming part of the instruction so as to justify the indemnity. The forwarder would need to show that he held the opinion that doing the act was reasonably necessary in the interests of the customer and presumably the court could require that opinion to be based on some grounds. It is less clear whether the wording would be sufficient to justify action that would otherwise be contrary to duty and would normally require specific authority e.g. delegation of authority, see 2C.8. below. *Cf* HAFFA Conditions, cl. 5.2.

499. See also Geologistics GTC, cl. 20 and TT CLUB 400, cll. 18 and 19. *Cf* further, DAMCO STC, cl. 37.

500. See 2.134.

501. See 2.124.

502. *Cf E.W. Taylor & Co (Forwarding) Ltd* v. *Bell* [1968] 2 Lloyd's Rep 63.

503. See 2C.7.2.

504. *Morten* v. *Hilton Gibbes & Smith* [1937] 2 KB 176.

505. See, however, fn. 471.

2.127 The extent of the discretion will naturally be limited by reference to the obligations undertaken by the forwarder or instructions received which is normally suggested in any case by the terms of typical clauses of this type.[506] For example, an agency to arrange transport does not necessarily follow from an instruction to arrange shipping documentation for the purpose of compliance with a letter of credit.[507] Consequently it is unlikely that a forwarder could justify action on the basis of such clauses if the forwarder has not been placed under any obligation. Conversely, a forwarder is not necessarily required to act and may be entitled to wait if the understanding with his customer is to act on receipt of a specific instruction as in *World Transport Agency* v. *Royte*,[508] where the forwarder was held not to be negligent in failing to act. Any freedom of choice granted by such clauses is subject, however, to the possibility that a clear instruction given orally[509] or in writing will override the printed clause as in *J Evans & Son (Portsmouth) Ltd* v. *Andrea Merzario Ltd*[510] on the basis of either a collateral warranty or that the written document does not express the whole terms.[511] A further possible basis might be an estoppel as to the meaning of the terms.[512] By analogy with deviation cases,[513] the liberty given should be read alongside the agreement contained in the forwarder's instructions and reconciled with it so that there is a discretion to act to an extent that does not contradict the instructions and is for the purpose of carrying them out.

2.128 There may be an argument that, since these clauses do not, as in previous editions of IFF Conditions,[514] state that such liberty as is granted by them is subject to express instructions in writing, this implies that the forwarder is not prepared to accept binding instructions and always reserves a liberty. Such an interpretation is questionable especially as these clauses do not state[515] that they apply even if precise instructions have been given.[516] Furthermore, even where a clause provided that the forwarder's freedom was limited only by instructions given in writing, it has been held that such words in a printed document could not override a clear oral undertaking.[517] This form of wording is retained in TT CLUB 400, clause 18 and

506. E.g. BIFA Clause 6(A) refers to entering into contracts necessary or desirable to fulfil the customer's instructions.

507. *F.H. Bertling* v. *Tube Developments Ltd* [1999] 2 Lloyd's Rep 55 (Scotland, Court of Sessions, Commercial Court).

508. [1957] 1 Lloyd's Rep 381.

509. Note that the forwarder is not bound to wait for written confirmation of an oral instruction, *Comptoir Franco-Anglais d'Exportation* v. *Van Oppen*, fn. 518.

510. [1976] 1 WLR 1078, [1976] 2 Lloyd's Rep 165.

511. *Weis* v. *Northern Traffic* (1919) 1 Ll L Rep 241.

512. *Yani Haryanto* v. *E.D. & F. Man (Sugar) Ltd* [1986] 2 Lloyd's Rep 44, 46–47; *Atlantic Lines & Navigation Co Inc* v. *Hallam Ltd (The Lucy)* [1983] 1 Lloyd's Rep 188.

513. See 2C.7.2.

514. E.g. cl. 4 of 1974 edn.

515. As they might, see IFF Conditions 1981, cll. 3 and 4 and 1984, cl. 4(D).

516. An appeal to the words "expressly authorises" would not necessarily suffice since they may be taken to mean that since the authority is given by the clause such authority need not be implied, which does not justify overriding instructions otherwise also expressed.

517. *Evans* v. *Merzario*, fn. 510 above.

may be useful to justify a refusal to carry out a subsequent instruction unless given in writing.[518]

2.129 Clause 4(D) of the 1984 edition of the IFF Conditions gave the forwarder liberty to depart from instructions if reasonable in the interests of the customer.[519] If such a liberty could override a clear instruction, which may be doubtful where the forwarder, by accepting it, is considered to have undertaken to perform in the way directed, the present BIFA clauses may be inadequate in that they do not expressly give the forwarder authority to depart from instructions.[520] They may need to do this since the likely interpretation of these clauses is that they are applicable only where no precise instruction in the matters indicated has been given. In other words the clauses as they stand grant a discretion which could not operate so as to contradict the instructions given by the customer properly understood, but a clause which gave such a right could so operate subject to the possibility that the instructions were understood by the customer as overriding such freedom as in *Evans* v. *Merzario.*

2C.6.3 Application of UCTA

2.130 Questions as to the exclusion or limitation of liability for breach of instructions are considered at 2C.22 and 2C.23. Issues as to the application of UCTA can also be raised here. If the freedom granted by these clauses were thought to contradict what might otherwise have been implied (or not implied)[521] it might be considered as entitling the forwarder to render a performance substantially different from what was reasonably expected from him and so be caught by UCTA, s. 3(2)(b)(i), unless they can be construed as merely defining the duty of the forwarder and thereby negating a duty that might otherwise be implied.[522] This could be particularly important where the method of performance normally would be impliedly unauthorised, e.g. stowage of goods on the deck of a ship.[523]

2.131 Some clauses may go further than simply permitting the forwarder to exercise a discretion or to depart from instructions. They may permit the forwarder to cease performance altogether. Similar clauses appear also in standard carriage contracts. For example, TT CLUB 400, clause 19(b) allows the forwarder to comply with orders of any authority and provides that on compliance the forwarder's responsibility is to cease. Again the issue would arise as to whether this is caught by section

518. *Cf Comptoir Franco-Anglais d'Exportation* v. *Van Oppen* (1922) 13 Ll L Rep 59. Normally, as an agent the forwarder would be bound to obey an instruction given orally altering a previous instruction even if given in writing, *Meddich & Meddich* v. *Cullen & Harvey* (1983) 36 SASR 542, Fridman, p. 157.

519. *Cf* Geologistics GTC, cl. 20, P&O Nedlloyd STC 1997, cl. 4(B) and TT CLUB 400, cl. 19(A), similarly TT CLUB 400, cl. 40(A).

520. As, e.g., do TT CLUB 400, cll. 19(a) and 40(a) and DAMCO Standard Trading Conditions, cl. 38(a).

521. Or give freedom to depart from express instructions.

522. See *Treitel*, pp. 267–8 and 273–4.

523. TT CLUB 400, cl. 18(B) gives freedom to the forwarder to arrange carriage on deck unless otherwise agreed in writing. Geologistics GTC, cl. 9 provides that the company shall not be obliged to arrange for the goods to be carried, stored or handled separately from the goods of other customers, *cf* BIFA 1989, cl. 7(C).

3(2)(b)(ii) of UCTA as a claim to be entitled to render no performance or as a clause which merely defines the duty of the forwarder in a way that is not caught by that Act.[524] TT CLUB 400, clause 20 might seem to be somewhat clearer since it grants the forwarder a discretion to terminate performance of the contract in circumstances such as hindrance, risk, delay, difficulty or disadvantage which cannot be avoided by reasonable endeavours. This can, perhaps, be construed as defining the duty of the forwarder as a duty to perform only when such circumstances are not present.[525]

2C.6.4 Obedience and negligence

2.132 Obedience to instructions and the duty to exercise skill and care can be analysed as separate obligations, but as is illustrated by *World Transport Agency* v. *Royte*[526] they are sometimes conflated.[527] Certainly issues of negligence can arise where there is negligence in the means of performing the act, or where the act is only necessary because of the negligence of the forwarder or because the forwarder is deemed negligent in failing to inform the principal of the need to act. An agent given a discretion to exercise must use skill and care in doing so.[528] Whether negligence in the exercise of the choice can be excused by clauses such as these is more difficult. This seems particularly unlikely in the context of BIFA 2005A in the light of clause 23[529] which imposes a positive duty of care. Even without the addition of clause 23 such liberty clause may be said not to place fairly the risk of such negligence on the customer.[530] Such negligence, however, would not in itself be a performance outside the parameters of the contract.[531]

2C.6.5 Choice of terms

2.133 Clause 7 of the BIFA 1989 edition omitted to give any discretion in respect of the choice of contract terms when making contracts for the customer. This is treated to a limited extent in clause 16 of BIFA 2005A,[532] where there is, in effect, a choice of terms offered by carriers themselves as opposed to a choice between the terms offered by different carriers etc. It is unlikely to be covered by the word "acts" in

524. See *Treitel*, p. 273–4.
525. *Cf* cl. 5, 1984 edn, IFF Conditions.
526. Above fn. 508. *Cf Meddich & Meddich* v. *Cullen & Harvey*, above fn. 518.
527. The case might, perhaps, have been decided on the basis of obedience, and the question of negligence left to the issue of the steps taken to inform the principal of the difficulty.
528. Bowstead and Reynolds, Art. 40. *Cf Henderson* v. *Merrett Syndicates Ltd* [1994] 2 Lloyd's Rep 468 at p. 490, [1995] 3 All ER 506 at p. 523, *per* Lord Goff.
529. Clause 26 of BIFA 1989. See the inconclusive discussion of an issue of this type at first instance in *Geofizica DD* v. *MMB International Ltd* [2009] EWHC 1675 (Comm) at [26]–[28].
530. Compare where an "absolute discretion" is given to an agent *Glasgow West Housing Association Ltd* v. *Siddique* 1998 SLT 1081.
531. See further the discussion of cl. 4(B) (cl. 7 of BIFA 2000 and cl. 8 of BIFA 1989) at 2C.7.
532. Clause 18 in the 1989 edition, below, 2C.16.

sub-clause (D) of clause 7,[533] although the freedom to contract with any person in sub-clause (A) might be construed as including the terms on which such persons contract.[534] Clause 6(A) of BIFA 2005A might be construed as giving authority to contract on trading conditions but this may do little more than indicate what would be implied especially in view of the further discretion given in clause 16. In the absence of an express term, authority to contract on some terms must be implied and the forwarder, in making a choice, must act reasonably and in good faith but will usually bind his principal to terms usual in the trade by analogy with *Morris* v. *C.W. Martin & Sons.*[535] A decision with more direct relevance is *Swiss Bank Corp* v. *Brink's-MAT Ltd*,[536] where there was evidence that the terms were widely used in handling the type of cargo and it was not unreasonable or unusual to trade on such terms. This case compares, however, with *Elof Hansson Agency* v. *Victoria Motor Haulage Co Ltd*,[537] where the relevant term had not been generally accepted nor judicially recognised and the plaintiffs would have assumed that an older and less onerous clause would have applied. Where there is a choice of terms the forwarder may be required to seek instructions from his customer by analogy with the position at common law where a carrier provides alternative terms.[538] However, greater latitude may be granted where a commercial customer sending ordinary merchandise is involved and the more important question is the quality and speed of the service provided by the choice of operators.

2C.7 LIBERTIES OF THE FORWARDER—AS PRINCIPAL

2.134 **BIFA 2005A, clauses 4(B) and 5**

4.(B) The Company reserves to itself full liberty[539] as to the means, route and procedure to be followed in the performance of any service[540] provided in the course of business undertaken subject to these conditions.[541]

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533. Compare TT CLUB 400, cl. 18 which permits the entry into contracts on any terms whatsoever without notice to the Customer (*cf* DAMCO Standard Trading Conditions, cl. 37). The terms and conditions of the National Customs Brokers and Forwarders Association of America authorise the selection of and engaging of carriers subject to all conditions etc. This was applied in *ABN AMRO Verzekeringen BV* v. *Geologistics Americas Inc* [2003] AMC 834 (SDNY).

534. *Cf* the US decision of *Bronislaw Tarnawski* v. *Schenker Inc* [2003] AMC 2230 (WD Wash (Tacoma)) where the express liberty granted to an NVOCC to "choose or substitute the means, route and procedure to be followed in the . . . transportation of the goods" was sufficient authority to bind the cargo owner to the ocean carrier's bill of lading.

535. [1966] 1 QB 716, [1965] 2 Lloyd's Rep 63. See also *Singer* v. *Tees & Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 and *Spectra International plc* v. *Hayesoak Ltd* [1997] 1 Lloyd's Rep 153.

536. [1986] 2 Lloyd's Rep 79, at p. 98.

537. (1938) 54 TLR 666. A useful comparison can also be made with the duty of a seller to make a "reasonable" contract with a carrier on behalf of his buyer under s. 32(2) of the Sale of Goods Act 1979. This in turn depends upon contracting on usual terms as to which see *Thomas Young* v. *Hobson and Partner* (1949) 65 TLR 365.

538. As in *Von Traubenberg* v. *Davies Turner* [1951] 2 Lloyd's Rep 462.

539. The previous version of this clause in cl. 7 of BIFA 2000 gave the Company a reasonable liberty rather than a full liberty as in the current clause.

540. The previous version of this clause in BIFA 2000 confined the liberty to the handling, storage and transportation of goods.

541. There may have been some doubt about whether the previous version of this clause applied only where the forwarder acted as a principal or applied whether the role is that of principal or agent but the addition of the words "any service" etc may have resolved this, see above fn. 497. Clause 5 of the FIATA

5. When the Company contracts as a principal for any services, it shall have full liberty to perform such services itself, or, to subcontract on any terms whatsoever, the whole or any part of such services.[542]

2C.7.1 Liberty and instructions

2.135 Where forwarding conditions take account of the possibility that the forwarder may act as principal rather than as agent they may include liberties which correspond to those considered in the previous section. These will tend to focus on modes of performance rather than contracts. Similar liberties appear in conditions used by carriers and are normally at least as wide especially when adopted by carriers providing multimodal transport.[543] As with the clauses considered in the previous section the liberties granted by clauses such as these would likely be subject to any specific instructions given by the customer. The 1984 edition of the IFF Conditions produced a different inference, since the liberty given to the forwarder as an agent was made subject to express instructions, whereas the liberty as a principal was not, thus leading to the inference that the liberty as a principal could apply to express instructions as to route etc so as to enable the forwarder to depart from them. Such an inference is much less likely under the present clauses since the difference which existed under the 1984 conditions has been removed.

2C.7.2 Liberty to deviate

2.136 At least in respect of the route the clause amounts to a liberty to deviate. By analogy with deviation cases in carriage by sea,[544] the liberty in clause 4(B) must be read in light of the actually agreed carriage.[545] Thus, for example, where a forwarder agrees to carry, the described carriage and the liberty must be read together and reconciled and the liberty must not be used to frustrate the described carriage but must be subordinate to it.[546] It is legitimate to bear in mind that the printed words, whilst they cannot be ignored, are designed to apply to a variety of contracts and are not specially agreed upon in relation to a particular carriage.[547] Furthermore, a court,

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Model Rules, which makes similar provision, appears among the general provisions. It applies unless otherwise agreed but enables the forwarder to act without notice and in addition to liberties in respect of means, route and procedure, specifically permits carriage on deck. P&O Nedlloyd STC 1997 made such provision in cl. 5(A) which was linked to where P&O Nedlloyd acted as a principal.

542. Clause 5 of BIFA 2000 included the words "to third parties including the Company's own parent, subsidiary, or associated Companies". TT CLUB 600, cl. 18 provides liberty for the Logistics Provider to instruct a division of the Logistics Provider or a Logistics Provider's Group Company to provide carriage, storage and/or handling of products as well as a third party service provider.

543. See e.g. cl. 19 of the Maersk Line Multimodal Transport BL. *Cf* FBL, cl. 11. See further 3.47.

544. See further Gaskell *et al.*, para. 6C.

545. Compare cl. 19(2) of the Maersk Line Multimodal Transport BL which widens the purposes behind exercise of the liberty to actions unconnected to the actual carriage but provides that such actions shall be deemed to be within the contractual carriage and shall not be a deviation.

546. *Per* Viscount Sumner, *Frenkel* v. *MacAndrews* [1929] AC 545 at p. 562.

547. See, *per* Lord Herschell, *Glynn* v. *Margetson* [1893] AC 351 at p. 354.

having considered the various documents issued by the forwarder and the surrounding circumstances, may consider that a specific route was agreed upon.[548] A clause which referred specifically to a right to depart from an agreed route or method of carriage would be effective, however,[549] provided that the purpose of the contract was not frustrated and subject to being overridden by a definite undertaking to perform in a particular way.

2.137 Generally clause 4(B) will grant some discretion to the forwarder and justify a departure from strict adherence, for example to a direct geographical route that might otherwise be implied.[550] In light of the usages and exigencies of the trade and having regard to the existence of the liberty, the court can determine whether the action of the carrier is within the range permitted by the contract. It is a question of degree, and a departure by the forwarder from what could be expected in light of the route etc agreed, for purposes unconnected with the contract could not be expected to be saved by the clause.[551]

2.138 Unlike the 1984 Conditions there is no clause which deals specifically with the Hague Rules[552] so that the conditions only are applicable, in the absence of mandatory application of the Rules, unless the forwarder has also issued a bill of lading which is in fact effective to override the conditions.[553] Where the Rules apply as a matter of statutory force, Article IV, rule 4 provides an additional liberty to that provided by the contract.[554] The known course of dealing of the forwarder may well, in practice, be such that it will be difficult to imply an undertaking to carry by any particular route or to deliver, for example, consolidated goods in any particular order.[555] Where a particular route or method of performance would otherwise be implied, the clause might be caught by section 3(2)(b)(i) of UCTA provided that this is seen as rendering a performance substantially different from what was reasonably expected rather than negating a duty that would otherwise be implied.[556]

2C.7.3 Choice of safest method

2.139 In the absence of the express discretion granted by a clause such as clause 4(B) a forwarder in the position of a carrier may be required, where a choice of methods

548. *Charles Weis & Co Ltd* v. *Northern Traffic Ltd* (1919) 1 Ll L Rep 241.

549. As in *Connolly Shaw* v. *Nordenfjeldske S.S.* (1934) 50 TLR 418.

550. See Viscount Sumner, *Frenkel* v. *MacAndrews*, fn. 546, above, at p. 563, *cf Beatson* v. *Haworth* (1793) 6 TR 531.

551. Compare *Thiess Bros* v. *Australian S.S.* [1955] 1 Lloyd's Rep 459. Compare further the liberty to make a reasonable deviation under the Hague Rules, Art. IV, r. 4, which rests on a wider basis, *Stag Line* v. *Foscolo Mango* [1932] AC 328, *per* Lord Atkin at p. 343. *Cf* further the Hamburg Rules, Art. 5(6) and the Rotterdam Rules, Art. 17(3)(l)(m)(n)(o).

552. Compare TT CLUB 400, cl. 44.

553. See above, 2.16.

554. *Renton* v. *Palmyra Trading Corp of Panama*, *per* Jenkins LJ in the Court of Appeal [1956] 1 QB 462, [1955] 2 Lloyd's Rep 722 at p. 505 and p. 744. The point was left open in the House of Lords, see *per* Lord Morton [1957] AC 149, [1956] 2 Lloyd's Rep 379 at p. 171 and p. 391; see also *Scrutton*, p. 405.

555. *Mayfair Photographic Supplies Ltd* v. *Baxter Hoare* [1972] 1 Lloyd's Rep 410.

556. See above. Compare *Anglo-Continental Holidays* v. *Typaldos Lines* [1967] 2 Lloyd's Rep 61, and see Treitel, pp. 267–8 and 273–4.

of carriage exists, to choose the safest method unless choice of the safer method would be unreasonable.[557] Nevertheless the usual course of business known to the customer will be relevant.[558] The existence of the discretion may mean that it will be easier for a carrier to show that he has authority to choose one means rather than another, possibly even where the method chosen is the one less usual. The real importance of the liberty may well lie in its relation to other clauses excluding liability. It is arguable that the discretion granted by the clause, whilst it puts some risk onto the customer, does not necessarily put all risks of negligence even in the choice of means, etc, onto the customer. This was clearer under the equivalent clause as expressed in BIFA 2000 which gave a reasonable liberty. As so expressed it was neither necessarily inconsistent with an implied duty of care, nor with the duty expressed in clause 23. It would not have justified a forwarder in choosing a clearly unsafe means or unsatisfactory route etc. Whether the "full liberty" given by the current clause would do so may be similarly doubtful if read consistently with clause 23. However, any negligence as to choice could be said to fall within the parameters of the contract and not outside it, which may have an effect on the construction of other restrictive clauses so that it may make it easier for such clauses to cover such negligence.

2C.7.4 Subcontracting

Under BIFA 1989 Conditions, no express right was given to subcontract and the only relevant possibility was contained in clause 8.[559] A narrow construction of the words might confine them to means, etc, used when the forwarder is personally performing the relevant service. This could be so especially in circumstances where, particularly in the light of the nature of the goods, it should be clear to the forwarder contracting as a principal that the customer would not have agreed to the service being subcontracted.[560] On the whole, however, the nature of forwarding operations will be such that performance would not normally be construed as personal to the forwarder so that there would be an implied right to subcontract commonly supported by a custom of the trade.[561] Liberty to subcontract would, however, appear to have been implied by clause 6 of the 1989 edition derived from the undertaking to perform personally or procure performance.[562] Since an extensive authority to subcontract on any terms was not given by the 1989 Conditions, a *2.140*

557. *Lister* v. *Lancashire and Yorkshire Railway* [1903] 1 KB 878 at p. 880.
558. *Mayfair Photographic Supplies*, fn. 555, above.
559. Clause 7 of BIFA 2000 and cl. 4(B) of BIFA 2005A.
560. As in the carriage by road case of *Garnham, Harris & Elton* v. *Alfred W. Ellis Transport* [1967] 1 WLR 940, [1967] 2 Lloyd's Rep 22.
561. *Homecraft Weavers Ltd* v. *George Ewer & Co Ltd* (1945) 78 Ll L Rep 496, *John Carter* v. *Hanson Haulage* [1965] 2 QB 495, [1965] 1 Lloyd's Rep 49.
562. See *Spectra International plc* v. *Hayesoak Ltd* [1997] 1 Lloyd's Rep 153 (CLCC Bus. List). Compare TT CLUB 400, cl. 42 and DAMCO STC, cl. 14. Some forwarding conditions are less clear but appear to contemplate, at least, the possibility of subcontracting even if not specifically authorised e.g. Geologistics GTC, cl. 28 and FIATA Model Rules, cl. 7.3. More explicit clauses authorising subcontracting are commonly to be found in carriers' conditions, see e.g. Maersk Line Terms and Conditions, cl. 4 (*cf*, however, FBL which makes the reference to procuring performance in cl. 2.1(a)).

similar duty to that suggested in 2.133 would seem appropriate under those conditions. Clause 5 of the current edition now gives an express liberty to subcontract and indicates that this may be on any terms whatsoever. The extent of the implied authority of the forwarder would be of particular relevance to a subcontractor seeking to rely on a bailment on terms.[563]

2C.8 LIBERTY TO DELEGATE

2.141 **BIFA 1989, clause 9**

9. The Company shall be entitled to perform any of its obligations herein by itself or by its parent, subsidiary, or associated Companies.[564] In the absence of agreement to the contrary any Contract to which these Conditions apply is made by the Company on its own behalf and also as Agent for and on behalf of any such parent, subsidiary or associated Company, and any such Company shall be entitled to the benefit of these Conditions.

2C.8.1 Delegation of agency

2.142 An agent may not delegate his authority, or appoint a sub-agent to do any act on behalf of his principal, except with the express or implied authority of the principal.[565] This does not apply to purely ministerial acts but since forwarding operations are likely to involve confidence[566] and discretion this exception will apply rarely. The right to delegate may be implied, however, under any usual or customary

563. See further *Singer* v. *Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 and *The Pioneer Container* [1994] 2 All ER 250 at p. 259 and *Spectra*, above. See also the comments in the next paragraph.

564. The common law restrictions on the freedom of an agent to delegate authority are discussed at 2C.8.1. This clause gives express authority to delegate to the limited number of persons stated. Previous editions of the conditions contained a wider authority to delegate to "any other person, firm or Company", *cf* Geologistics GTC, cl. 21, and TT CLUB 400, cl. 18(e), HAFFA, cl. 5.2. It would seem unlikely that the general authority given in cl. 7(D) of the 1989 edition could provide a wide authority to delegate in view of the personal confidence generally reposed in the agent. Besides, it could not cover further acts taken by the sub-agent since the clause depends on those acts being in the interests of the customer "in the opinion of the Company". *Cf* cl. 40(a) of TT CLUB 400, which likewise may be interpreted as authorising such contracts and acts to enable the forwarder to complete the mission entrusted to him and not to transfer that mission to another agent. Clause 18(e) of TT CLUB 400, however, grants a right to the forwarder to contract for the performance of its own obligations. If such clauses can be viewed as granting a right to render a performance substantially different from that expected, they may be caught by s. 3(2)(b)(i) of UCTA, but not if they merely prevent an implied duty (i.e. not to delegate) from arising, see 2.130 above. Clause 9 has been removed from the current conditions. It may have been thought to be unnecessary in the light of new cll. 5 and 6(A) in the current conditions (see above 2.124 and 2.134). However cl. 5, which expressly refers to parent, subsidiary or associated companies, only applies where the forwarder acts as a principal. Clause 6(A) relates to contracts made by a forwarder on the customer's behalf with the intention of creating privity of contract between the customer and the third party. It would not appear to authorise the delegation of power to a sub-agent which does not necessarily carry with it the creation of privity between the customer and the sub-agent.

565. *Bowstead and Reynolds*, Art. 34 citing *De Bussche* v. *Alt* (1878) 8 Ch.D. 286 at pp. 310–311.

566. Such as that arising from the supply of information to the forwarder and the careful use of that information when dealing with third parties, *cf* in relation to estate agents: *John McCann & Co* v. *Pow* [1974] 1 WLR 1643.

authority, or from the nature of the business.[567] Hill[568] suggests that: "Such authority must . . . be implicit in all forwarding operations, or otherwise the smooth running of the trade would be impossible . . . ". It is submitted, however, that whilst this must be true for those forwarding operations where the forwarder needs to employ the services of a correspondent agent at a distance to enable goods to be processed at destination, this is not necessarily true at those points of a transit where the forwarder is present and can be expected to exercise a personal skill and confidence in transmitting, for example, information concerning the goods. In those circumstances the permission of the customer should be obtained if this is possible.

2.143 The use of express terms to provide a liberty to delegate may produce the difficulty that by granting an express right it might not be possible to imply any further right. Such further rights might be regarded as inconsistent with the rights granted expressly. This may be the case with a clause such as clause 9 of BIFA 1989 unless it is arguable that the clause is not inconsistent with any further right than that granted by it. Furthermore, the clause refers to "any of its obligations" which is wider than obligations undertaken as an agent. It could therefore justify the subcontracting of performance of services to one of the companies indicated. Any further right to subcontract would depend on further express grant or possible implication provided such implication is not considered inconsistent with the limited liberty granted by this clause.

2C.8.2 Privity of contract with sub-agent

2.144 Delegation of agency does not normally create privity of contract between the principal and the sub-agent.[569] To establish that the principal authorised the agent to establish privity of contract between the principal and the sub-agent requires precise proof, as Wright J indicated in *Calico Printers Association* v. *Barclays Bank and Anglo-Palestine Co.*[570] Alternatively, it may be shown that the intention was for the forwarder to appoint a substitute for himself.

2.145 A clause such as Clause 9 of BIFA 1989 does not seem to have this intention as it anticipates sub-agency.[571] Rather, this clause is a form of "Himalaya clause" which seeks, through the agency of the forwarder, to establish such privity of contract as to enable the sub-agent to rely on the conditions.[572] The basic lack of privity of contract might suggest to the customer an absence of liability but this type

567. *De Bussche* v. *Alt*, fn. 520, above, esp. p. 311, *per* Thesiger LJ. This may be a further reason why cl. 9 of BIFA 1989 may have been thought to be unnecessary and deleted from BIFA 2000.

568. At p. 173.

569. Nor does it remove the contractual non-delegable duty of the original agent, *Henderson* v. *Merrett Syndicates Ltd* [1994] 2 Lloyd's Rep 468, [1995] 3 All ER 506; *cf*, however, the position in tort, *Aiken* v. *Stewart Wrightson Members Agency Ltd* [1995] 2 Lloyd's Rep 618.

570. (1931) 145 LT 51 at p. 55.

571. *Cf Margolis* v. *Newson Bros Ltd* (1941) 71 Ll L Rep 47.

572. *Cf* Geologistics GTC, cl. 21 which seeks to go further and extract a promise from the customer not to seek to impose on the sub-agent a liability greater than or additional to that accepted by the company under the conditions. Compare further cll. 6 and 21 of the IFF 1981 Conditions which sought both to bring sub-agents into the contract but also extracted a promise from the customer not to sue them (as to enforcement of such a promise see *Nippon Yusen Kaisha* v. *International Import and Export Co Ltd (The Elbe Maru)* [1978] 1 Lloyd's Rep 206; *cf Neptune Orient Lines Ltd* v. *J.V.C. (UK) Ltd* [1983] 2

of clause can be useful to protect the sub-agent from non-contractual liability such as that confirmed in *Henderson* v. *Merrett Syndicates Ltd* (*No. 1*).[573] Ironically, the insertion of such a clause may assist in defeating an argument that the chain of contracts is such as to exclude such liability.

2.146 Prior to the Contracts (Rights of Third Parties) Act 1999 this type of clause had to satisfy certain conditions necessary for their validity.[574] Since the clause is limited to parent, subsidiary or associated companies, it may be easy to establish the authority, which under common law was necessary to sustain the clause. Where such clauses include a wider range of potential sub-agents such authority may well be harder to find.[575] The existence of this Himalaya clause would not necessarily prevent the persons identified in it from relying on their own terms under a bailment on terms.[576]

2C.9 RIGHTS OF LIEN

2.147 **BIFA 2005A, clause 8**

8. (A) Subject to Sub-Clause (B) below,
the Company:

(i) has a general lien[577] on all Goods and documents relating to Goods in its possession, custody or control[578] for all sums due[579] at any time to the Company[580] from the Customer and/or Owner on any account whatsoever, whether relating to Goods belonging to, or services provided by or on behalf of the Company to the Customer or Owner. Storage charges shall continue to accrue on any Goods detained under lien;[581]

Lloyd's Rep 438; see also Palmer, p. 1928, 38–153, *Scrutton*, Art. 26 and below 2C.19). Geologistics GTC, cl. 18, resolves the contradiction that such a combination suggests.

573. [1995] 2 AC 145, [1994] 2 Lloyd's Rep 468, [1995] 3 All ER 506.

574. See *per* Lord Reid in *Scruttons Ltd* v. *Midland Silicones Ltd* [1962] AC 445 at p. 474, and *New Zealand Shipping Co Ltd* v. *A.M. Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 Lloyd's Rep 534; see also Glass and Cashmore, p. 41, Palmer, p. 1872–3, 38–092–093, *Scrutton*, Art. 26. See further, generally, Merkin ed. *Privity of Contract* (2000).

575. *Southern Water Authority* v. *Carey* [1985] 2 All ER 1077; *cf Port Jackson Stevedoring Pty Ltd* v. *Salmond and Spraggon (Aust.) Pty Ltd (The New York Star)* [1981] 1 WLR 138.

576. *The Pioneer Container* [1994] 2 All ER 250 at p. 264; see, however, *The Mahkutai* [1996] AC 650, [1996] 2 Lloyd's Rep 1, but contrast *The Rigoletto* [2000] 2 Lloyd's Rep 532.

577. The clause purports to grant a general and active lien to the forwarder, *cf* Geologistics GTC, cl. 11, TT CLUB 400, cll. 22 and 23, DAMCO STC, cl. 41. General liens are discussed below at 2C.9.2 and active liens at 2. Particular liens are discussed at 2C.9.1. The BIFA clause does not contract for a particular lien in comparison with some previous editions of the IFF Conditions and with TT CLUB 400, cl. 23. Clause 17.1 of the DHL Express (UK) Ltd STC provides simply for a particular and active lien.

578. See 2C.9.3, below.

579. See 2C.9.4 below.

580. Added since BIFA 2000.

581. The words "on any account" until the end of the sub-clause added since BIFA 2000.

(ii) shall be entitled, on at least[582] 28 days notice in writing[583] to the Customer,[584] to sell[585] or dispose or deal[586] with such Goods or documents as agent for, and at the expense of, the Customer and apply the proceeds in or towards the payment of such sums;

(iii) shall, upon accounting to the Customer for any balance remaining after payment of any sum due to the Company, and for the cost of sale and/or disposal and /or dealing, be discharged of any liability whatsoever in respect of the Goods or documents.[587]

(B) When the Goods are liable to perish or deteriorate, the Company's right to sell or dispose of or deal with the Goods shall arise immediately upon any sum becoming due to the Company, subject only to the Company taking reasonable steps to bring to the Customer's attention its intention to sell or dispose of the goods before doing so.[588]

2C.9.1 Rights of particular lien

2.148 At common law a forwarder can normally expect to have a particular lien on his principal's goods, when he acts as an agent, for lawful claims for charges, expenditure etc, incurred in carrying out his duties.[589] When the forwarder is acting in other capacities he will have such particular lien at common law as is applicable to that capacity. Thus where the forwarder acts as a common carrier he is

582. The equivalent clause in BIFA 2000 referred simply to 28 days' notice.

583. Presumably sums must be "due" before notice can be given. The phrase "notice in writing" would appear to imply actual communication with the customer before it can take effect in comparison with sub-clause (B) of the clause which requires only reasonable efforts to trace the parties there indicated (see also *Holwell Securities Ltd* v. *Hughes* [1974] 1 WLR 155, *cf New Hart Builders Ltd* v. *Brindley* [1975] Ch 342).

584. For the definition of "customer" see cl. 1, see above 2.19.

585. An active lien, see 2C.9.5 below.

586. References to dealing with the goods have been added since BIFA 2000.

587. The exclusion of liability will need to be reasonable when UCTA is applicable. A prior question will be that of the proper scope of the exclusion. The intention may be simply to cover the potential liability for conversion involved in the act of selling the goods. It may be intended to prevent questions arising from the conduct of the sale, including any question of negligence surrounding the conduct of the sale. It may be intended to have a much wider scope and to cover any liability arising in relation to the goods or documents the object of the lien, such as a claim for damage done to the goods or a failure to carry out instructions in relation to them whether arising before or after the exercise of the lien. Such width seems unlikely to be accepted by the courts. The clause may, however, be wide enough to cover a claim for loss or damage which arises out of the exercise of the lien, such as loss of a sale (see also cl. 26(C), below), or damage done to the goods whilst the lien is being exercised which reduces the value of the goods on a sale. In *W. Young & Son (Wholesale Fish Merchants)* v. *B.T.C.* [1955] 2 QB 177, a similar exclusion was attached to a right of sale in circumstances where a carrier was unable to deliver the goods and was held to exclude liability for the event which produced the inability to deliver, even though this was due to the actions of the carrier's servants. The exclusion here does not relate to circumstances preventing delivery but the exercise of a right of lien. Consequently, the intention may be considered as being to cover the risks to the goods, or their value, involved in maintaining the lien and conducting the sale. Whether it will cover any negligence of the forwarder in these activities will depend on whether the clause is seen merely as a warning as to risks on the customer as in *Hollier* v. *Rambler Motors (A.M.C.) Ltd* [1972] 2 QB 71, or as a clear exclusion which covers the only obvious head of claim as in *Alderslade* v. *Hendon Laundry* [1945] KB 189.

588. The power of sale granted by this clause is considered further below at 2C.9.5. A further power of sale is granted by cl. 10(B) discussed below at 2C.11. A power of sale may be implicit also in the power given in cl. 18 to deal with dangerous goods, see below 2C.18.

589. *Bowstead and Reynolds*, Art. 65, and see *Societa Anonima Angelo Castelletti* v. *Transmaritime Ltd* [1953] 2 Lloyd's Rep 440 at p. 449. *Cf Schenkers Ltd* v. *Betancor & Co Ltd*, *World's Carrier*, 15 April 1939, p. 318, Mayor's Court, cited in Hill, p. 222, note 44.

automatically entitled to a particular lien.[590] It is unclear, and opinion differs, as to whether a private carrier automatically has a particular lien against his customer.[591] A similar doubt exists in respect of a warehousekeeper's lien.[592] Where a forwarder is owed the premium for insurance under which a claim has arisen, he has a particular lien on the certificate of insurance, and a right of set-off against the proceeds of the claim.[593] Since, in general, an agent is entitled to a particular lien,[594] there may be little difficulty in establishing such a lien at common law without having to contract for it expressly, although it may be better to contract for it just in case. Any lack of authority to exercise a lien can result in liability for wrongful interference with goods.[595]

2.149 Where the forwarder purports to exercise a particular lien against goods or documents belonging to a person other than his principal, this will be possible where either the forwarder is obliged to accept the goods at common law, for example where he acts as a common carrier, or where implied or ostensible authority exists on the part of his principal to contract for the lien.[596] Such implied authority is generally easy to establish in the case of a particular lien provided that the forwarder's principal was in lawful possession of the goods at the time possession was transferred to the forwarder and that the transfer of possession is not inconsistent with the purposes for which the customer was in possession of the goods as regards the owner of them.[597] In *Cassils & Sassoon* v. *Holden Wood Bleaching*,[598] it was pointed out that a particular lien is not available in favour of a

590. *Skinner* v. *Upshaw* (1702) 2 Ld Raym 752 (see further Palmer, pp. 1497–8, 27–038). Some previous editions of the IFF Conditions stated that forwarders do not act as common carriers, and such provision is still often made in some conditions in use, see e.g. Geologistics GTC, cl. 26 and see further 2C.5.3, above, as to the likelihood of forwarders being found to be common carriers.

591. Compare Glass and Cashmore, p. 62 and Palmer, p. 955, 16–051 with Hill, p. 215 and Kahn-Freund, pp. 405–406. The first two texts note the difficulty that bailees for reward do not have a common law lien on the goods unless they improve them. Hill notes the uncertainty but cites also Kahn-Freund who appears to consider that a private carrier has a particular lien in respect of his charges, but not as against the true owner of the goods unless he is also the consignor. Hill (at p. 216) notes the logical flaw in the apparent differentiation between the common carrier and the private carrier based on the obligation of the former to carry the goods. Hill points out that the obligation arises only in respect of a consignor willing to pay the charges in advance. If the forwarder chooses to give credit then any carriage is really a matter of choice rather than obligation.

592. Compare Glass and Cashmore, at para. 1.63 with Hill, at p. 216. See also Palmer, p. 844, 14–098.

593. *Mildred* v. *Maspons* (1883) 8 App Cas 874, Hill, p. 286, n. 32.

594. Bowstead and Reynolds, Art. 65.

595. See e.g. *T. Comedy (UK) Ltd* v. *Easy Managed Transport Ltd* [2007] EWHC 611 (Comm), [2007] 2 Lloyd's Rep 397.

596. *Cassils & Sassoon* v. *Holden Wood Bleaching* (1915) 84 LJKB 834 at p. 840, *per* Buckley L.J, *cf*, *Lukoil-Kaliningradmorneft plc* v. *Tata Ltd and Global Marine Transportation Inc* [1999] 2 Lloyd's Rep 129. Where the lien has been contracted for by the owner of the goods through a term in a bill of lading it seems that it will survive any later change of ownership even if transfer of the bill of lading does not effect a transfer of the contract of carriage, see *Feoso Maritime Co Ltd* v. *Faith Maritime Co Ltd* (*The Daphne L*), Singapore Court of Appeal 25 August 2003, summarised in www.onlinedmc.co.uk. For the court the contractual lien was dependent on continued possession of the cargo (see below 2C.9.3) and operated as a remedy in rem.

597. See the cases cited in *Cassils*, above, fn. 546, and also *Tappenden* v. *Artus* [1964] 2 QB 185, *Bowmaker* v. *Wycombe Motors* [1946] KB 505, and *Electric Supply Stores* v. *Gaywood* (1909) 100 LT 855. On the ostensible authority of forwarders themselves to create liens see *Gallimore* v. *Moore* (1867) 6 SCR (NSW) 388 and *Leaf* v. *Canadian Shipping* (1878) 1 WN 220, cited in Hill, p. 224.

598. Fn. 596, above, at p. 842, *per* Buckley LJ.

subcontractor where a principal contractor has contracted to do a job for a certain sum and has subcontracted part of that job to a subcontractor for a different sum. This was on the principle that there was no obligation between the customer and the contractor for the part of the job subcontracted to be done for a particular sum, so that passing on that obligation to the subcontractor was inconsistent with the agreement made between the customer and the contractor. This could affect a forwarder in the position of a sub-agent or subcontractor or where the intention is to grant a right of lien to a subcontractor of the forwarder.

2.150 Where the forwarder is unable to exercise a lien because of the lack of authority of his principal to bind the owner, he may seek to rely on an indemnity or warranty contained in the contract. No express indemnity is provided in BIFA 2005A in clause 8. Reliance would need to be placed on the warranty in clause 3[599] rather than the indemnities provided in clause 20.[600] A specific clause might state that the customer warrants that he has the authority to grant the lien against the owner.[601]

2.151 The existence of the lien must be consistent with the obligations accepted by the forwarder.[602] It is not inconsistent for a forwarder or carrier to exercise a lien in respect of dangerous goods since any person exercising a lien must exercise proper care for the safety of the goods the subject of the lien.[603]

2.152 Unless the forwarder has an independent right to exercise a lien[604] he will only be able to exercise such rights as his customer has against a third party owner of the goods,[605] whether the customer is, for example, a consignor or sending forwarder for whom he is acting as sub-agent.[606] Where the forwarder fails to exercise such rights as instructed he will be liable for such failure but damages will be based on the value of the lien, which may be of little value if the goods are perishable or if the debtor is good for the money.[607] Where the third party is not the owner of the goods,[608] or is the owner but does not have the immediate right to possession of the goods[609] the forwarder may contract on the basis that he will only part with possession in return for a promise that the third party pays his charges.[610]

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599. See 2.33.

600. Although these might come into play once the forwarder has accounted to the customer after exercising a right of sale and is then sued by the owner.

601. See e.g. cl. 17.3 of DHL Express (UK) STC.

602. See e.g. in the case of a carrier, *Hirst* v. *Page* (1891) 7 TLR 537 and in the case of a garage, *Hatton* v. *Car Maintenance Co Ltd* [1915] 1 Ch 621.

603. *Kala Ltd* v. *International Freight Services (UK) Ltd* QBD, 7 June 1988, unreported.

604. E.g. as a common carrier or contracted for by his customer with the authority of the owner.

605. Where the forwarder is acting for a foreign principal the exercise of any rights of lien may well depend on what is available under the proper law of the contract, see further Hill, p. 223.

606. *Brunton* v. *Electrical Engineering Co* [1892] 1 Ch. 434. Wider rights may be available to a sub-agent against the original principal especially where the principal is undisclosed, see Bowstead, Art. 71(2), and *Fisher* v. *Smith* (1878) 4 App Cas 1.

607. See *Societa Anonima Angelo Castelletti*, fn. 589, above, at pp. 449–450.

608. E.g. a consignee to whom property has not passed.

609. As where the forwarder is exercising a right of lien on behalf of his principal.

610. *Anglo-Overseas Transport Co Ltd* v. *David Zanellotti Ltd* [1952] 1 Lloyd's Rep 232 at p. 235, *per* Slade J. See also *Schenkers Ltd*, fn. 589 above.

2.153 A forwarder may not follow the instructions of his principal if this would amount to conversion of a third party's goods.[611] The purported exercise of a lien when there is no right to do so, so as to interfere with the transit to the named consignee, will amount to a distinct breach of contract with the forwarder's principal.[612] As an agent a forwarder might find that the exercise of a right of lien amounts to a breach of his duty of fidelity especially in circumstances where it is clear that the agent has put his own interests before that of his principal as in *The Borag,*[613] where it was said that "common sense suggests that where the agency is of a continuing nature, it will not usually survive the exercise by the agent of rights inconsistent with those of the principal over goods which are the very subject-matter of the agency; and this would appear to indicate that the principal's conduct must at least be of a repudiatory nature, even if not formally treated by the agent as such, before the agent can exercise his remedy of self-help".[614]

2.154 Whilst in *The Wiltshire Iron Co* v. *G.W. Ry*[615] a carrier was unable to exercise a lien until the goods had reached their destination, this must be seen in the context of the case in that a lien does not, without more, justify a refusal to carry, and any right given by an express clause must be given a businesslike construction. Consequently, in *Kala Ltd* v. *International Freight Services (UK) Ltd*,[616] a forwarder who was not, in the circumstances, a carrier was held to be justified in instructing the actual carrier to detain goods at an intermediate depot since this was a reasonable exercise of his rights. To have exercised that right at a later stage would have been futile and might have exposed the goods to loss or damage.

2C.9.2 Rights of general lien

2.155 A general lien, exercisable against the principal's goods, may be acquired by contract, or by implication of law or by trade or local custom.[617] Such a custom is extremely difficult to prove and the existence of an express clause is, in fact, a serious obstacle to someone seeking to rely upon custom.[618] This is all the more so if it is sought to extend the custom beyond those of his principal's goods. A packer has a general lien, by implication of law, on his principal's goods.[619] In *Langley, Beldon & Gaunt Ltd* v. *Morley,*[620] it was said that this "appears to have been based, primarily, on a custom that prevailed in the middle of the 18th century, when packers were, to some extent, factors, and advanced money on goods warehoused

611. *Societa Anonima Angelo Castelletti*, (fn.589, above) at p. 447.
612. *Langley, Beldon & Gaunt Ltd* v. *Morley* [1965] 1 Lloyd's Rep 297 at p. 307. In this case since the property was in the consignee there was no remaining interest in the plaintiff seller to support a claim for conversion.
613. [1980] 1 Lloyd's Rep 111, at first instance, reversed on other grounds, [1981] 1 WLR 274, [1981] 1 Lloyd's Rep 483.
614. Mustill J at p. 122.
615. (1871) LR 6 QB 776.
616. Fn. 603.
617. Hill, p. 217.
618. *Langley, Beldon & Gaunt*, fn. 612, above, at p. 306.
619. *Re Witt* (1876) 2 Ch D 489.
620. Above fn. 612.

with them for *inter alia* packing".[621] In *Ahlers* v. *Broome*,[622] a shipping agent who made advances against proceeds of sale could not rely on the general lien of a factor. This uncertain application of custom creates a particular difficulty for forwarders whose activities may be classified in different ways.[623] Since the modern forwarder is likely to operate under a general balance of account it is best for him to contract for a general lien.

2.156 The general lien granted by clause 8 of BIFA 2005A attaches in respect of sums due from the Customer[624] and/or Owner. The single "or" used in the equivalent clause in BIFA 2000 could be construed as conjunctive so that the lien could attach to each, not only for money owed by them, but also for money owed by the other[625] as indicated in *Chellaram & Sons (London) Ltd* v. *Butlers Warehousing & Distribution Ltd.*[626] This compares with *United States Steel Products Co* v. *G.W. Ry.*[627] Here the word "owner" was construed as meaning the person entitled to demand delivery, and not whoever might be the legal owner at any particular time.[628] Thus a seller's right of stoppage of transit was not defeated by a general lien for money owed by the owner buyer. Lord Atkinson[629] indicated that clear words are required to indicate an agreement on the part of a seller to postpone his right of stoppage in favour of the general lien. See also *Black & Broom* v. *J. Coppo & Co*,[630] where the lien attached to money due from the "owners or consignees", and the seller of goods was able to recover them from the forwarder since, despite the fact that money was owed by the buyer to the order of whom the bill of lading had been made, he had rejected the goods and so did not become owner of them. It might, perhaps, have been assumed that the buyer was not to be considered as the consignee. The reference to and/or in the current conditions would not appear to effect any significant change.

2.157 Where the forwarder seeks to exercise the general lien against an owner of goods with whom he is not in privity of contract he must show an express or implied authority given by the owner to the person who has contracted with him to create the lien.[631] To be implied it must have been contemplated that the goods would be entrusted to the forwarder on such terms.[632] It would naturally be easier to imply it where the lien is exercised in respect of money owed by the demander of the goods than in respect of money owed by another.[633] The criteria laid down in *Chellaram*[634] would need to be satisfied whether they are applicable directly, as where the forwarder is a subcontractor, or by analogy when, for example, goods are being

621. Mocatta J, at p. 305.
622. (1938) 62 Ll L Rep 163.
623. Hill, p. 217.
624. See cl. 1 of BIFA 2005A, 2.19, for definition of customer.
625. Subject to privity, see below.
626. [1978] 2 Lloyd's Rep 412, *per* Megaw LJ, at p. 415.
627. [1916] 1 AC 189.
628. See *per* Lord Parker, at p. 207.
629. At p. 204.
630. (1922) 13 Ll L Rep 279.
631. Once created by the owner of the goods it may, however, survive a change of ownership, see *Feoso*, above fn. 596.
632. See *per* Phillimore LJ in *Cassils*, above, fn. 596, at p. 843 in respect of a subcontracting bleacher seeking to exercise a lien against the owner for the debts of the head contractor printer.
633. This underlies the difficulty faced by the courts in *Cassils*, fn. 596 and *Chellaram*, fn. 626.
634. Above, fn. 626, especially at p. 417.

forwarded to a buyer with whom no contract with the forwarder has been established. The criteria which were laid down in respect of a warehousekeeper sub-bailee for the debts of the head-contractor carrier were that the demander knew or should have realised that the goods might come into the hands of the sub-bailee (i.e. that he would do the work), and knew or should have realised that the sub-bailee would contract only on the basis of the general lien claimed. In this case the Court of Appeal held that the judge's finding that the plaintiffs knew that the work (i.e. packing of the goods into containers) would be carried out by the defendants could not be sustained. Further, it was not sufficient for the plaintiffs to have realised that it might be the case that such work would be carried out by the defendants unless it could be shown that they knew that the defendants would insist on a term such as this and the evidence did not show this. The case was distinguished, however, in *Jarl Trä AB* v. *Convoys Ltd*.[635] Parcels of timber were entrusted to a sea carrier whose bills of lading incorporated standard conditions which expressly provided that the carrier was entitled to subcontract on any terms the (*inter alia*) "handling . . . undertaken by the Carrier". This was sufficient to enable a wharfinger at the discharge port to maintain a general lien (against the claimants) contained in its contract with the sea carrier for charges owed to it by that carrier. The judge saw this as a case of bailment on terms and applied *The Pioneer Container*.[636] As in that case the express permission to subcontract was "on any terms" and the Privy Council expressed the view that in such a case only terms which are so unusual or unreasonable that they could not reasonably be understood to fall within such consent are likely to be held to be excluded. Given that it was more common than not for those whose business involves handling and storage of goods to contract for a lien (sometimes particular and sometimes general) could not be regarded as unusual. Furthermore, although the consequences of applying a general lien were considered to be "startling" in *Chellaram*, Moore-Bick J did not consider that the effects were likely to be such that no shipper could be taken to have consented to them. If, as permitted by the clause, the sea carrier did subcontract, goods belonging to several different shippers would be likely to come into the hands of the same subcontractor and, given that many such subcontractors contract for a general lien, this risk must be accepted as arising in the ordinary course of business. It may be that this decision does not give sufficient weight to the distinctive line of cases devoted to liens rather than wider issues of bailment on terms.[637] It certainly suggests a strong distinction between the type of case where there is an express term permitting subcontracting on any terms albeit that, as in this case, it is incorporated by reference and on the basis of a course of dealing (and leading to the further incorporation of a term with potentially onerous results) and where there is no such express term.

2.158 It should be noted further that an attempt in this case (in the alternative) to rely on the sea carrier's lien clause via the Himalaya clause in the bill of lading[638] failed

635. [2003] 2 Lloyd's Rep 459.
636. [1994] 2 AC 324.
637. See also *T Comedy (UK) Ltd* v. *Easy Managed Transport Ltd* [2007] EWHC 611 (Comm), [2007] 2 Lloyd's Rep 397.
638. For Himalaya clauses see 2.245 and 3B.6.

since the judge did not regard the right of lien as a "defence"[639] and was not one of the conditions from which the parties intended servants or agents of the carrier to benefit directly. Finally the possibility can be borne in mind that privity of contract might in any case be directly established with both a seller and a buyer of goods in respect of different aspects of a transit so that a buyer might find himself bound by a general lien provided for in the conditions even if privity has not been established through the agency of the seller.[640]

2C.9.3 The need for possession

2.159 At common law the agent must possess the goods: "there can be no lien upon any property unless it is in the possession of the party who claims the lien".[641] Where a forwarder is named as sender on a consignment note made with a shipowner but is acting merely as an agent for a seller principal in making the contract with the shipowner and the goods are in the possession of the shipowner on behalf of the buyer consignee who is the owner of the goods, the forwarder does not have possession. Rather, the shipowner has possession on behalf of the consignee.[642] In *Kala Ltd* v. *International Freight Services (UK) Ltd*,[643] however, a forwarder who "acted as freight forwarders not mere forwarding agents", and who issued a "through bill of lading" to their customer, but were not "carriers" and were named as sender on a CMR consignment note and detained goods whilst in the hands of the CMR road carrier, were in possession of the goods. The customer had granted the forwarders the right to control the goods during transit and they retained that right (confirmed by CMR) as against the actual carrier. *Kala* involved a previous edition of the IFF Conditions which granted both a right of lien and a right of detention. The exercise of control over the goods was held, in that case, to be a valid exercise of the right of detention whether there was possession or not. The current BIFA Conditions do not contain a right of detention but only a right of lien. It seems unlikely that the words "custody and control" could add anything to the word "possession" so as to justify the exercise of a lien even in the absence of possession or constructive possession (for example, by possession of a document of title) since the claim is for the exercise of a "lien" which in its essential meaning, as seen above, depends upon possession, although "custody and control" can have a wider meaning.[644] Such additional words might, therefore, be treated by a court as words of emphasis and a separate right of detention as in *Kala*, above, should be contracted for to cover other forms of control. The clause also gives a lien on documents so that whilst possession of them may not amount to constructive

639. The Himalaya clause which applied the Standard Conditions whenever claims relating to the performance of the contract are made against servants or agents, was contained in a term headed "Defences and Limits for the Carrier and Servants". The first paragraph which then applied the defences and limits was said to provide the context for the Himalaya clause.

640. See *J.O. Lund Ltd* v. *Anglo Overseas Transport Co Ltd* [1955] 1 Lloyd's Rep 142.

641. *Bowstead and Reynolds*, Art. 65 citing *Shaw* v. *Neale* (1858) 6 HL Cas 581 at p. 601.

642. *Langley, Beldon & Gaunt* v. *Morley* [1965] 1 Lloyd's Rep 297 at p. 306.

643. QBD, 7 June 1988, unreported.

644. E.g. in *Langley*, above, the agent had control as sender but not possession. A servant can have custody without possession: *Mires* v. *Solebay* (1677) 2 Mod 242, 86 ER 1050, Palmer, p. 458, 7–001.

possession of the goods (as in the case of a bill of lading) they might, in effect, prevent the customer from exercising control over the goods until the lien is released.

2.160 Some trading terms contain a provision that the lien shall survive the delivery of the goods.[645] Since delivery could be expected to entail a loss of possession it is hard to see how the "lien" could survive this. The intention may be to seek to continue constructive possession post delivery. Whilst this is possible[646] it may need to evince a clearer intention that constructive possession is being retained. Further, where the known circumstances of the delivery are clearly inconsistent with the retention of constructive possession (e.g. if it is known that the goods will shortly be consumed after delivery) it would seem unlikely that such a clause could be effective in this way.

2C.9.4 Lien only for sums due

2.161 Any lien is inconsistent with current credit terms as the debt must be due before the lien can be exercised.[647] For a sum to be "due" presupposes that an ascertained or immediately ascertainable sum is presently payable and this does not include a mere claim for unliquidated damages (such as an unquantified claim for an indemnity) which are neither ascertained nor presently ascertainable.[648] The charges and expenses of exercising a lien can only be recovered as a matter of express contract.[649] BIFA, clause 8(A)(i) now[650] makes clear that storage charges continue to accrue during the exercise of the lien.[651] In *Kala*,[652] it was considered that they cannot be acquired by unilaterally seeking to impose them at the time the lien is exercised which includes a claim for demurrage on trailers necessarily delayed by the exercise of a lien on the goods contained in them. However, in this case the forwarders were able to justify their claim for such sums under the rights granted by the indemnity

645. E.g. TT CLUB 400, cl. 23 and DAMCO, cl. 41.

646. As, e.g., in *Caldwell* v. *Sumpters* [1972] Ch. 478, see Palmer, p. 915, 15–081, where the third party receiver of the goods held them to the order of the bailee.

647. Crossley Vaines, p. 138 and see *Kala*, fn. 643 above. As to time of payment see cl. 21(A), 2.266 below.

648. *Gromal (UK) Ltd (in liquidation)* v. *W.T. Shipping Ltd*, CA, 13 July 1984, unreported. See also *DRL Ltd* v. *Wincanton Group Ltd* [2011] EWCA Civ 839, where the exercise of the lien was in breach of an agreement to pay a certain sum towards money owed and amounted to a repudiation of the contract to provide a home delivery service.

649. *Somes* v. *British Empire Shipping* (1860) 8 HL Cas 338, see also *Jarl Trä* (above fn. 635, where the judge rejected claims (in the absence of express provision) for storage charges during the period of exercise of the lien, interest on the amount outstanding and solicitors' fees presented as part of the costs of exercising the lien, although the judge noted this did not prevent the defendants from seeking an award of costs in the exercise of the court's discretion). *Cf* where the charges are incurred for the preservation of the goods prior to the demand for possession, *per* Lord Diplock, *China Pacific SA* v. *Food Corpn of India* (*The Winson*) [1982] AC 939, [1982] 1 Lloyd's Rep 117, at p. 963 and p. 125 distinguished in this context in *Metall Market OOO* v. *Vitorio Shipping Co Ltd (The Lehmann Timber)* [2012] EWHC 844 (Comm), [2012] 2 Lloyd's Rep 73.

650. Inserted since BIFA 2000.

651. *Cf* DHL Express (UK) Ltd STC, cl. 17.2 which entitles the company to charge for the cost of loading and unloading whilst a lien is being exercised together with warehouse rent and any other expenses incurred during the period during which the lien is being asserted.

652. Fn. 643 above.

clause in use at that time[653] and thereby justify their claim for a lien, provided that the sum represents an actual liability of the forwarder and not a mere unquantified claim against him.

2C.9.5 Active lien

2.162 At common law there is no right to sell goods to satisfy the debt which is the subject of the lien.[654] Such a lien is passive and not active.[655] BIFA, clause 8(A)(ii) provides a right of sale exercisable only after 28 days' notice in writing has been given to the customer.[656] The clause entitles the carrier to pay over the balance remaining after satisfying the lien and the costs of sale or disposal. As an agent the forwarder will be required to act reasonably in and about the conduct of the sale.

2.163 Apart from this clause[657] an agent would be justified in selling goods only in circumstances of necessity, the agent acting for the interests of the owner in circumstances where it is not possible to communicate with the owner before the sale becomes necessary, principles applied in cases concerning carriers by land.[658] BIFA clause 8(B) removes the obstructions to sale imposed by common law so that the carrier can satisfy his lien by sale of perishable goods immediately upon any sum becoming due whether or not the sale is necessary, or in the interests of the customer and on taking only reasonable steps to inform the customer. It enables the carrier to ensure that his lien does not become worthless due to the deterioration of the goods.[659]

2C.9.6 Effect of compulsory rules

2.164 Where an international regime of liability applies, the possibility arises that any contractual rights of lien may be negated because of inconsistency with the compulsory regime which may have its own regime for enabling the carrier to recover carriage charges by means of retaining possession of the goods until payment. This is the case under the CMR Convention by virtue of Article 13(2). In *T. Comedy (UK) Ltd* v. *Easy Managed Transport Ltd,*[660] Hirst QC considered that Article 13(2) creates a self-contained code whereby the consignee has the right to require delivery of the goods on payment of the charges shown to be due on the consignment note and coupled with the 1965 Act creates a statutory lien for the carriage charges. Consequently the general lien granted by RHA Conditions and the particular lien, to the extent that it was wider than that granted by Article 13(2), were null and void under Article 41 of CMR. In the event, since no carriage charges

653. See further and compare BIFA, cl. 20, 2.250.
654. Subject to necessity which is considered below.
655. *Mulliner* v. *Florence* (1878) 3 QBD 484.
656. See also Geologistics GTC, cl. 11, TT CLUB 400, cl. 23, DAMCO, cl. 41, DHL Express (UK) Ltd STC, cl. 17.1, HAFFA, cl. 14.
657. Or other clause granting a right of sale, e.g. cl. 10(B), see below, 2.168.
658. *Sims & Co* v. *Midland Ry* [1913] 1 KB 103, and *Springer* v. *Great Western Ry* [1921] 1 KB 257. See further Palmer, 2nd edn, p. 998, *Bowstead and Reynolds*, Art. 33 and Fridman, p. 140.
659. See *Societa Anonima Angelo Castelletti* v. *Transmaritime*, fn. 589.
660. [2007] EWHC 611 (Comm), [2007] 2 Lloyd's Rep 397.

appeared in the consignment note, no right of lien was available under Article 13(2).

2.165 The rights of lien granted by clause 8 would not be caught by UCTA.[661] Should the forwarder's customer happen to be a consumer, however, there might be a possibility of challenge under the Unfair Terms in Consumer Contracts Regulations 1999.

2C.10 BROKERAGES AND COMMISSIONS

2.166 **BIFA 2005A, clause 9**

9. The Company shall be entitled to retain and be paid all brokerages, commissions, allowances and other remunerations customarily retained by, or paid to, freight forwarders.[662]

2.167 It is common for forwarders to receive commissions from carriers (e.g. air carriers under IATA resolutions) insurers or other operators.[663] Such commissions or brokerages may be in place of remuneration from the customer or in addition to it especially where the forwarder is acting in a dual capacity, for example as ship's agent as well as forwarding agent. Where the forwarder acts as a consolidator/principal charging his client a rate for individual goods and obtaining a bulk discount with a carrier, there will be little difficulty since he is not likely to be considered as acting as an agent. Where he acts as an agent and, in particular, where he charges on the basis of a commission, any further remuneration received from third parties might be challenged as a secret commission.[664] At common law such commissions or discounts might be justified by custom, but since such custom might be challenged as being unreasonable, as it would purport to justify a potential conflict of interest,[665] it would require the consent of the principal. The clause, in effect, provides such consent and enables the difficulties to be sidestepped. They might not be so avoided, however, where the forwarder simply makes a profit since this could not strictly be counted as a commission or remuneration customarily retained by forwarders in the trade.[666] This type of clause would seem to be less appropriate in contract logistics where a closer relationship and more service orientated contract can be expected.[667]

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661. As opposed to the exclusion clause, see above.

662. See also Geologistics GTC, cl. 23 and TT CLUB 400, cl. 24, DAMCO STC, cl. 36, HAFFA, cl. 11.11.

663. See Hill, p. 254.

664. *Turnbull* v. *Garden* (1869) 38 LJC 331, *Hippisley* v. *Knee Bros.* [1905] 1 KB 1. See further *Bowstead and Reynolds*, Art. 50 and Fridman, p. 181.

665. See *Robinson* v. *Mollett* (1875) LR 7 HL 802.

666. Compare *Immediate Transportation Co Ltd* v. *Speller, Willis & Co* (1920) 2 Ll L Rep 645 at p. 647.

667. TT CLUB 600, cl. 10 provides rather for the use of reasonable endeavours to enable the customer to benefit from reduced third party costs and charges subject to the maintenance of service levels and general customer care.

2C.11 DELIVERY

BIFA2005A, clause 10 2.168

10 (A).[668] Should the Customer, Consignee or Owner of the Goods fail to take delivery at the appointed time and place when and where the company is entitled to deliver, the Company shall be entitled to store the Goods, or any part thereof, at the sole risk of the Customer or Consignee or Owner, whereupon the Company's liability in respect of the Goods, or that part thereof, stored as aforesaid, shall wholly cease. The Company's liability, if any, in relation to such storage, shall be governed by these conditions. All costs incurred by the Company as a result of the failure to take delivery shall be deemed as freight earned, and such costs shall, upon demand,[669] be paid by the Customer.[670]

(B) The Company shall be entitled at the expense of the Customer to dispose of or deal with (by sale or otherwise as may be reasonable in all the circumstances):—

(i) after at least 28 days notice in writing to the Customer, or (where the Customer cannot be traced and reasonable efforts have been made to contact any parties who may reasonably be supposed by the Company to have any interest in the Goods) without notice, any Goods which have been held by the Company for 90 days and which cannot be delivered as instructed; and

(ii) without prior notice, any Goods which have perished, deteriorated, or altered, or are in immediate prospect of doing so in a manner which has caused or may reasonably be expected to cause loss or damage to the Company,[671] or third parties, or to contravene any applicable laws or regulations.

2C.11.1 Delivery and transit clauses

BIFA clause 10 deals with circumstances where there has been an inability to make delivery. It is, in effect, an end of transit clause in that it seeks, by the exclusion clause, to alter the nature of the forwarder's duty in the circumstances indicated.[672] It would seem, at first sight, to be relevant only in circumstances where the forwarder has been employed to effect delivery since it refers to the company being 2.169

668. The equivalent sub-clause in BIFA 2000 reads as follows: "If delivery of the goods or any part thereof is not taken by the Customer, Consignee or Owner, at the time and place when and where the Company is entitled to call upon such person to take delivery thereof, the Company shall be entitled to store the goods or any part thereof at the sole risk of the Customer, whereupon the liability of the Company in respect of the goods or that part thereof stored as aforesaid shall wholly cease and the cost of such storage if paid for or payable by the Company or any Agent or Sub-Contractor of the Company shall forthwith upon demand be paid by the Customer to the Company."

669. Once a sum has become "due" by having been demanded by the forwarder it can become subject to the lien granted by cl. 8, 2.147 above, provided that the forwarder is in constructive possession of the goods in storage.

670. *Cf* Geologistics GTC, cl. 10, TT CLUB 400, cl. 21, DAMCO STC, cl. 40. See further HAFFA, cl. 18 which deals with this situation by use of the concept of deemed delivery and DHL Express (UK) Ltd STC, cl. 11 which provides for a more general clause dealing with inability to deliver for reasons beyond the company's reasonable control. Other trading terms tend to include, in addition to the delivery clause, provisions dealing with hindrances to performance which may include termination which can then trigger the effect of the delivery clause having placed the goods at the disposal of the customer, e.g. DAMCO, cl. 39, TT CLUB 400, cl. 20.

671. The reference to the Company in addition to third parties was added to the 2000 conditions (formerly cl. 12 of BIFA 1989).

672. *Cf* TT CLUB 400, cl. 21 which in such circumstances entitles the forwarder to store the goods in the open or under cover at the sole risk and expense of the customer. *Cf* DAMCO STC, cl. 40 which goes on to add a proviso that the Company thereafter takes reasonable steps to bring any such storage to the Customer's attention.

entitled to deliver.[673] The forwarder might, however, need protection where he is employed as an agent and is forced under his duty of care to regain possession or control of the goods on the inability of the carrier to effect delivery, although this does not sit happily with the wording of the clause. At common law a carrier in possession of the goods at the end of transit, whilst losing any possible liability as an insurer[674] will probably retain some duty of care even if not to the same extent as the duty normally applicable to a bailee for reward.[675]

2.170 Unlike some standard carrier conditions[676] BIFA clause 10 is not specific as to the precise period of transit. It refers to the time and place when and where the company is entitled to deliver.[677] Where the goods are to be delivered to a consignee's address, this is likely to be construed as meaning delivery to the consignee during usual hours of business, as at common law.[678] Where goods are to be collected, transit, at common law and under RHA Conditions, will not normally cease until after a reasonable time[679] and it may be possible to imply a duty to give notice of arrival.[680] Where, for whatever reason, the goods are left on the forwarder's hands the clause appears to imply that transit ceases. It may be, however, that the clause does not contemplate an arrangement for collection from the forwarder's depot. Arguably the point is left open and it may therefore be possible to imply a reasonable time for collection. Alternatively, under the clause as it appeared in BIFA 2000,[681] being entitled to call for delivery to be taken might be taken to imply (a) notice, for the purpose of making the call and (b) reasonable time in which to respond to the notice.

2.171 The interpretation that the clause does not contemplate collection would, however, have fitted with a view that might have been taken in light of the remainder of the clause in BIFA 2000 which made reference to the cost of storage "if paid for or payable by the Company . . . ". This suggests that the clause at that time contemplated storage of the goods with a third party rather than by the company in its own depot.[682] If correct, this would mean that transit (in the sense of an altered basis of liability) would cease, and the exclusion would apply, only when the goods were stored with a third party and the clause would implicitly permit the forwarder to do this. On this view, should goods remain in the forwarder's depot the general clauses dealing with liability and limitation would continue to apply. The clause now

673. *Cf* TT CLUB 400, cl. 21 which also refers to the person whose services the company makes use of, although this might simply mean where the company subcontracts for delivery.

674. See *Chapman* v. *Gt. Western Ry* (1880) 5 QBD 278.

675. Compare *G.N. Ry* v. *Swaffield* (1874) LR 9 Ex. 132, *McKinnon* v. *Acadian Lines* (1978) 81 DLR (3d) 480, *Mitchell* v. *L. & Y. Ry* (1875) LR 10 QB 256 with *Heugh* v. *L. & N.W. Ry* (1870) LR 5 Ex. 51. See Palmer, 2nd edn, p. 1003. It is possible that after taking steps to secure storage of the goods with a third party any non-delegable duty normally applicable in bailment would thereby cease.

676. E.g. RHA Conditions of Carriage 2009, cl. 6, BRB Conditions 1986, cl. 10.

677. As does TT CLUB 400, cl. 21 although referring rather to the time and place when and where the "Company . . . is entitled to call upon the Customer or Owner to take delivery".

678. *Chapman*, above, fn. 674 at p. 281.

679. *Chapman,* above, fn. 674.

680. See *Mitchell*, fn. 675, above. Compare *Houlder* v. *General Steam Navigation* (1862) 3 F&F 170 in carriage by sea, see Glass and Cashmore, p. 35.

681. See fn. 668.

682. A forwarder, as such, has no obligation to store the goods himself: *Club Speciality (Overseas) Inc* v. *United Marine* [1971] 1 Lloyd's Rep 482, at p. 485, *cf* TT CLUB 400, cl. 21.

simply refers to "all costs" and is therefore neutral as to whether these costs are incurred directly or indirectly.

2.172 The cesser of liability would relieve the forwarder of continuing liability for the risks of continued storage and possibly negligence of any third party.[683] It would not, it is submitted, cover liability for negligence in the initial process of storing the goods (for example placing them in an insecure or unsafe place) or a failure in respect of the choice of a third party. Such liability would remain subject to the duty expressed in clause 23.[684] The addition in the current clause that the company's liability, if any, in relation to such storage, shall be governed by the conditions would seem to cover this. It might also cover other breaches of duty, such as a duty to give notice to the customer of an inability to deliver where this can be implied, but it is doubtful whether it could cover liability for damage to the goods arising during carriage to a place of storage although it can be considered that the general conditions would in any case apply up to that point. Clearly liability ceases only when the goods have been stored.[685] The cesser of liability provides further protection to a forwarder faced with the argument that since he has not stored the goods himself the protective provisions do not apply.[686]

2.173 So far as costs are concerned, the clause may add little to the common law rights available to a bailee to claim expenses incurred in preserving the goods[687] or a forwarder incurring an expense that was reasonably necessary in performing their duty.[688] A clause in previous editions of IFF Conditions provided that pending forwarding or delivery, goods could be warehoused at the forwarder's discretion at the customer's expense. Although strictly confined to the periods indicated,[689] such clauses might give a wider discretion than at common law to incur the expense.[690]

2.174 The BIFA clause does not impose an express obligation on the customer to take delivery which such express obligation might provide a further possibility of obtaining an order of "specific performance" in circumstances where the taking of delivery is refused as was considered in *P & O Nedlloyd BV* v. *Arab Metals Co (No. 2)*[691] which is discussed below at 2.210.

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683. Presumably authority to store with a third party can be obtained from cl. 5 if the word store in itself cannot be taken to mean both to store personally or through another (*cf Metaalhandel JA Magnus BV* v. *Ardfields Transport Ltd* [1988] 1 Lloyd's Rep 197.

684. See above, 2.95.

685. It will anyhow be subject to UCTA, see 2C.2.2. Compare the possible argument in respect of TT CLUB 400, cl. 20, (2.131), which clause might still be available in circumstances covered by cl. 19 b.

686. *Cf Firmin & Collins Ltd* v. *Allied Shippers Ltd* [1967] 1 Lloyd's Rep 633, and *L. Harris (Harella) Ltd* v. *Continental Express and Burns Transit Ltd* [1961] 1 Lloyd's Rep 251.

687. *G.N. Ry* v. *Swaffield*, fn. 613 above, *China Pacific SA* v. *Food Corpn of India (The Winson)* [1982] AC 939, [1982] 1 Lloyd's Rep 117.

688. *Immediate Transportation Co Ltd* v. *Speller, Willis & Co* (1920) 2 Ll L Rep 645 at p. 647 (see further below, 2.256.

689. See *Kala Ltd* v. *International Freight Services (UK) Ltd*, QBD, 7 June 1988, unreported.

690. TT CLUB 400, cl. 20, would also appear to do so where the forwarder decides to abandon the performance in the circumstances indicated in the clause.

691. [2007] 2 Lloyd's Rep 231, [2007] 1 WLR 2288.

2C.11.2 Power of sale

2.175 At common law any sale by the forwarder of the customer's goods requires to be justified by agency of necessity.[692] Alternatively, where the forwarder is a bailee a power of sale may by exercised by virtue of section 12 or 13 of the Torts (Interference with Goods) Act 1977. BIFA clause 10(B) provides an express power of sale which distinguishes non-perishable and perishable goods.

2.176 In respect of non-perishable goods BIFA clause 10(B)(i) requires either 28 days' actual notice[693] to be given to the "customer" and so can be satisfied by giving notice to the person requesting the services or the person on whose behalf the services are provided,[694] or no notice if no such notice can be given because the customer cannot be traced, on taking reasonable efforts to contact persons who reasonably appear interested in the goods. It appears from the structure of the clause that the goods must have been held for 90 days before the forwarder can give the notice and it must not have been possible to deliver as instructed.[695] The clause clearly presupposes some knowledge in the forwarder that there are persons so interested and appears to require the forwarder to attempt to contact all such persons as might be so interested. It is unclear whether the clause is satisfied when contact has in fact been made with one of those persons. The forwarder is well advised to be diligent in his efforts as there is a risk of committing a conversion against a person interested in the goods, should there be any lack of privity of contract between them. Clause 10 (B) can be considered to stand alone and not conditioned by circumstances indicated in sub-clause (A) although an argument might be made to that effect. Other trading conditions may provide for a right of sale in a stand-alone clause or in a clause dealing with a range of causes for the inability to deliver as instructed.[696]

2.177 Under BIFA clause 10(B)(ii) no notice is required in respect of perishable goods.[697] The goods can be sold when they have perished, deteriorated or altered or are in immediate prospect of doing so, which latter phrase presumably refers back to all the other possibilities indicated.[698] The qualification that the goods must have caused or may be expected to cause loss or damage appears to relate both to where goods have in fact perished, etc, or are about to do so.[699] Thus interpreted the sub-

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692. See above 2C.9.5.

693. *Cf* Geologistics GTC, cl. 10(B)(i) in similar terms and TT CLUB 400, cl. 22(A) which specifies 21 days.

694. See cl. 1, above 2.19.

695. *Cf* TT CLUB 400, cl. 22, CIFFA, cl. 11.

696. *Cf* TT CLUB 400, cl. 22, DHL Express (UK) Ltd STC, cl. 11, CIFFA, cl. 11. DAMCO STC, cl. 41 deals with the rights of disposal and lien in the same clause which might raise an issue as to whether the two rights are interdependent.

697. Clause 10 overlaps with cl. 15 but under that clause there would only be a duty to notify the customer before taking action if the goods had been accepted under written instructions, (see below, 2.203).

698. TT CLUB, cl. 22(B) is in similar terms. Geologistics GTC, cl. 10(B)(ii) refers to perishable goods which are not taken up immediately on arrival, or incorrectly addressed or marked or which in the opinion of the company would be likely to perish in the course of carriage, storage or handling. Presumably the BIFA clause is not intended to apply only on the arrival of the goods although an argument along those lines might be made based on the overall context of cl. 10.

699. Since goods which are in prospect of perishing are unlikely to have produced actual damage.

clause has a more limited and reasonable application. The reference to the Company as well as Third Parties was added by BIFA 2000.[700]

2C.12 LIMITATIONS OF PERFORMANCE—INSURANCE

BIFA 2005A, clause 11 *2.178*

11(A) No insurance will be effected except upon express instructions given in writing[701] by the Customer[702] and accepted in writing by the Company,[703] and all insurances effected by the Company are subject to the usual exceptions and conditions of the policies of the insurers or underwriters taking the risk.[704] Unless otherwise agreed in writing, the Company shall not be under any obligation to effect a separate insurance on the goods,[705] but may declare it on any open or general policy held by the Company.[706]
(B) Insofar as the Company agrees to effect insurance, the Company acts solely as agent for the Customer, and the limits of liability under clause 26(A)(ii) of these Conditions shall not apply to the Company's obligations under Clause 11.[707]

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700. Formerly cl. 12 in BIFA 1989.

701. It is understood that the need for instruction in writing is to ensure that there is proof that there was an intention to insure.

702. For the effect of the clause see 2C.12.3 below.

703. The requirement of acceptance in writing by the company was added after BIFA 2000.

704. The reference here to the usual conditions of the insurer, presumably, "is intended to cover any special limitations which underwriters may from time to time impose", Hill, p. 280. Where some "usual" condition of a particular insurer is, in fact, unusual among insurance terms generally adopted, an issue relating to skill and care of the forwarder in obtaining the insurance might arise, as discussed in 2C.5, unless, as indicated in 2.132, the express right granted by the clause is considered to negative any wider duty.

705. BIFA 2000 referred to each consignment.

706. The right expressed here to declare goods of the customer on an open or general (e.g. floating) policy reflects a long-standing practice of forwarders, e.g. *James Vale & Co* v. *Van Oppen & Co Ltd* (1921) 6 Ll L Rep 167, 37 TLR 367. The clause would appear to protect a forwarder in circumstances where it might otherwise be implied that a policy should be obtained or possibly a duty to warn that no policy is to be provided, e.g. where the customer is known to be a seller CIF who should provide a policy rather than a certificate to his buyer under the terms usually implied under such a contract of sale, *Harper & Co Ltd* v. *R.D. Mackechnie & Co* (1925) 22 Ll L Rep 514, *cf* Schmitthoff, para. 2–023. In *Granville Oil & Chemicals Ltd* v. *Davies Turner & Co Ltd* [2003] EWCA Civ 570, [2003] 2 Lloyd's Rep 356 (CA), the forwarder arranged insurance for the claimant and informed them that it was on all risks terms. Unfortunately under the terms of their open cover, against which the cargo had been declared, the cargo would only be covererd if inspected prior to shipment, which was not the case. The case proceeded on the basis that this failure in arrangement was a breach of contract. See further below fn. 707.

707. Under the 1989 Conditions the equivalent to this clause made any failure in respect of insurance arrangements subject to the limits of liability as currently expressed in cl. 26 (cl. 29 in BIFA 1989 and cl. 27 in BIFA 2000). In *Overseas Medical Supplies Ltd* v. *Orient Transport Services* [1999] 2 Lloyd's Rep 273, where the forwarder failed, without explanation, to obtain the insurance as agreed in the contract, it was held that the applicable limit failed to satisfy the test of reasonableness in the Unfair Contract Terms Act 1977, see below 2.301. In the current conditions insurance arrangements are expressly removed from the limit that would otherwise be applicable so that the issue in *Overseas Medical Supplies* would not arise under the current conditions. Any failure in such arrangements will be subject, however, to the time limit in BIFA, cl. 27(B), see 2.304. The equivalent clause of the 1989 edition was upheld as reasonable by the Court of Appeal in *Granville Oil & Chemicals Ltd* v. *Davies Turner & Co Ltd*, above fn. 706. See further 2.309. This case concerned the failure of the forwarder to obtain effective cover. One difference with *Overseas Medical Supplies* was the commercial standing of the claimant suggestive of equal bargaining strength with the defendant.

2C.12.1 Clauses limiting performance

2.179 Several clauses in BIFA 2005A and other standard conditions adopted by forwarders commonly seek to place limits on a forwarder's undertaking or qualify it by means of a precondition. Some seek to limit the kinds of goods which the forwarder is prepared to accept other than under special arrangements.[708] Such restrictions, in so far as they are effected through an actual refusal by the forwarder to handle such goods, would not be subjected to control under the Unfair Contract Terms Act 1977 since that Act does not affect the basic freedom of the forwarder to choose whether or not to contract at all. The Act does not restrict a clause which excludes a contractual duty from arising even under section 3(2)(b)(ii).[709] BIFA clause 12, which restricts the forwarder's duty in respect of collection arrangements to that of an agent[710] would seem also to fall outside the control of the Act since it qualifies the contractual duty undertaken by the forwarder rather than liability in respect of it. BIFA clauses 11 and 16 make clear the absence of a contractual duty to arrange insurance[711] or to make declarations of value to carriers etc,[712] and as such would not, therefore, appear to be caught by section 3 of the Act. Nevertheless there may be a duty of care in respect of these matters and in so far as these clauses restrict a duty giving rise to a liability in negligence they may be caught by section 2 (combined with the proviso in section 13(1)(c)) and subject to the requirement of reasonableness to that extent. Note also that TT CLUB 400, clause 4(D), in addition to clauses similar to these BIFA clauses, states that the company acts as an agent and never as a principal when providing services in respect of or relating to customs requirements, taxes, licences, consular documents, certificates of origin, inspection, certificates [*sic*] and other similar services.[713]

2.180 The arrangements necessary to operate complex logistics contracts may require a more detailed specification of insurance arrangements placing obligations on both parties to make arrangements relevant to their respective responsibilities and access arrangements. For example, the logistics provider may be required to obtain cover for public liability, employer's liability and operator's liability; the customer may be required to obtain cover for the anticipated goods or products as well as for public liability and products liability.[714]

2C.12.2 No duty to insure at common law

2.181 It has been said that at common law, in the ordinary case of a forwarding agent dealing with commercial goods in the ordinary course of his business, there is no obligation on a forwarder either to insure goods on behalf of his client or to inquire

708. See BIFA, cll. 14 and 15, below, 2.203.
709. Treitel, p. 273–4, 7–069, Jacobs, p. 116.
710. See 2.187.
711. See 2.178.
712. See 2.211.
713. *Cf* DAMCO STC, cl. 11.(C). See further, below, the points in 2C.12.4.
714. *Cf* TT CLUB 600, cl. 13

whether the latter has effected cover for them whilst in transit.[715] In *Von Traubenberg* v. *Davies Turner & Co Ltd*,[716] however, a forwarder was held to be in breach of a duty of reasonable care and skill in not obtaining instructions as to the protection required for valuables belonging to a non-commercial client. A forwarder can normally assume that a commercial customer will have enough knowledge about his business either to cover his goods adequately or instruct the forwarder accordingly.[717] A contrast can be made with the position where there has been an agreement to effect carriage which is then subcontracted, since it was accepted in *Eastman Chemical International AG* v. *N.M.T. Trading Ltd and Eagle Transport Ltd*[718] that, if the contractor chooses to subcontract, there is an implied term that they will entrust the goods to someone who insures the goods and that this means that steps will be taken to see that, if there is a policy in being, the subcontractor will comply with its conditions which in this case required the use of a roadworthy vehicle.

2C.12.3 Effect of clauses excluding an obligation to insure

This type of clause puts the matter beyond doubt,[719] at least in respect of negating a possible implied requirement on the forwarder to arrange goods insurance and where the conditions have been incorporated into the contract.[720] It has been suggested[721] that such a clause would have protected the forwarder in *Von Traubenberg*.[722] Arguably there remains a duty to warn where the nature of the customer, or the goods or the circumstances are sufficient to raise the duty, especially where the conditions include a clause such as BIFA clause 23.[723] BIFA clause 11(A) does not expressly exclude such liability. On the other hand, it might be argued that, notwithstanding clause 23, the emphatic nature of clause 11(A) indicates an intention to put the entire risk as to the need for insurance onto the customer. The reasonableness of such a negation of responsibility would be subject to challenge under section 2 of the Unfair Contract Terms Act 1977. *2.182*

715. Hill, p. 276 citing *W.L.R. Traders Ltd* v. *B. & N. Shipping Agency Ltd* [1955] 1 Lloyd's Rep 554.

716. [1951] 2 Lloyd's Rep 462, distinguishing *W.L.R Traders*, above fn. 715.

717. See further, *Club Speciality (Overseas) Inc* v. *United Marine* [1971] 1 Lloyd's Rep 482, where it was implied that the forwarder did not have to concern himself with whether the warehouse in which goods were stored after being cleared through customs was covered by insurance and *United Mills Agencies* v. *Harvey Bray* [1951] 2 Lloyd's Rep 631 concerning an insurance broker. Compare the cases in 2C.12.4.

718. [1972] 2 Lloyd's Rep 25 at p. 35. See further Palmer, "Bailments and the Obligation to Insure" (1992) 136 SJ 244. *Cf Laceys Footwear (Wholesale) Ltd* v. *Bowler International Freight Ltd* [1997] 2 Lloyd's Rep 369, where the forwarder (acting as carrier) had expressly agreed to insure the goods.

719. See also Geologistics GTC, cl. 6 and TT CLUB 400, cl. 12. *Cf* CIFFA, cl. 13, HAFFA, cl. 12, DAMCO STC, cl. 27. See further Global Logistics cl. 2 which states that the Company does not insure the goods and the Customer shall make arrangements to cover the Goods against all risks to the full insurable value thereof (including all duties taxes and other disbursements). This links with a wide exclusion of liability in the same clause. *Cf* also OOCL Logistics, cl. 7 which requires the customer to provide all-risk insurance but against a background of fault liability.

720. *Colverd & Co Ltd* v. *Anglo-Overseas Transport Co Ltd* [1961] 2 Lloyd's Rep 352.

721. By Hill, p. 280.

722. Above 2.181.

723. See 2.95.

The fact that a forwarder does agree to insure without having received written instructions would not seem to negate the effectiveness of other parts of the clause, nor the effectiveness of the other conditions, if relevant, provided that they have been incorporated into the contract as in *Colverd & Co Ltd* v. *Anglo Overseas Transport & Co Ltd*,[724] where an argument of this kind appears to have been abandoned.

2C.12.4 The forwarder effecting insurance as agent

2.183 BIFA clause 11(B) seeks to make clear that in effecting insurance the forwarder does so only as an agent. This performs the same function as clauses which indicate that customers should have recourse to the relevant insurers and not to the forwarder in the event of a claim.[725] As an agent, provided the forwarder has carried out the instructions as to insurance properly and with skill and care, it is no concern of his that the customer is unable to recover on the policy.[726] The case of *J.H. Brown* v. *American Express Co*, *Lloyd's List*,[727] can perhaps be explained on the basis of breach of a wider duty of care rather than an automatic right of recourse.

2.184 Notwithstanding the printed clause, there may be evidence to show that the forwarder has in fact effected the insurance as a principal towards his customer rather than as an agent, although the evidence would need to be strong in order to displace the clear wording of the clause. TT CLUB, clause 12, seeks to further the inference of agency by displacing the effect that any difference in the premium rate charged by the insurer from that charged by the forwarder might have.

2.185 Under the 1989 edition the equivalent to BIFA, clause 11(B)[728] placed a duty on the forwarder to use best efforts to arrange insurance so that any failure to arrange the insurance as instructed, despite the use of best efforts, was at the risk of the customer. This would be implied, not least by BIFA clause 23.[729] The forwarder will also be under a duty to inform the customer of any inability to make the arrangements, as well as, where appropriate, a duty to advise correctly and to make

724. [1961] 2 Lloyd's Rep 352.

725. As did previous IFF Conditions and as do Geologistics GTC, cl. 6, TT CLUB 400, cl. 12 (which indicates, additionally, that the Company is an agent of the Customer in effecting insurance). *Cf*, also, DAMCO STC, cl. 27. *Cf*, further, CIFFA, cl. 13 which also excludes liability for loss or damage to the goods during transport or storage which could have been covered by insurance.

726. *Jones* v. *European & General Express Co Ltd* (1920) 4 Ll L Rep 127. See also, *James Vale & Co* v. *Van Oppen & Co Ltd* (1921) 6 Ll L Rep 167, 37 TLR 367.

727. 10 June 1921, cited in Hill, p. 282, n. 20.

728. Clause 13(B).

729. Clause 6 of Geologistics GTC similarly reserves the rights of the customer against the company in respect of any negligence on the part of the company in effecting insurance. TT CLUB 400, cl. 12(D), states, however, that "should the insurers dispute their liability for any reason the insured shall have recourse against the insurers only and the Company shall not be under any responsibility or liability whatsoever in relation thereto notwithstanding that the premium upon the policy may not be at the same rate as that charged by the Company or paid to the Company by its customers". Unless this is subject to the qualification that it does not apply where the forwarder has been negligent in respect of the insurance arrangements he has made, it will be subject to the test of reasonableness under UCTA where this is applicable (on the assumption that the arranging of insurance does not fall within the exclusion from the Act, in Schedule 1(1), of insurance contracts which would seem to be clear in the light of *Overseas Medical Supplies Ltd* v. *Orient Transport Services* [1999] 2 Lloyd's Rep 273).

such enquiries of his customer as are necessary to satisfy his duty of care, as in *McNealy* v. *Pennine Insurance Co Ltd.*[730]

It has been suggested that the duty of a forwarder at common law in respect of carrying out instructions as to insurance may vary as to whether or not the forwarder is also an insurance broker. In the latter case, a higher duty may be imposed than in the former.[731] It may be better to say that his common law duty of care depends on what may reasonably be expected of him in all the circumstances.[732] Thus it depends not only on the skill to be expected of the forwarder but also the nature of the client.[733] Not only would the fact that the forwarder was or was not a broker be relevant, but also the expectations of the client as to the forwarder's abilities. A forwarder might be under a higher duty than a broker as such in the light of the knowledge that the particular forwarder has as to his customer's business. The fact that the forwarder has a brokering division in another part of his business, or a London office which might be expected to have greater expertise, might also be considered as a relevant factor, although the fact that a forwarder did not send an instruction to his London office which might have been more familiar with the market was held not to be negligent in the circumstances in *James Vale & Co* v. *Van Oppen & Co Ltd.*[734] As with an insurance broker, a forwarder may not be under any special duty to notify his client at once as to the terms of the insurance.[735] *2.186*

2C.13 COLLECTION ARRANGEMENTS

BIFA 2005A, clause 12(A) & (C) *2.187*

12 (A) Except under special arrangements previously made in writing by an officer of the Company so authorised,[736] or made pursuant to or under the terms of a printed document signed by the Company, any instructions relating to the delivery or release of the Goods in specified circumstances only, (such as, but not limited to, against payment or against surrender of a particular document) are accepted by the Company, where the Company has to engage third parties to effect compliance with the instructions, only as agents for the Customer.[737]

730. [1978] 2 Lloyd's Rep 18.
731. Hill, p. 278.
732. *Chaudry* v. *Prabhaker* [1989] 1 WLR 29, *per* Stuart-Smith LJ at p. 34.
733. Compare *United Mills Agencies* with *Von Traubenberg*, above, fn. 716. See also in respect of motor insurance agents, *Osman* v. *J. Ralph Moss Ltd* [1970] 1 Lloyd's Rep 313 and *McNealy* v. *Pennine Insurance Co Ltd* [1978] 2 Lloyd's Rep 18.
734. (1921) 6 Ll L Rep 167 at p. 170.
735. *United Mills Agencies*, fn. 717 above. Further cases involving the issue of whether the forwarder was negligent in respect of carrying out his instructions as to insurance or in ensuring that conditions specified by the insurers are complied with or in checking the existence of a valid policy are cited in Hill, pp. 282–283 (see, in particular, *Guignan Freres* v. *Cox* (1920) 5 Ll L Rep 49; *Firmin & Collins Ltd* v. *Allied Shippers Ltd* [1967] 1 Lloyd's Rep 633 and *International Art Depositories* v. *Wingate & Johnson Ltd*, *Lloyd's List*, 27 April 1928). See also *Granville Oil & Chemicals Ltd* v. *Davies Turner & Co Ltd* (above fn. 706).
736. The reference to an authorised officer has been added since BIFA 2000.
737. For discussion of this sub-clause see 2C.13.1.

(C) The Company shall not be under any liability in respect of such arrangements as are referred to under Sub-Clause (A) and (B) hereof save where such arrangements are made in writing,[738] and in any event, the Company's liability in respect of the performance of, or arranging the performance of, such instructions shall not exceed the limits set out in clause 26(A)(ii)[739] of these conditions.[740]

2C.13.1 Restrictions on responsibility for cash on delivery arrangements etc.

2.188 As with clause 11,[741] the intention of BIFA clause 12(A) appears to be to direct claims to the relevant third party in circumstances where cash on delivery or delivery against documents arrangements are made, at least where they are not made in writing.[742] This would seem, in principle, to reflect common law where the forwarder is acting as an agent in instructing, for example, a carrier in respect of such arrangements on behalf of his customer. Where, however, a forwarder engages a sub-agent to effect delivery the forwarder, as such sub-agent's principal, would normally retain a liability for the failure of the sub-agent to carry out the instruction.[743] It would seem contrary to principles of agency to suggest that the clause could be extended to cover the actions of sub-agents on the grounds that they are third parties. Where the forwarder sends documents of title to a bank to be released to the consignee on payment, and the bank permits delivery without payment[744] the forwarder may well be able to claim that the bank is in the position of a third party rather than a sub-agent. Here, however, the forwarder would have the difficulty that the clause only refers to the delivery or release of goods and the reference to the generality of the clause would appear to relate only to the arrangements surrounding the delivery of the goods and not to arrangements for release of documents however relevant they may be to delivery of goods.[745]

2.189 A further difficulty arises where the forwarder has in fact accepted liability as a carrier, subcontracts this carriage to an actual carrier and then instructs the carrier as to the release of the goods. If the words "Third Parties" are to be interpreted by

738. For discussion of this part of the sub-clause see 2C.13.2.

739. See 2.292.

740. The words "in any event . . . in respect of the performance of" may well be sufficient, as a matter of construction, to cover both negligence in the carrying out of the instructions as well as knowingly failing to carry out the instruction, in view of their width (*cf Joseph Travers & Sons Ltd* v. *Cooper* [1915] 1 KB 73; *Alexander* v. *Railway Executive* [1951] 2 KB 882 at p. 893; *Hoare* v. *G.W. Ry* (1885) 52 LT 324) and in view of the fact that they relate to the limitation of liability and not exclusion of liability (see *Ailsa Craig Fishing Co Ltd* v. *Malvern Fishing Co Ltd and Another* [1983] 1 WLR 964) and that any breach must involve, ultimately, a failure to perform the instruction. The limitation may well be required, however to satisfy the requirement of reasonableness under the Unfair Contract Terms Act.

741. See above, 2.178.

742. Compare TT CLUB 400, cl. 14(A), which requires the instructions to be in writing, unless previously agreed or under a document signed by the company. *Cf* further DHL, cl. 9.6, DAMCO STC, cl. 25, CIFFA, cl. 5, HAFFA, cl. 13.

743. See *Union Bank of Australia Ltd* v. *Rudder* (1911) 13 CLR 152 at p. 161 (High Court of Australia). See also Hill, p. 193.

744. E.g. *Danzas* v. *National Bank of Alaska* [1964] AMC 1832 (District Court, Alaska), see Hill, p. 194.

745. See e.g. the contrast made in *Eastern Kayam Carpets Ltd* v. *Eastern United Freight Ltd*, QBD, 6 December 1983, unreported.

reference to the term as used in agency relationships, then the clause does not cover subcontractors. If it does cover subcontractors it will need to be justified under the requirement of reasonableness, it being caught by section 2 and section 3(2)(b)(i) of the Unfair Contracts Terms Act when applicable. This is because the clause seeks to reduce liability to that of an agent quite apart from the general exclusion of liability which appears in clause 12(C).

2C.13.2 Exclusion of liability

2.190 BIFA, clause 12(C) appears to provide for a general exclusion of liability unless such arrangements are made in writing. On the one hand it may be arguable that this exclusion only operates where the forwarder has not engaged a third party since clause 12(A) appears to suggest that the forwarder will have responsibility as an agent and a written agreement is required only to create a larger responsibility. On the other hand the intention might well be that this sub-clause excludes liability entirely if there is no written arrangement etc, whereas sub-clause (A) reduces the liability to that of an agent where a third party is engaged but no special arrangement has been made to increase the liability. It would seem necessary to make the intention more clear.[746]

2.191 An oral promise to perform the service might be deemed to negate the printed condition.[747] Nevertheless, the customer's awareness of the clause may be sufficient to deprive the forwarder's servants of apparent authority to accept such instructions otherwise than in writing, the more so if the customer is aware of the forwarder's course of dealing in this respect.[748] Any apparent authority of the servants or agents of the forwarder to amend the conditions may need, however, to be negated by an appropriate clause.[749] Where the servant of the forwarder has no authority (actual or apparent) to accept the instructions or amend the conditions, the exclusion could not be deprived of its effect in negating the authority by the Unfair Contract Terms Act.[750] Should, however, a servant of the forwarder nevertheless be considered to have authority to accept the instruction notwithstanding that it is not in writing, it would seem possible to challenge the exclusion under section 3 of that Act.

2C.14 ADVICE AND INFORMATION

BIFA 2005A clause 13, DAMCO STC, clause 32 *2.192*

13. Advice and information, in whatever form it may be given, is provided by the Company for the Customer only.[751] The Customer shall indemnify[752] the Company against all loss and

746. TT CLUB, cl. 14, is expressed in terms which suggest no liability at all if there is no written instruction and a limited liability if there is.

747. *J. Evans & Son (Portsmouth) Ltd* v. *Andrea Merzario Ltd* [1976] 1 WLR 1078, [1976] 2 Lloyd's Rep 165.

748. Compare *Slim* v. *G.N. Ry* (1854) 14 CB 647.

749. See 2.14.

750. On the reasoning of *Overbrooke Estates Ltd* v. *Glencombe Properties Ltd* [1974] 1 WLR 1335.

751. The words "and the Customer shall not pass such advice or information to any Third Party without the Company's written agreement" have been excised since BIFA 2000.

752. The indemnity could not be challenged under the Unfair Contract Terms Act 1977 even where personal injury is involved unless the customer is a consumer (s. 4), provided that the indemnity is not

damage suffered as a consequence of passing such advice or information on to any third party.[753]

32. Information, in whatever form or manner it may be given, is provided by the Company:

(a) in good faith, but is not held out to be, nor to be taken as guaranteed, complete, accurate or timely, and no warranty, representation or undertaking whatsoever is given in respect of any Information.

(b) for the Customer only, and the Customer shall defend, indemnify and hold harmless the Company for any liability, loss, damage, cost or expense arising out of any other person relying on such Information.[754]

2C.14.1 Liability for negligent misstatement

2.193 Fielding enquiries as to appropriate routes, transport operators, procedures and rates has traditionally been a natural part of the forwarder's function. BIFA clause 13 is intended to cover the potential liability of the forwarder to persons other than his immediate customer. Such liability would arise where the common law duty of care in respect of negligent misstatements is breached under the principles established in *Hedley Byrne & Co Ltd* v. *Heller & Partners Ltd*.[755] The liability can arise where the relationship between the forwarder and the recipient of the advice is sufficiently proximate, as would be the case where the advice is given directly to the recipient with the intention that he should rely on it.[756]

2.194 In *Caparo Industries plc* v. *Dickman,*[757] Lord Oliver indicated that the relationship between the adviser and recipient may typically be held to exist where:

(1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given;

(2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose;

(3) it is known, either actually or inferentially, that the advice so communicated is likely to be acted on by the advisee for that purpose without independent inquiry; and

(4) it is acted on by the advisee to his detriment.

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being used as a means of excluding liability for damage or injury to the customer himself in which case it can be caught by s. 2. Compare *Thomson* v. *Lohan* [1987] 1 WLR 649 with *Phillips Products* v. *Hyland* [1987] 1 WLR 659.

753. The words "any breach of this Condition by the Customer" in BIFA 2000 have been deleted and substituted by the words appearing in the text. See also TT CLUB 400, cl. 16(C) which retains the reference to breach of condition. *Cf* further, DAMCO STC, cl. 32.

754. See fn. 776 below.

755. [1964] AC 465. Even if the restriction accepted by the majority of the Privy Council in *Mutual Life and Citizens' Assurance Co Ltd* v. *Evatt* [1971] AC 793 is good law, it would seem likely that a forwarder could be seen as being in the business of giving this sort of advice.

756. A straightforward example in respect of insurance brokers is provided in *Sarginson Bros* v. *Keith Moulton & Co* (1942) 73 Ll L Rep 104.

757. [1990] 2 AC 605 at p. 638.

2.195 These criteria encapsulate both the case where the adviser gives the information for the purpose that the recipient should rely on it as well as where he is aware of the probability of reliance by another,[758] but in either case Lord Oliver made clear[759] that the relationship of proximity is not to be extended beyond circumstances in which advice is tendered for the purpose of a particular transaction or type of transaction and the adviser knows or ought to know that it will be relied on by a particular person or class of persons in connection with the transaction.[760] Thus, where the forwarder knows that information given to the customer will be passed on to another to be used to guide that person, there may be liability. An example could be where information is given to another forwarder in order to guide a customer of that forwarder, or where it is given to a seller for the purpose of guiding a buyer. Whilst there is some possibility of liability even where the forwarder knows that the information will be passed on to a range of persons rather than an individual, such persons must not form part of an indeterminate class of persons who might rely on the information. Rather they must be within a range of persons whom the forwarder contemplates are likely to rely on the information for the purpose for which it was given.

2.196 To establish liability it will often be necessary to show reasonable reliance by the plaintiff but this will not always be so. Reliance is necessary to establish the chain of causation[761] but if this can be established without showing reliance it may be possible to establish liability provided the relationship is sufficiently proximate.[762] Thus instructions given by a forwarder which are likely to cause loss to a person directly contemplated, if incorrect, may establish liability; likewise, if the forwarder issues a defective document. Incorrect advice may even cause physical harm to a person who relies on it or to some further person in consequence of the advice being followed. An example would be incorrect advice as to the packing of goods. Unless a product liability principle can be applied it seems likely that a close relationship of proximity will still need to be established.[763] Furthermore, note should be taken of the requirement that for an agent to be liable in this context there must be an assumption of responsibility by the agent such as to create a special relationship distinguishable from the liability that may attach to the principal through the actions of the agent.[764]

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758. See *Smith* v. *Bush* [1990] 1 AC 831, *per* Lord Griffiths at p. 865.

759. At p. 642.

760. *Cf Mariola Marine Corp* v. *Lloyd's Register of Shipping (The Morning Watch)* [1990] 1 Lloyd's Rep 547.

761. See the comments of Lord Goff in *Henderson* v. *Merrett Syndicates Ltd* [1994] 3 All ER 506 at p. 520. A further issue may be whether the negligent advice must be the proximate cause of the loss, *cf Pacific Tall Ships Co* v. *Kuehne and Nagel Inc* [2000] AMC 2250.

762. See *Ross* v. *Caunters* [1980] Ch 297 at p. 313. Compare Purchas LJ in *Pacific Associates Inc* v. *Baxter* [1990] 1 QB 993 at p. 1009.

763. See *Clayton* v. *Woodman & Son (Builders) Ltd* [1962] 2 QB 533 (reversed on the facts on appeal, see [1962] 2 QB 546).

764. See *Williams* v. *Natural Life Health Foods Ltd* [1998] 1 WLR 830, and S. Todd, (1998) 14 *Professional Negligence* 136.

2C.14.2 Contractual and other bases of liability

2.197 The fact that an instruction does follow so that the information ceases to be given gratuitously would not prevent the duty of care under *Hedley Byrne* from arising.[765] The position in that case should be simpler since breach of a contractual duty of care, reinforced by clause 26 of BIFA 1989, clause 24 of BIFA 2000 or clause 23 of BIFA 2005A could apply, and may be easier to establish than the *Hedley Byrne* duty since it might be possible for the contractual duty to exist in circumstances which are not strong enough to establish a common law duty of care for negligence.[766]

2.198 An alternative basis of liability could arise under the Misrepresentation Act 1967 where the forwarder acts on the customer's subsequent instructions given on the basis of the advice received from the forwarder. This basis will be useful in making clear that the burden of proof will be on the forwarder to show that he had reasonable grounds for making the statement.[767]

2.199 A further basis of liability may arise which does not depend on contract or the subsequent issue of an instruction but may follow from the accepted duty of an agent, even where he is a gratuitous agent, to exercise a modicum of care in acting for a principal[768] and this can include the situation where an agent is asked to check a fact and report on it to his principal as in *Gomer & Another* v. *Pitt & Scott.*[769] Here a shipping agent was asked to check an insurance policy and misinformed his principal as to the scope of cover and was held liable for failure to exercise the moderate care required in performing gratuitous business. This may be viewed more generally as a gratuitous response to an instruction,[770] but in so far as it involved the imparting of information it might technically be considered as being within the purview of the exclusion in clause 15 of BIFA 1989.[771]

2C.14.3 Effects of disclaimer

2.200 Clause 15 of the 1989 edition of the BIFA Conditions which was the equivalent of clause 13 of BIFA 2000 and 2005A, in addition to the indemnity which appears in the current conditions also contained wording which provided that where the advice is not followed by a related instruction to the forwarder it is provided gratuitously and without liability. This would cover both the situation where the information is given solely to the customer and where the information is passed on to another.[772]

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765. Lord Jauncey, *Smith* v. *Eric S. Bush* [1990] 1 AC 831 at p. 870, see now, generally, *Henderson* v. *Merrett Syndicates Ltd* [1994] 2 Lloyd's Rep 468, [1994] 3 All ER 506.

766. See *Howard Marine & Dredging Co Ltd* v. *A. Ogden & Sons (Excavations) Ltd* [1987] QB 574.

767. See *Howard Marine*, previous footnote.

768. Presumably now within the scope of the general principle of tortious reliance as expressed in *Henderson* v. *Merrett Syndicates Ltd* [1994] 2 Lloyd's Rep 468, [1994] 3 All ER 506.

769. (1922) 12 Ll L Rep 115.

770. See cl. 2(A) of BIFA 2005A.

771. See 2.200.

772. Apart from the use of a disclaimer there may be clauses in some contracts limiting the authority of an employee from making a representation, e.g. in an entire agreement clause which provides for the agreement to supersede any prior promises, agreements, representations, undertakings or implications. Such a clause can be effective to exclude collateral warranties and misrepresentations except misrepresentation as to matters that are not the subject of the terms of the agreement; such a clause, although not an exemption clause, might be regulated by UCTA depending on the application of

2.201 In *Hedley Byrne*,[773] much of the reasoning of their Lordships appears to be based on the adviser voluntarily assuming liability to the recipient. Any disclaimer would form part of the material from which one deduces whether a duty of care and a liability for negligence was assumed[774] and use of the words "without responsibility" in oral and written communications directly making the representation amounted to an express disclaimer or responsibility so that no duty of care could be implied. There is, however, the alternative view that the phrase "assumption of responsibility" can only have any meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts on the advice as indicated by Lord Griffiths in *Smith* v. *Eric S. Bush.*[775] Whichever is the correct basis it seems that the disclaimer excluding liability in clause 15 of BIFA 1989 will fall within section 2 of the Unfair Contract Terms Act since it is a term or notice which excludes or restricts the relevant obligation or duty under section 13.[776] If through negligent advice personal injury is caused the liability cannot be excluded under section 2(1), but in respect of other loss or damage the disclaimer must satisfy the test of reasonableness under section 2(2).

2.202 Among the factors to be considered in respect of the test of reasonableness in this context are:[777]

(1) the equality of bargaining power;
(2) the practicality of obtaining the advice from an alternative source taking into account considerations of costs and time;
(3) the difficulty of the task for which liability is being excluded;
(4) the practical consequences of the decision on the question of reasonableness.

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s. 3(2)(b)(i) in the circumstances: *Axa Sun Life Services plc* v. *Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep 1.

773. Above 2.193.

774. See *per* Lord Pearce [1964] AC 465 at p. 540.

775. [1990] 1 AC 831 at p. 862. Compare the comments of Lord Goff in *Henderson* v. *Merrett Syndicates Ltd* [1994] 3 All ER 506 at p. 520 where he noted the tendency of the courts to criticise the concept of "assumption of responsibility" in the context of the scope of the category of persons to whom the duty is owed. Where this problem does not arise he felt that there seems to be no reason why recourse could not be had to the concept.

776. See *per* Lord Griffiths, above, p. 857. He rejected the view that the disclaimer prevents the common law duty from arising so that the Act has no application. He drew on the fact that the second report of the Law Commission on *Exemption Clauses* (Law Com No. 69), the genesis of the Act, included disclaimers in respect of information or advice as matters to be controlled. Consequently the disclaimer must be disregarded when considering whether the adviser owes a duty of care. Nevertheless, a disclaimer which clearly goes to the scope of the representation made as where its purpose is to indicate that information supplied has not been verified will not be caught by the restrictions on exclusion clauses, see *IFE Fund SA* v. *Goldman Sachs International* [2006] EWHC 2887 (Comm) [2007] 1 Lloyd's Rep 264. In this case the disclaimer was made directly in the document making the representation. See also *Raiffeisen Zentralbank Osterreich AG* v. *Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123. A provision such as that in DAMCO STC, cl. 32 (a), reproduced above, might be distinguishable on the basis that it appears in a printed form designed for various services and not directly attached to the communication of the information. More difficult, perhaps, is the indication in sub-clause (b) and in the BIFA clauses (current and 1989) that the information is provided for the customer only. This would seem to be confined to supporting the indemnity only and would only have relevance to a third party if they had notice of it, as a matter of reliance.

777. *Per* Lord Griffiths, above, at p. 858.

The last factor includes the important consideration of insurance and the extent to which the customer of the forwarder or other contemplated recipient of the advice can be expected to insure in respect of it. It would seem likely that insurance would not figure largely in the considerations of a customer in respect of the advice itself as opposed to the usual insurance involved in the carriage of the goods. The fact that the information is given gratuitously (where this is the case) will in itself be an important factor.

2C.15 RESTRICTIONS ON ACCEPTABLE GOODS

2.203 **BIFA 2005A, clauses 14 and 15, BIFA 2000, clause 14(B)**

14. Without prior agreement in writing by an officer of the Company so authorised,[778] the Company will not accept or deal with Goods that require special handling regarding carriage, handling, or security whether owing to their thief attractive nature or otherwise including, but not limited to bullion, coin, precious stones, jewellery, valuables, antiques, pictures, human remains, livestock, pets, plants.[779] Should any Customer nevertheless deliver any such goods to the Company, or cause the Company to handle or deal with any such goods, otherwise than under such prior agreement,[780] the Company shall have no liability whatsoever for or in connection with such goods, howsoever arising.[781]

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778. The reference to an officer of the company was added after BIFA 2000.

779. The clause requires the customer to declare goods of the type specified in it. In *Long* v. *District Messenger & Theatre Ticket Co* (1916) 32 TLR 596, a messenger company was held unable to rely on a similar clause where the plaintiff was held to have had insufficient notice of it, and it is arguable that the notice required in this case was higher than that normally applicable to incorporate an exclusion clause (since a receipt issued by the company was signed by the plaintiff's servant). Certainly if there is knowledge or a known course of dealing in respect of such goods it would deprive the company's employees of apparent authority to deal with them (subject to waiver, see fn. 782 below) so that they do not come into the possession of the company under the contract: *Slim* v. *G.N. Ry* (1854) 14 CB 647. See further, however, fn. 781.

780. There is a difference in the nature of the agreement required as between cll. 14 and 15. Clause 14 requires prior agreement whereas cl. 15 refers to instructions previously received. This might suggest a difference between the period prior to the making of the contract and after it. Furthermore cl. 14 requires the agreement to be by an officer of the company whereas cl. 15 simply refers to the Company. Presumably this means that an employee with authority (actual or apparent) to represent the company but without being formally an officer of it can bind the company under cl. 15.

781. At first sight this exclusion of liability might not be construed as such, since it merely confirms the refusal to contract in respect of such goods as in *Slim* v. *G.N. Ry* (1854) 14 CB 647. However, in *Datec Electronic Holdings Ltd* v. *UPS Ltd* [2007] UKHL 23, [2007] 2 Lloyd's Rep 114, this type of provision was regarded as an exclusion of liability. Presumably to incur any liability at all the company would need to be aware that it is in possession of some goods through an authorised servant and might be regarded as an involuntary bailee once it does become aware (see generally Palmer, ch.13). The reasoning in *Datec* suggests that not being aware of the character of the goods coming into its possession as falling within the restriction does not prevent there being a contract of carriage, but as just indicated, it would seem arguable that any common law liability would be at the same level as that of an involuntary bailee with only a limited duty of care not to damage the goods or convert them. The exclusion of liability could, therefore, work on this more limited liability. As such it might fall within the purview of s. 3 of the Unfair Contract Terms Act 1977. It could perhaps also fall within s. 2 of UCTA in so far as it may take effect to exclude any limited duty of care involved. In this case the customer's knowledge of the clause and the opportunity to enable him to insure the goods before despatching them will be especially relevant, *cf Phillips Product* v. *Hyland* [1987] 1 WLR 659. However, the customer may well be in breach of cl. 17(A), see below, 2.214, in failing to provide full particulars of the goods and will not be able to rely on the Act to negate a term, the application of which has the effect of putting him in breach, *MacRae and Dick Ltd* v. *Philip*, 1982 SLT 5.

14. (B) The Company may at any time waive its rights and exemptions from liability under Sub-Clause (A) above in respect of any one or more of the categories of goods mentioned herein or of any part of any category. If such waiver is not in writing, the onus of proving such waiver shall be on the customer.[782]
15. Except pursuant to instructions previously received in writing and accepted in writing by the Company, the Company will not accept or deal with Goods of a dangerous or damaging nature, nor with Goods likely to harbour or encourage vermin or other pests, nor with Goods liable to taint or affect other Goods. If such Goods are accepted pursuant to a special arrangement, but, thereafter, and in the opinion of the Company, constitute a risk to other goods, property, life or health, the Company shall, where reasonably practicable, contact the Customer in order to require him to remove or otherwise deal with the goods, but reserves the right, in any event, to do so at the expense of the Customer.

2C.15.1 Restricting duties and responsibilities for valuable and dangerous goods

Whether acting as an agent or as a carrier a forwarder normally has the freedom to choose whether or not to carry or deal with any particular type of goods. Clauses such as BIFA, clauses 14 and 15 enable a choice to be made in general terms and are similar to those used by other forwarders[783] and by carriers.[784] The requirement to obtain an agreement to carry is normally imposed in respect of goods which present special risks because of their value or nature.[785] Other clauses may require simply that notice be given to the forwarder/carrier where the goods require some special treatment or facility to be carried correctly.[786] These BIFA clauses reflect the *2.204*

782. The clause has been excised from BIFA 2005A. The special reference to waiver in this clause may reflect the fact that the courts have said that a carrier who accepts goods as presented without enquiry waives his right to know their contents and value, see *per* Best CJ in *Riley* v. *Horne* (1828) 5 Bing. 217, at p. 222. The clause seeks to govern the possibility of waiver more directly. It will depend on sufficient notice being given to the customer. Provided that such notice is clearly established it would seem sufficient to place some onus on the customer although what exactly the customer must prove to establish the waiver is not made clear. Presumably something more than mere delivery of the goods is anticipated, but proof of actual authority of a servant of the forwarder might not be required especially where such a servant has apparent authority which he might continue to have notwithstanding that no arrangement is made in writing (as suggested by the clause). It may be more likely, however, that the reference to the Company is a sufficient indication that only an employee who is in a sufficiently senior position to represent the Company has actual or apparent authority to make the waiver.

783. See also Geologistics GTC, cll. 7 and 8, TT CLUB 400, cl. 10. Geologistics GTC, cl. 7 imposes liability on the customer for delivery of dangerous goods without agreement along with a specific indemnity. TT CLUB 400, cl. 10 provides for the customer not to deliver such goods along with liability and indemnity. See also DHL, cl. 5.1, DAMCO, cl. 22(a) and (b). In BIFA it is cl. 18 rather than cl. 15 which provides for the liability of the customer and the indemnity of the company.

784. E.g. RHA Conditions 2009, cl. 9(2)(a).

785. In addition to the various types of goods identified in the BIFA Conditions, the P&O Ferrymasters GTC refer to a list of banned goods available online (see cl. 1.1) which under cl. 4.1 the company will not accept for carriage (*cf*, the list of excluded goods in DHL Express, cl. 1.1, which includes tobacco products) and a list of theft attractive goods which under cl. 4.2 the company will carry only against payment of an agreed surcharge. Clause 4.3 excludes liability for such goods which are unwittingly and unknowingly carried due to failure of the customer to comply with a duty imposed under cl. 3.1.1 to identify in writing the precise nature of the value of the goods to be carried.

786. E.g. TT CLUB 400, cl. 11, which provides that the customer undertakes not to tender for transportation any goods which require temperature control without giving written notice of their nature and the temperature range to be maintained as well as to ensure that containers into which the goods have been stuffed by the customer have been properly stuffed, properly pre-cooled or pre-heated and the thermostatic controls properly set. This is coupled with an exclusion of liability (*cf* DAMCO STC, cl. 23(a) and (c)). This more specific treatment should obviate difficulties that may arise in seeking to

need to provide both for where the forwarder acts as a carrier or as an agent. In a logistics contract, especially where complex, the goods or products may be set out fully making such clauses unnecessary. Alternatively there may be a general clause requiring information from the customer[787] about various matters including the goods to enable the logistics provider to safely perform the services and comply with legal requirements.[788]

2.205 Clause 14 is useful in two further respects:

(i) a forwarder who is considered to be acting as a common carrier will have a duty to carry imposed at common law unless the refusal to carry is justified (which is the case with dangerous goods). The clause should be sufficient to make clear that a forwarder does not act as a common carrier in respect of the goods specified in it[789] unless, possibly, the course of dealing contradicts this. Alternatively they may be regarded as an exclusion of the duty to carry;

(ii) the usual rule at common law is that a carrier is answerable for goods delivered generally to him (other than dangerous goods) unless he asks the consignor the nature of the goods and is misled by the answer as in *Tichburne* v. *White*.[790] This rule would leave the carrier exposed if goods were of a particularly high value. Some protection was available at common law[791] if the carrier were misled by the conduct of the consignor who despatched the goods at a rate or in a manner which indicated to the carrier that the goods were not valuable.[792] Carriers and forwarders will anyhow be protected from this risk by the incorporation of limitation clauses.[793] BIFA clause 14 can provide additional protection especially if it were to be considered reasonable under the Unfair Contracts Terms Act and the limit of liability were not.

2.206 More particularly, both BIFA clauses are designed to protect the forwarder/carrier from the particular risks associated with the goods specified. Apart from the special position of dangerous goods at common law,[794] the manner of consigning valuable goods provides a defence to a carrier if this presents a temptation to the

draw the protection for the forwarder from the more general warranties and indemnities (see e.g. BIFA, cl. 17(B) and cl. 20(A)). General clauses may well provide the necessary protection in law but as a practical matter such a clause obviates unnecessary litigation if a clear and specific clause can be pointed to. This TT CLUB 400 clause may well reflect a more specific interest than is possible under BIFA clauses which are designed for more general use and which may need amendment to suit specialist activities, see also 2.1. Clauses dealing with temperature controlled goods are considered further at 4.94.

787. Not all forwarding conditions provide for this but rely on one or more restrictions clauses along with a warranty of accuracy in the description of goods.

788. *Cf* TT CLUB 600, cl. 7. *Cf*, further DAMCO STC, cl. 30 which requires information about the goods but which contains also cl. 22(a) which states that unless otherwise agreed the customer shall not deliver dangerous goods. Similarly, the P&O Ferrymasters GTC provide both for restrictions on the goods to be carried (cl. 4) and a duty to provide details of the goods to be carried (cl. 3).

789. See *per* Buckley LJ, *Sutcliffe* v. *G.W. Ry* [1910] 1 KB 478 at p. 494.

790. (1719) 1 Strange 145.

791. Apart from the special protection provided for common carriers under the Carriers Act 1830.

792. *Gibbon* v. *Paynton* (1796) 4 Burr. 2298; *Tyly* v. *Morrice* (1699) Carth. 485.

793. Which may well require a special declaration or agreement for the limit to be exceeded, see BIFA, cl. 26 at 2.292.

794. See 2.207.

carrier's servant to steal them as in *Bradley* v. *Waterhouse & Briggs*.[795] Clause 14 would provide a more general basis for the protection of the forwarder.

2.207 In respect of dangerous goods the rule at common law is that a common carrier is entitled to refuse to carry dangerous goods.[796] Clause 15 goes further and would operate to justify a refusal to accept such goods even though the forwarder is otherwise bound to follow the customer's instructions. Furthermore, in so far as clause 15 may be wider than the common law in respect of the range of goods covered by it,[797] it will serve as notice of a restriction on any profession of common carrier status as indicated above. Clause 15 reinforces and links with clause 18 which provides for an indemnity should the customer deliver goods in breach of clause 15.[798] Further protection is provided by the warranty given in clause 17(A).[799] The scheme of protection provided for the forwarder parallels the common law right of a carrier to be informed of dangerous goods.[800] This right is the counterpart of a duty which seems to arise from the implied warranty of fitness which the common law imposes on the consignor or shipper and is thereby stricter than a duty of care in negligence. These clauses therefore extend the protection of such a right to the forwarder who may act neither as a carrier nor even as a bailee and so might not benefit from a strict implied warranty.[801]

2.208 The treatment of dangerous goods in BIFA, clause 15 differs from that of valuable goods in clause 14 (including 14(b) in BIFA 1989) in two respects. Firstly there is no exclusion of liability. It might be thought that the protection given by the indemnity in clause 18 is sufficient. Secondly there is no express provision in respect of waiver. This might reflect the fact that, unlike valuable goods, it would seem more difficult to establish a waiver by mere acceptance of the goods without notice to any servant or agent of the forwarder of the nature of the goods.[802]

2C.15.2 Dealing with dangerous goods where accepted

2.209 The second half of clause 15 of BIFA 2005A gives the forwarder discretion to deal with the goods where they are considered to constitute a risk.[803] This discretion is provided in the case where the forwarder accepts such goods. The case where the forwarder is not aware of the harmful nature of the goods is dealt with by clause 18.[804] Whilst the forwarder has freedom to take an opinion in respect of the risk, a probable construction of the clause is that it applies where there are facts to indicate that there is a real risk and not an abstract possibility of risk. The duty to contact the customer is separated from the right of removal so that the right can exist even

795. (1828) 3 C. & P. 318.
796. *Bamfield* v. *Goole & Sheffield Transport Co Ltd* [1910] 2 KB 94 at p. 115.
797. See 2C.18.1.
798. See 2.234. Geologistics GTC, cl. 7 and TT CLUB 400, cl. 10 combine the different elements of the protection which are separated by the BIFA clauses.
799. See 2.214.
800. *Brass* v. *Maitland* (1856) 6 El. & Bl. 470.
801. See Palmer, p. 667, 12–004.
802. *Cf Long* v. *District Messenger and Theatre Ticket Co*, above fn. 779.
803. *Cf* TT CLUB 400, cl. 10(c), DHL Express, cl. 5.2–5.5, DAMCO STC, cl. 22(c).
804. See 2.234.

where there is failure to contact, although failure should result in the customer being able to make a claim in respect of expenses needlessly incurred. The clause does not specifically deal with the situation in which the goods do not present an actual risk but do not, nevertheless, comply with specific regulations relevant to the carriage of dangerous goods. The warranty given in clause 17(B),[805] or the general indemnity in clause 20(A),[806] would need to be relied upon to protect the forwarder. Geologistics GTC provide a stricter alternative at the end of the printed conditions since they require the sender of dangerous goods by air to provide a declaration that the goods are packed in accordance with the relevant regulations. It would seem preferable to have a more specific warranty and indemnity to ensure compliance with dangerous goods regulations than is provided either by BIFA clause 15 or clauses 17, 18 and 20, in circumstances where the forwarder is not involved in the preparation of the goods. Furthermore, a specific warranty in respect of documentation would also seem necessary to cover, for example, the need for a container packing certificate in respect of dangerous goods under merchant shipping regulations.

2.210 Where a transport operator has been unable to make delivery the difficulties this could represent may be exacerbated if the goods are dangerous or require special treatment and either limited facilities are available or there is concern about a build up of expenses. The BIFA conditions do not impose any express obligation on the customer to take delivery which might otherwise provide the further possibility of obtaining an order of Specific Performance in circumstances where the taking of delivery is refused as was considered in *P & O Nedlloyd BV* v. *Arab Metals Co (No. 2)*.[807]

2C.16 RATES AND DECLARATIONS

2.211 **BIFA 2005A, clause 16**

16 Where there is a choice of rates according to the extent or degree of the liability assumed by the Company[808] and/or third parties, no declaration of value will be made and /or treated as having been made except under special arrangements previously made in writing by an officer of the Company so authorised as referred to in clause 26 (D).[809]

2.212 Trading conditions of carriers often provide for different levels of liability depending on the rate that the customer is prepared to pay. A traditional choice is

805. See 2.214.
806. See 2.250.
807. [2007] 2 Lloyd's Rep 231, [2007] 1 WLR 2288. See 2.174.
808. The reference to the Company has been added since BIFA 2000.
809. The requirement for authorisation by an officer of the company has been added since BIFA 2000. *Cf* Geologistics GTC, cl. 22, TT CLUB 400, cll. 13 and 41.

between "Owners Risk" terms, involving a restricted responsibility on the part of the carrier in return for a lesser charge than that payable under "Company's Risk" terms which impose a greater level of responsibility on the carrier.[810] As with BIFA Conditions, some may require certain types of goods to be declared[811] or permit the customer to agree on a higher limit of liability than the standard limit in the contract normally on payment of higher carriage charges.

2.213 The forwarder's duty at common law is to seek instructions from the customer and it is not sufficient to send the goods under contractual terms commonly required by consignors.[812] Clause 16 of BIFA 2005A seeks to limit this obligation. It is, however, confined to where a declaration of value is required to be made. In some cases a choice needs to be made without involving a declaration of value[813] so that the clause would not appear to restrict the duty of care in respect of such choices.[814] Since a clause of this type restricts the operation of a duty of care, it falls within section 2(2) of the Unfair Contracts Terms Act 1977 and is thus subject to the requirement of reasonableness. Where a forwarder has been put on notice of the high value of the goods, and especially where there has been agreement to increase the forwarder's own limits under clause 26(D),[815] it would seem unreasonable for the forwarder to be relieved of a duty to forward the goods at a higher rate without seeking instructions from the customer.[816] Clause 22(i) of the Geologistics GTC and clause 13 of the TT CLUB 400 conditions go further and state that unless instructions are received in writing the company shall not be obliged to make any declaration for the purposes of any statute, convention or contract or as to any special interest in delivery.[817] Such a clause would, for example, relieve liability for failure to make a declaration under the Carriers Act 1830 whereby the liability of a common carrier may be relieved entirely in respect of specified undeclared valuables despatched in packages.[818] This would seem likely to fail the test of reasonableness especially as such a clause would cover circumstances in which the forwarder had already been informed in writing as to the nature of the goods, especially as the clause would also seem to seek to relieve the forwarder of a duty to make any declaration in respect of dangerous goods which, if he has knowledge of them, would amount to a most serious dereliction of duty.

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810. Compare conditions 9(1) and 9(2)(b) of the Road Haulage Association Conditions of Carriage 2009, (see Clarke & Yates, 1.288 *et seq*).

811. E.g. RHA Conditions 2009, condition 9(2)(a), (see Clarke & Yates, 1.292).

812. *Von Traubenberg* v. *Davies, Turner & Co Ltd* [1951] 2 Lloyd's Rep 462, *per* Somervell LJ at p. 467.

813. As noted in 2.212 above the choice between "Owners Risk" and "Company's Risk".

814. *Cf* Geologistics GTC, cl. 22(ii) which, in addition, states that the goods may be dealt with at customer's risk or other minimum charges.

815. See 2.292.

816. See, however, *Swiss Bank Corp* v. *Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79, at p. 98 where Bingham J saw no negligence in an agent contracting with a forwarder whereby liability was excluded for valuable goods unless special arrangements had been made in circumstances where the customer had made plain that the valuable goods would be insured.

817. This also appeared in former editions of IFF Conditions, e.g. 1981 Conditions, cl. 9(i).

818. See Glass and Cashmore, p. 17, Palmer, p. 1493, 27–034.

2C.17 CUSTOMER OBLIGATIONS—WARRANTIES

2.214 **BIFA 2005A, clause 17, BIFA 2000, clause 17**

17 The Customer warrants:
(A) (i) that the description and particulars of any Goods or information furnished, or services required, by or on behalf of the Customer are full and accurate,[819] and
(ii) that any Transport Unit[820] and/or equipment supplied by the Customer in relation to the performance of any requested service is fit for purpose, and
(B) that all Goods have been properly and sufficiently prepared, packed, stowed, labelled and/or marked, and that the preparation, packing, stowage, labelling and marking are appropriate to any operations or transactions affecting the Goods and the characteristics of the Goods.[821]
(C) that where the Company receives the Goods from the Customer already stowed in or on a Transport Unit, the Transport Unit is in good condition, and is suitable for the carriage to the intended destination of the Goods loaded therein, or thereon, and
(D) that where the Company provides the Transport Unit, on loading by the Customer, the Transport Unit is in good condition, and is suitable for the carriage to the intended destination of the Goods loaded therein, or thereon.

17. The Customer warrants:
(A) that the description and particulars of any goods furnished by or on behalf of the Customer are full and accurate.
(B) that all goods have been properly and sufficiently prepared, packed, stowed, labelled and/or marked, and that the preparation, packing, stowage, labelling and marking are appropriate to any operations or transactions affecting the goods and the characteristics of the goods.
(C) that where the Company receives the goods from the Customer already stowed in or on a container, trailer, tanker, or any other device specifically constructed for the carriage of goods by land, sea or air (each hereafter individually referred to as "the transport unit"), the transport unit is in good condition and is suitable for the carriage to the intended destination of the goods loaded therein or thereon.

2C.17.1 The forwarder's scheme of protection

2.215 Several clauses are grouped together in the BIFA Conditions under the heading "The Customer" which seek to protect the forwarder and which may mirror or be additional to the protection provided at law. They illustrate a complex range of techniques which, whilst they will overlap in the protection provided, reflect the need to take account of the variety of functions that a forwarder may be called upon to perform. The techniques include express warranties as in clause 17, liability for

819. The references to information and services have been added since BIFA 2000.
820. Defined in cl. 1.
821. *Cf* TT CLUB 400, cl. 9, DAMCO STC, cl. 20(a), UKWA Conditions for Logistics, cl. 2.1.2. Naturally the warranty given here could not apply where the forwarder performs the relevant operation himself as part of his contractual undertaking (as is made clear e.g. in TT CLUB 400, cl. 9). The warranty could prove to be an onerous one since it may be necessary for the packing etc. of the goods to conform to the requirements of the various possible means by which the goods may be transported. Thus in the case of dangerous goods they will need to comply with the detailed packaging and marking regulations applicable to the mode of transport involved, see further 4.19. It might be reasonable to construe the warranty as limited to operations or transactions within the contemplation of the customer and not solely within the discretion of the forwarder. However, the warranty is phrased in wide terms, is not an exception or limitation and so strictly speaking is not to be construed *contra proferentem*. A more specific requirement in respect of carriage by air is provided by Geologistics GTC.

dangerous goods in clause 18,[822] indemnities[823] and an undertaking not to sue.[824] Other clauses impose obligations on the customer in respect of payment,[825] freight charges etc,[826] and general average.[827] A further warranty is provided outside this group in clause 3.[828]

2.216 Unlike claims against the forwarder to which a time limit for a claim is expressed in clause 27 the scheme of protection for the forwarder set out in the BIFA Conditions make no specific reference to any time limit for claims made by the forwarder in respect of them. Consequently this will be supplied by the Limitation Act 1980 which will operate as a procedural limitation, barring the remedy rather than extinguishing the claim. Consequently there may be discretion to amend particulars of claim after the time limit has passed.[829]

2C.17.2 Warranties as to goods and interrelationship with protection implied in law

2.217 The warranties in clause 17 relate to the operations involved in providing the service and handling the goods as compared with the contractual relationship with the customer dealt with by clause 3.[830] Some other conditions in use may add further warranties. For example TT CLUB 400, clauses 6 and 7 include warranties that the customer has reasonable knowledge of matters affecting the conduct of his business[831] including the terms of sale, and that the customer will give sufficient and executable instructions. This last might serve to fill a gap in the warranties in respect of the supply of correct documentation where the forwarder is not involved in the preparation of such documentation.[832] This could be especially important in respect of dangerous goods or customs documentation, since a failure to supply correct documents may make the instructions inexecutable.

2.218 In respect of handling the goods the forwarder or his servants may be exposed to danger or expense caused by the condition of the goods. In the absence of express protection a forwarder will seek to rely on the protection provided by the general law. The warranties in clause 17 and the liability provided for by clause 18 are

822. See 2.234.
823. Clause 20, see 2.250. See also cl. 18.
824. Clause 19, see 2.244.
825. Clause 21, see 2.266.
826. Clause 12(B) (Clause 22 in BIFA 2000), see 2.266.
827. Clause 20(D), see 2.250.
828. See 2.33.
829. See e.g. *P&O Nedlloyd BV* v. *Arab Metals Co (The UB Tiger)* [2006] EWCA Civ 1300, [2007] 2 Lloyd's Rep 148. See further in respect of the application of time limits to claims for Specific Performance *P&O Nedlloyd BV* v. *Arab Metals Co (No. 2)* [2006] EWCA Civ 1717, [2007] 2 Lloyd's Rep 231, [2007] 1 WLR 2288.
830. See also Geologistics GTC, cl. 5, TT CLUB, cll. 6–9.
831. As did cl. 6(A) of IFF Conditions, 1984 edn. See also DAMCO STC, cll. 18 and 19. See also the additional warranties provided for in cl. 21 including that the customer is not on the US Commerce Department's Denied Persons List.
832. DHL Express, cl. 3 provides for the responsibility of the customer where international carriage is involved to ensure the accurate completion of documentation and also lists documentation required.

useful, however, in overcoming some of the limitations inherent in the more general protection.

2.219 Absent express protection the forwarder may seek to rely on:

(i) The common law warranty that the goods are fit for carriage. This provides protection against the covert despatch of dangerous goods.[833] This is a limited protection which will depend on the forwarder acting at least as a carrier.[834] Where it applies liability is strict.[835] Whether acting as a carrier or not the forwarder will often be in an intermediary position and so may well be required to warrant the condition of the goods[836] or be subject to the implied warranty at common law as was the case in *G.N. Ry* v. *L.E.P. Transport Co.*[837] Express warranties of this type can therefore extend the protection in recourse available to a forwarder especially if unable to rely on the common law warranty of fitness if not acting as a carrier. Since the common law warranty focuses a duty on the consignor such warranties can usefully extend the duty to a wider range of persons through the definition of customer.[838] Further, the common law warranty is essentially focused on dangerous goods although it has been extended by analogy to goods not physically dangerous.[839] The express warranties in clause 17 and the liability in clause 18 extends the protection well beyond dangerous goods and to a range of expense which might not be recoverable under the strict operation of the common law warranty.

(ii) In addition to the common law warranty where the forwarder is acting as a carrier for all or part of a transit he may avail himself of the protection provided by carriage of goods regimes of liability such as Article IV, r. 6 of

833. It is discussed also at 2.224 and 2.235.

834. In carriage by land the principle was originally developed as a corollary of the carrier's duty to carry and so operated in favour of common carriers and carriers under a statutory duty to carry, O Kahn Freund, *The Law of Carriage by Inland Transport*, p. 379. The duty was also applied in carriage by sea, see the case of *Brass* v. *Maitland* (1856) 6 E&B 470 in respect of a ship put up as a general ship. The question of whether, in carriage by land, the duty extends to private carriers is considered not free from doubt (O. Kahn Freund, p. 379 and see Bugden (1st edn), p. 499). In *Burley Ltd* v. *Stepney Borough Council* (1947) 80 Ll L Rep 289 at p. 294, Hallett J considered that the implied warranty applied irrespective of whether the carrier is under a common law or statutory duty to carry and thecase is used as authority to suggest the extension in Palmer (2nd edn), p. 999, and Glass and Cashmore, p. 53. In respect of carriage by sea, Mustill J, in *The Athanasia Comninos* [1990] 1 Lloyd's Rep 277 at p. 281, indicated that the contractual obligations as to the suitability of the ship and as to the giving of warnings concerning any dangerous characteristics of the goods are not confined to cases where the goods are tendered to a common carrier but are capable of applying, in appropriate circumstances, to all contracts for the carriage of goods by sea.

835. *Effort Shipping Co Ltd* v. *Linden Management SA (The Giannis NK)* [1998] AC 605.

836. E.g. BRB Conditions 1986, cl. 4(1), *cf* RHA Conditions 2009, cl. 3.

837. [1922] 2 KB 742. As in this case the forwarder might engage liability as consignor/shipper. A forwarder or NVO might also engage liability as charterer on the express terms of the charterparty, *cf Compania Sud Americana de Vapores SA* v. *Sinochem Tianjin Import & Export Corp (The Aconcagua)* [2010] EWCA Civ 1403, [2011] 1 Lloyd's Rep 683.

838. Bugden suggests (at p. 504 of the 1st edn) that to protect his position the freight forwarder will need to procure specific contractual remedies from persons, such as shippers, who may not be his customer. He notes the recommendation of IATA Resolution 1650 for the use of a shipper's letter of instruction and the use that can be made of the SITPRO Dangerous Goods Declaration and the FIATA declaration.

839. *Mitchell Cotts & Co* v. *Steel* [1916] 2 KB 610, loading of unlawful cargo involving risk of seizure or delay, see Wilson, *Carriage of Goods by Sea* (7th edn), p. 34.

the Hague-Visby Rules and Article 22 of CMR. As in (i) above these will provide only limited protection.

(iii) A further possibility will be to establish a liability in tort if negligence on the part of the customer can be proved. Even here there may be difficulty if the forwarder is put to financial expense such as, for example, protecting his equipment rather than suffering direct damage.

(iv) In some situations the forwarder could gain recognition as a person who would be required to neutralise a danger and so could obtain recovery for expense on this basis as in *Losinjska Plovidba* v. *Transco Overseas Ltd (The Orjula)*.[840] Furthermore the need to restore vehicles and equipment for continued use may be sufficient to enable the expense to be recovered as "damage" as was the case in *Losinjska* in respect of the ship and containers.

2.220 Unlike the clear position in law of marine insurance, it is unclear whether performance of these express warranties will be construed as conditions precedent to the liability of the forwarder,[841] or to the performance of his obligations.[842] In common with the usage of the term "warranty" in the general law of contract they are likely to be construed as promises the breach of which does not give rise to a right to terminate but merely a right to damages for the breach. If it is the case that promissory terms are now subject to a threefold classification[843] it would seem likely that the courts would accept the express classification used in the contract and treat them as warranties in the normal way.[844] It has been suggested that a serious breach of warranty might have the effect of justifying a termination.[845] This could be an important right to a forwarder faced with the difficulty that due to some breach of warranty by the customer he is unable to continue with the despatch of the goods except by incurring an inordinate expense leaving him with the risk of seeking recourse from the customer.

2.221 The warranties in clause 17 of BIFA 2005A cover aspects such as the description of the goods, their packaging and the transport unit. Presumably their existence would not prevent the creation of additional implied warranties arising directly from the facts such as a warranty arising out of the release of the goods to the customer.[846] As they impose duties on the customer they do not fall within the Unfair Contract Terms Act 1977. Unlike indemnities they could not be treated as reverse exceptions. Furthermore, the fact that by clause 20 of BIFA 2005A the customer contracts to provide an indemnity in respect of them does not, it is submitted, affect their classification as warranties with the consequence that the cause of action in respect of breach of them arises on breach of the warranty and not

840. [1995] 2 Lloyd's Rep 395.

841. *Cf Bank of Nova Scotia* v. *Hellenic Mutual War Risk Association (Bermuda) (The Good Luck)* [1991] 2 Lloyd's Rep 191.

842. As they may be broken in only a trivial way, see *Treitel*, pp. 811–812, 17–023, and *Huntoon Co* v. *Kolynos Inc* [1930] 1 Ch. 528.

843. Conditions, intermediate terms and warranties, see further *Treitel*, p. 883, 18–048.

844. *Cf*, however, *AG Schuler* v. *Wickman Machine Tool Sales* [1974] AC 235, *Treitel*, p. 878–9, 18–043.

845. *Treitel*, p. 883, 18–048.

846. See generally 2C.20.4.

at any later time.[847] As a breach of contract, however, they would be subject to the usual rules of causation and remoteness.[848]

2.222 More specific features of the interplay between the express provisions and the position generally at law are made in the course of the following more detailed consideration of the clauses.

2C.17.3 Description and particulars of goods

2.223 The warranty in BIFA clause 17(A) covers the forwarder where he is not fully informed as to the nature and characteristics of the goods. Whilst this naturally includes dangerous or harmful goods, it should extend also to goods which have characteristics relevant to customs requirements[849] etc, likely to cause difficulties or delay if the forwarder is not aware of them. Furthermore, where a shipper has furnished an inaccurate specification, so that a forwarder is required to pay increased freight charges as a result to obtain release of bills of lading, the express warranty will make clear the customer's liability for the excess.[850] In addition they cover information furnished and services required. The extent of the warranty will depend on the width to be given to the word "full" which may be confined to such particulars as are in the contemplation of the customer in light of his instructions to the forwarder. Arguably, therefore, the warranty, under this part and the other warranties given in the clause, would not extend to the capacity of the goods to be carried in any particular way or at a particular rate of freight. In *Zimmerman & Son (Merchants) Ltd* v. *Baxter, Hoare & Co Ltd*,[851] McNair J considered that the forwarder, from the nature of the goods, had been put on notice that they might have a low weight/capacity ratio and that it was the forwarder's responsibility to check whether the goods had peculiar characteristics.

2.224 As has been noted, dangerous goods are also dealt with in clause 18.[852] In BIFA 2000, clause 18 provided for an indemnity which applied where no arrangements had been made in writing. The warranty in BIFA, clause 17(A) provides a specific obligation to inform. If the forwarder is in fact fully informed by the customer then any risks involved will be on him except to the extent that a risk is put back onto the customer by other clauses.[853] However, clause 18 of BIFA 2005A now indicates that it, and the indemnity, applies whether dangerous goods are declared or not. As with the implied warranty of fitness at common law[854] the express warranty will apply regardless of any fault on the part of the customer,[855] and it will also apply regardless of the source of the particulars, provided that they are supplied to the

847. See 2C.20.

848. See e.g. *Shaftesbury International Freight & Transport Ltd* v. *BKR Gesellschaft für Export und Import mbH* (CA, 29 October 1992, unreported).

849. E.g. particularly in relation to customs clearance, see Hill, p. 266.

850. *Cf Brushfield Sargent & Co Ltd* v. *Holmwright Engineering Co Ltd* [1968] 1 Lloyd's Rep 439, see Hill, p. 149.

851. [1965] 1 Lloyd's Rep 88, Hill, p. 147.

852. See 2.234.

853. E.g. see cl. 15 at 2.203.

854. See *G.N. Ry* v. *L.E.P. Transport Co Ltd* [1922] 2 KB 742.

855. The 1974 edn of the IFF Conditions provided expressly that the warranty did not depend on the negligence of the customer.

forwarder "on behalf of" the customer. Further it extends to the range of persons identified as the customer[856] and will not depend upon the forwarder himself being a carrier. Unlike the common law warranty of fitness the warranty will not inure directly for the benefit of the forwarder's servants or agents.[857] No attempt is made here to extend the obligation expressly to the company's servants or subcontractors[858] although other BIFA clauses are designed to regulate attempts by the customer to claim against them.[859] No damages could be claimed by the forwarder to represent the damage suffered by servants etc,[860] although compensation paid by the forwarder might be recoverable where this is in the reasonable contemplation of the parties and the forwarder is liable to pay it.[861] Compensation paid to other customers of the forwarder may be similarly restricted. More helpful, in this respect, may be the possibility at common law that, where the forwarder is a bailee of other goods which are damaged by goods belonging to the customer, he can recover on behalf of their owners damages for the negligence of the customer whether or not he is liable to them.[862] This would not apply where such owners have already been compensated by the customer.[863] Such recovery, however, may well be limited by reason of the restrictions imposed in respect of pure economic loss.[864] It seems also that the warranty of fitness implied at common law would also enable the forwarder to recover on behalf of other customers regardless of his liability to them and negligence on the part of the customer.[865] However, it is arguable that the extent of the express warranties given by the whole of the clause is such as to leave no room for implication of the implied warranty.[866] Possibly such a restriction on the implied warranty might affect only the liability of the consignor and carrier and might not affect implication of the warranty in respect of third parties.[867]

Where the forwarder or his authorised servants have knowledge of the relevant features of the goods, apart from that supplied by the customer, any loss that the forwarder were to incur arguably might be said not to flow from the breach and so would not be recoverable from the customer. More difficult is where the forwarder has means of knowledge but chooses not to use it and relies solely on the information supplied by the customer. Such means of knowledge will be sufficient *2.225*

856. See cl. 1, above, 2.19.

857. As to the common law see *Bamfield* v. *Goole & Sheffield Transport Co* [1910] 2 KB 94 which suggests that liability under the implied warranty does not depend on privity of contract, see Palmer, (2nd edn), p. 1001. Only in respect of associated companies etc., was any attempt made to extend the conditions under an agency clause, see cl. 9 of BIFA 1989, above, 2.141. *Cf* TT CLUB 400, cl. 16(d)(ii) which gives the benefit of the conditions to servants, subcontractors or agents via the agency of the company.

858. *Cf* TT CLUB 400, cl. 16(e), see below fn. 874.

859. Clauses 18, 19 and 20, see 2.234, 2.244 and 2.250.

860. *Woodar* v. *Wimpey Construction UK Ltd* [1980] 1 WLR 227 (see *Treitel*, pp. 626–627, 14–023).

861. The indemnities provided for in cl. 20 may, however, provide a wider basis for recovery, see 2.250.

862. *The Winkfield* [1902] P 42.

863. *O'Sullivan* v. *Williams* [1992] 3 All ER 385.

864. *Losinjska Plovidba* v. *Transco Overseas Ltd (The Orjula)* [1995] 2 Lloyd's Rep 395 at p. 400.

865. As a consequence of *G.N. Ry* v. *L.E.P.*, fn. 854.

866. An argument rejected in *Ministry of Food* v. *Lamport & Holt Line Ltd* [1952] 2 Lloyd's Rep 371, where the common law was held to imply a wider term than that expressed in the contract. *Cf G.N. Ry* v. *L.E.P.*, fn. 854, above, where the express obligations contained in the contract were not considered.

867. See Palmer, 2nd edn, p. 1000.

to negative the implied warranty of fitness.[868] In respect of this express warranty, the position would seem to depend on whether the forwarder could be considered in breach of his duty of care in failing to use such means of knowledge[869] so as to break the chain of causation as between the breach of warranty and the loss.[870] It would seem, however, to be more likely that the forwarder can rely on the warranty of accuracy in that the risk is placed squarely on the customer.[871]

2.226 A further difficulty may arise in respect of recovery for the forwarder's own liability to a carrier. Where this flows from the operation of law there can be no doubt about recovery for it as a direct and natural consequence of the breach under the principles of *Hadley* v. *Baxendale*.[872] Difficulties may arise where the forwarder's liability arises from the forwarder exercising a choice. Naturally if, in order to carry out the contract, the forwarder needs to incur a contractual responsibility to another this would likely be within the sufficient contemplation of the parties to enable the forwarder to obtain recourse under the warranty. More difficult is where the forwarder need not have undertaken the liability. Contrast the case where the forwarder hires a vehicle which he uses to collect the goods. In carrying out his contract he will necessarily incur a responsibility towards the bailor of the vehicle.[873] If, however, he is instructed to arrange hire for his client and in doing so accepts responsibility in respect of damage to the vehicle additional to that of his customer, such liability might not be recoverable under the warranty.[874] It could, therefore, be important to determine the source of the forwarder's liability.

2.227 Presumably the forwarder's liability would stem from his status as consignor.[875] Identification of the "consignor" is a matter of some difficulty.[876] The status of "consignor" may depend on a person's involvement with the making of a contract of carriage as principal or agent. Even as an agent there may be some doubt where the forwarder's principal is named as the consignor. In the law of carriage by sea it seems possible that there can be more than one shipper and that a person may become shipper by permitting his name to appear on the bill of lading.[877]

868. *Acatos* v. *Burns* (1878) 3 Ex. D. 282, *Transoceanica* v. *Shipton* [1923] 1 KB 31.

869. See BIFA 2005A, cl. 23, 2.

870. *Cf O'Conner* v. *B.D. Kirby & Co* [1972] 1 QB 90 and see *Micada Compania Naviera SA* v. *Texim* [1968] 2 Lloyd's Rep 57.

871. *Cf* cl. 9 of IFF Conditions 1970 which declared the customer to be "bound" by the descriptions etc. See also *Micada*, above fn. 870.

872. (1854) 9 Ex. 341.

873. Whether as consignor, or under a duty to take proper care of the chattel as hirer, see generally Palmer, p. 1162, 21–058.

874. As for recovery under an indemnity, however, see below, 2C.20 and see TT CLUB 400, cl. 16(e) which expressly makes the customer liable for loss, damage, contamination, soiling, detention or demurrage before, during and after the carriage of property (including containers) of the company or any person or vessel belonging to servants, subcontractors or agents, caused by the customer (note also the agency clause in sub-cl. (d)(ii)).

875. Although there might, arguably, be a liability arising from a status as forwarder rather than consignor based on *G.N. Ry* v. *L.E.P.*, above, fn. 854, *cf* Hill, p. 226, note 9.

876. See C. Cashmore, "Who are Consignors and Consignees for the Purposes of a Contract of Carriage" [1990] JBL 377.

877. See *The Athanasia Comninos* [1990] 1 Lloyd's Rep 277 at p. 280. *Cf* under CMR: Clarke, para. 73a. The forwarder who is engaging a sub-carrier is likely to fall within the definition of customer as e.g. under RHA Conditions 2009 or trader as under RHA Conditions 1991. In *Gillespie Bros. Ltd* v. *Roy Bowles Transport Ltd* [1973] 1 QB 400, [1973] 1 Lloyd's Rep 10, *per* Buckley LJ, p. 418 and p. 19, the forwarder might have been excluded from the duty to indemnify the sub-carrier if previous contracts

Alternatively, liability may be attached to a person who delivers goods to a carrier. It has been suggested, however, that liability will only attach to a forwarder where he acts as forwarder so that if he performs other functions on behalf of his client, such as packing, the mere fact that the goods are collected from his premises will not make him liable.[878] Arguably in the case where the forwarder is engaged to collect goods and deliver them into the hands of an on-carrier under arrangements made by another, it might well be doubtful whether the forwarder is liable as consignor. In such cases, were the forwarder to take on a liability when it was strictly unnecessary for him to do so, as noted above, it may not be possible for him to establish that his liability should be recoverable under the express warranty. It may be easier to do so under an indemnity.[879]

2C.17.4 Warranty that goods are properly packed, etc

2.228 One of the concerns underlying the warranty given by clause 17(B) of BIFA 2005A is to ensure compliance with regulations governing matters such as packing of goods.[880] Where the forwarder is aware of a failure and this amounts to an illegality, the forwarder will not be able to recover under the warranty if enforcement of the contract would offend public policy.[881] The fact that the forwarder has knowledge of the defect may defeat his right to damages for the breach of warranty if his failure to act amounts to a breach of his own duty of care under clause 23.[882] However,[883] the express warranty may negate the duty since the risk is placed on the customer. At common law, on the other hand, a carrier or forwarder knowing that goods are defective should not carry or forward them without dealing with the defect.[884] This will not be so where the risk is placed on the sender, the carrier having pointed out the defect to him.[885] Where, however, a defect is discovered during carriage, a carrier has a duty to take steps to preserve the goods.[886] It is possible that a court might interpret the warranty in printed conditions as covering latent defects only, or as lasting only for so long as the carrier/forwarder remains unaware of the defect.[887]

2C.17.5 Warranty as to transport unit

2.229 Clause 17(C) of BIFA 2005A provides for a warranty as to the condition of the transport unit and its suitability when the company received the goods already

of hire which related to specific vehicles had been in operation, since the forwarder might not thereby have been the "trader".

878. Hill, p. 226. *Cf* Cashmore, above fn. 876, p. 377, note 2.

879. See 2C.20.

880. See fn. 821 above.

881. *Ashmore, Benson, Pease & Co* v. *A.V. Dawson* [1973] 1 WLR 828. See Hanson [1973] CLJ 199 and Clarke, p. 423.

882. 2.95.

883. As with cl. 17(A), see 2.214.

884. *Richardson* v. *North Eastern Ry Co* (1872) LR 7 CP 75, *L.N.W. Ry Co* v. *Hudson* [1920] AC 324, *Carr* v. *L.N.W. Ry Co* (1875) LR 10 CP 307.

885. *Barbour* v. *S.E. Ry Co* (1876) 34 LT 67, *Gould* v. *S.E. & Chatham Ry Co* [1920] 2 KB 186.

886. *Beck* v. *Evans* (1812) 16 East. 244; *Cox* v. *L.N.W. Ry Co* (1862) 3 F&F 77.

887. *Cf Lambert* v. *Lewis* [1982] AC 225, [1981] 2 Lloyd's Rep 17.

stowed in or on it. In addition a new warranty is provided in sub-clause (A)(ii) as to the fitness of any transport unit or equipment supplied by the customer. The most obvious application of the warranty in clause 17(C) is to the situation where the customer himself has supplied the transport unit with the goods already stowed whether as owner or hirer and so naturally takes the risk as to its suitability. This is as opposed to where it is supplied to the forwarder for the purpose of loading to which (A)(ii) would most obviously apply. Sub-clause (A)(ii) shifts some risk away from the forwarder where he is involved in the operation of loading and stowage but this would be subject to issues of causation if the defect in the unit or equipment is patent.

2.230 Were the provision in sub-clause (C) to stand alone, as was previously the case under BIFA 2000, a difficulty would arise where the forwarder has supplied the transport unit which is then stowed by the customer. Since the object of the warranty is to protect the forwarder where he receives or arranges reception of a transport unit without being able to check its condition or suitability, especially as the goods are already in it, this warranty may be limited to the extent that it achieves that object. It may not, therefore, be sufficiently clear to put the risk of defects (apparent or latent) or of unsuitability on to the customer where the forwarder supplies the transport unit. However, an additional warranty by the customer is now provided for in sub-clause (D) as to the condition and suitability of the transport unit even if supplied by the company, on loading by the customer.

2.231 As such the clause can now be compared with those in bills of lading[888] and which clearly place the risk onto the customer in respect of suitability and patent defects of containers supplied by the carrier or forwarder. This BIFA warranty is not confined to patent defects. A carrier would normally be required to provide a suitable vehicle or container, at least on the basis that a carrier should take such care as is demanded by the goods[889] and presumably applicable also to a forwarder under his general duty of care.[890] Breach of such duty could effectively negate the clause in respect of any latent defect. In addition, there are also the terms implied by law under section 9 of the Supply of Goods and Services Act 1982, in respect of the quality and fitness of goods bailed under a contract of hire and involving strict liability. If the supply of the transport unit by the forwarder can be considered to fall within this the restriction on liability that the clause might represent could be subject to section 7 of the Unfair Contract Terms Act 1977.

2.232 TT CLUB 400, clause 26.a.iii only restricts the recovery of the customer in respect of a container where the unsuitability or defect is not due to any negligence of the company or would have been apparent on reasonable inspection. However, it goes on to provide in sub-clause (c) that, in the absence of a written request, the company is not under an obligation to provide a container of any particular type or quality. Again, this might be sufficient to restrict the possible strict liability in respect of fitness of goods under a contract of hire under the Supply of Goods and

888. E.g. DAMCO BL, cl. 11, TT CLUB 400, cl. 26. See *Marbig Rexel Pty Ltd and Another* v. *A.B.C. Container Express, the T.N.T. Express*, [1992] 2 Lloyd's Rep 636 (Sup Ct of NSW). See 4.118.

889. *Date & Cocke* v. *G.W. Sheldon & Co (London) Ltd* (1921) 7 Ll L Rep 53 at p. 54, *per* Bailhache J. See further *Lister* v. *Lancashire and Yorkshire Ry* [1903] 1 KB 878, *per* Alverstone CJ at p. 880.

890. See 2.95.

Services Act 1982 but subject to section 7 of the Unfair Contract Terms Act 1977.

2.233 Where the forwarder acts as a carrier and, for example, subcontracts the supply of a tractor to haul a trailer, there might be some illegality involved for which he may be responsible notwithstanding the supply of the trailer by the customer. Furthermore, a forwarder, as carrier, may find himself, under mandatory rules, responsible for the condition of the vehicle notwithstanding the fact that it is supplied by the customer and in consequence unable to transfer responsibility for that onto the customer by means of the contract.[891] Similarly, a carrier may be prevented by mandatory rules from excluding liability for supply of a defective vehicle or container notwithstanding the fact that the defect is apparent to the sender or shipper when he loads the goods[892] although the claim of the sender or shipper might well be defeated by application of principles of causation.

2C.18 CUSTOMER OBLIGATIONS—DANGEROUS GOODS

BIFA 2005A, clause 18 *2.234*

18 Without prejudice to any rights under clause 15, where the Customer delivers to the Company, or causes the Company to deal with or handle Goods of a dangerous or damaging nature, or Goods likely to harbour or encourage vermin or other pests, or Goods liable to taint or affect other goods, whether declared to the Company or not, he shall be liable for all loss or damage arising in connection with such Goods, and shall indemnify the Company against all penalties, claims, damages, costs and expenses whatsoever arising in connection therewith, and the Goods may be dealt with in such manner as the Company, or any other person in whose custody they may be at any relevant time, shall think fit.

2C.18.1 Express indemnity for dangerous and harmful goods

2.235 It is usual for forwarding and carriage conditions to make provision in respect of dangerous or other goods with a tendency to cause harm or peculiar expense. The initial concern arises from their covert despatch. In BIFA 2005A, clause 15 states that the Company will not accept them unless pursuant to previous instructions received and accepted in writing along with the right to deal with the risk presented by the goods even if accepted.[893] Clause 18 provides for the liability of the customer and for an indemnity in favour of the forwarder. A difference from the equivalent clause in BIFA 2000, however, is that the liability and indemnity apply whether the dangerous nature of the goods is declared or not which is not usually indicated in similar clauses appearing elsewhere.[894] The implications of this change are considered in the course of the discussion. Similar clauses in other conditions often

891. See in respect of the CMR Convention: *Walek & Co (International) Ltd* v. *Chapman & Ball* [1980] 2 Lloyd's Rep 279.

892. E.g. by combined application of Arts 3 and 41 of the CMR Convention, or Art. III, r. 1 and Art. III, r. 8, of the Hague Rules, see *Mitsui & Co* v. *American Export Lines, The Red Jacket* [1981] AMC 331.

893. See 2.203.

894. E.g. TT CLUB 400, cl. 10.

provide for the protection of the forwarder in a single clause.[895] However, there may still be overlaps with other protective provisions, especially where a warranty is provided as to the description of the goods, as in BIFA 17(A).[896] The protection granted to the forwarder is similar to that provided under the implied warranty of fitness at common law in respect of dangerous goods. However, it provides a greater protection than the common law in several respects:[897]

(i) The protection does not depend on the forwarder acting as a carrier, and indeed ensures that the forwarder is himself protected in respect of the implied warranty that the forwarder will have imposed upon him when consigning goods under *G.N. Ry* v. *L.E.P. Transport Co Ltd*.[898] Similarly where, in order to carry out his authority, the forwarder is obliged to give an express warranty to a carrier in respect of such goods;[899]

(ii) It is not confined to dangerous goods but covers goods likely to harbour or encourage vermin, etc, or liable to taint other goods. It also refers to goods of a dangerous or damaging nature. It would therefore seem unlikely that a court would confine this by reference to specific rules relating to dangerous goods.[900] It would seem likely that the protection afforded to the forwarder by these types of clauses would embrace all goods which by their nature contain some risk of causing damage to other goods whether or not that risk could be negated by adopting proper methods of carriage, since the customer is required to obtain express agreement before any such risk is accepted.[901]

2.236 Clause 18 of BIFA 2005A appears at first sight to extend the protection further since it provides for liability of the customer and for an indemnity whether or not the goods are declared. Consequently either the forwarder accepts no risk in respect of such goods or declaring them does not amount to acceptance of them so that the forwarder is not at risk. If the latter interpretation is correct then where the customer in fact obtains the express agreement of the forwarder in respect of goods of a particular description, and the goods in fact involve a greater risk than that anticipated in light of the description, it is arguable this falls within clause 17(A)

895. As does Geologistics, cl. 7. See also DHL Express, cl. 5, TT CLUB 400, cl. 10, DAMCO STC, cl. 22. See also the similar clauses appearing in conditions used by carriers e.g. DAMCO Combined Transport BL and Maersk Terms and Conditions, cl. 21, TT CLUB 100, cl. 7.

896. See 2.214, *cf* TT CLUB 400, cl. 8. Clause 17 of BIFA 2005A links also with the indemnity given in cl. 20.

897. The protection at common law is summarised at 2.219.

898. [1922] 2 KB 742.

899. *Cf Compania Sud Americana de Vapores SA* v. *Sinochem Tianjin Import & Export Corp (The Aconcagua)* [2010] EWCA Civ 1403, [2011] 1 Lloyd's Rep 683. See 2.219. for other forms of protection, most notably in the tort of negligence and *cf* also *Losinjska Plovidba* v. *Transco Overseas Ltd (The Orjula)* [1995] 2 Lloyd's Rep 395.

900. *Cf Ministry of Food* v. *Lamport & Holt Line Ltd* [1952] 2 Lloyd's Rep 371. *Cf* further, in the context of the Hague-Visby Rules, *Effort Shipping Co Ltd* v. *Linden Management SA (The Giannis NK)* [1998] AC 605, where it was held that "goods of a damaging nature" meant goods that are physically dangerous directly or indirectly. The House of Lords rejected the view that such goods were confined to those which caused direct physical damage to other goods. See further *Carver on Bills of Lading*, 9–288, and *Bunge SA* v. *ADM DO Brasil LTDA (The Darya Radhe)* [2009] EWHC 845 (Comm), [2009] 2 Lloyd's Rep 175.

901. *Cf The Athanasia Comninos* [1990] 1 Lloyd's Rep 277 and also *The Amphion* [1991] 2 Lloyd's Rep 101.

rather than this clause since the forwarder would have accepted the risk to the extent anticipated as following from the given description.

In common with similar clauses used in forwarding conditions, clause 18 of BIFA 2005A refers to both a liability and an indemnity. The intention behind this formulation in such clauses is not entirely clear. If a clause refers only to liability, an analogy with the decision in *Dock Services Ltd* v. *Caledonian Stevedoring Co Ltd*[902] might suggest that such wording imposes an obligation to indemnify. The contrast with the word "indemnify" in the same clause may negate this unless it is accepted, especially in light of use of the word elsewhere,[903] that the word is used in the sense of reimbursement for money paid by the forwarder to others in contrast to compensation for damage to the forwarder's equipment etc, to which the words "loss or damage" may be said to relate. On the other hand it may be argued that the intention of clause 18[904] of BIFA 2005A and the words "liability for loss or damage" are designed to impose a responsibility on the customer not to send such goods without special arrangements, rendering him in breach of contract should he do so. This is not entirely clear. Neither clause 15 nor clause 18 expressly imposes any obligation not to send dangerous goods without express agreement.[905] The expressed obligation of the customer is to give a full and accurate description of the goods under clause 17(A)(i). Furthermore clause 18 now provides for liability and indemnity whether the dangerous nature is declared or not which might mean either that liability and indemnity apply even if there is agreement to carry the goods or that they apply in the absence of written agreement even though their nature has been declared.[906] The wording is somewhat elliptical and contingent and compares with the more emphatic words in the clause considered in *Micada Compania Naviera SA* v. *Texim*.[907] A possible construction of the combined effect of clauses 15 and 18 is that they provide for both an implied obligation and an indemnity. It should be noted that breach of contract does not carry, in itself, an implied indemnity[908] although an indemnity may express the measure of damages available for a breach.[909]

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902. (1949) 82 Ll L Rep 179.

903. E.g. BIFA 2005A, cl. 20, TT CLUB 400, cl. 16, see 2.250.

904. Combined with cl. 15, see 2.203.

905. Contrast TT CLUB 400, cl. 10(a), which states that "Unless previously agreed in writing, the Customer shall not deliver to the Company or cause the Company to deal with or handle Dangerous Goods". The liability and indemnity is linked to this obligation in cl. 10(b). *Cf* DAMCO STC, cl. 22, DHL Express, cl. 5. Not all trading conditions necessarily link the indemnity to breach of an obligation by the customer, see e.g. P&O Ferries Freight Terms, cl. 7. It is not entirely clear whether DAMCO STC, cl. 22(b) links the liability and indemnity to the obligation in sub-cl. (a) but the different rights of dealing with the risks provided in sub-cl. (c) where the company agrees to accept them would seem to suggest that they are so linked. See, however, cl. 21.3 of the DAMCO BL. TT CLUB 100, cl. 7(6) links the indemnity both loss etc arising from breach but also "from any cause in connection with the Goods for which the Carrier is not responsible".

906. In such a case, however, carrying the goods in the face of a declaration might well be considered to be a waiver of the requirements of cl. 15.

907. [1968] 2 Lloyd's Rep 57.

908. *Nederlandsch-Amerikaansche Stoomvaart Maatschappij, NV* v. *Royal Mail Lines Ltd (The Nieuw Amsterdam)* [1958] 1 Lloyd's Rep 412.

909. *The Nieuw Amsterdam*, above, at p. 421. See further *Kruger* v. *Moel Tryvan Ship Co* [1907] AC 272 and the discussion by Staughton LJ, in *The Eurus*, fn. 922.

2.238 If it is accepted that an obligation to indemnify is imposed on the customer it might be possible to argue that the distinction made by Swanwick J in *County & District Properties Ltd* v. *C. Jenner & Son Ltd*[910] is relevant. This is the distinction based on whether the event to be indemnified is a loss, damage or expense or a breach of contract, act or omission of the indemnifier. In the latter case the cause of action will arise at the time the breach occurs so that, e.g. as one consequence, the time limit under section 5 of the Limitation Act 1980 will run from that time.[911] In the former case, as is the case with most express indemnities[912] the time limit runs from the time that the amount to be indemnified is ascertained.[913] Swanwick J was doubtful about the distinction which was purportedly based on *Bosma* v. *Larsen*.[914] In that case, however, the indemnity was expressed to be against liabilities, which McNair J construed as imposing an obligation against incurring a liability rather than the discharge or payment of it. Here the indemnity is clearly expressed to be in respect of ascertainable events.

2.239 Unlike clause 14 in respect of valuables etc,[915] there is no express exclusion of liability in clauses 15 and 18 of BIFA 2005A. The intention may be to adopt the general exclusion in clause 24.[916] In view of the fact that the risks relating to dangerous goods are clearly placed on the customer it would seem odd that liability for damage to the customer's goods is not excluded. It may be thought more likely that the forwarder would not wish to assume a duty of care in respect of them. On the one hand it has been held that one does not normally expect an exclusion to be contained within an indemnity clause, especially where there is an exclusion of liability elsewhere in the contract.[917] On the other hand the reference to the customer being "liable for all loss or damage . . . " might be taken to be equivalent to a clause transferring responsibility in respect of such goods and so treated as in *Phillips Products Ltd* v. *Hyland and Another*[918] as effective to exclude liability and, further, unaffected by the rule in *Alderslade* v. *Hendon Laundry Ltd*.[919] If the despatch of such goods is in any case a breach of contract this might well provide a defence to a claim for damage to them whether or not negligence is involved.

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910. [1976] 2 Lloyd's Rep 728.

911. See also *The Nieuw Amsterdam*, above, for the consequence in terms of assessment of a rate of exchange.

912. And with implied indemnities, see *Telfair Shipping Corp* v. *Inersea Carriers SA* [1984] 2 Lloyd's Rep 467.

913. See further below, 2C.20. *Cf The Catherine Helen* [1998] 2 Lloyd's Rep 511, where, in respect of the Centrocon arbitration clause, it was accepted that a claim for an indemnity could be brought before the formal cause of action could be enforced, for the purposes of the time limit in the clause, provided that it was clear that a claim was being made and not merely an intimation as to some vague future possibility.

914. [1966] 1 Lloyd's Rep 22.

915. See 2.203.

916. See 2.282. An implied exclusion can perhaps be derived from the rights granted to deal with dangerous goods in cll. 15 and 18.

917. *Airline Engineering Ltd* v. *Intercon Cattle Meat Ltd*, CA, 24 January 1983, unreported. See also Yates and Hawkins, para. 8B(2).

918. [1987] 2 All ER 620.

919. [1945] 1 All ER 244. See *White (Arthur) (Contractors) Ltd* v. *Tarmac Civil Engineering Ltd* [1967] 1 WLR 1508. See further 2.242 below.

2C.18.2 Causation and remoteness issues in respect of liability and indemnity for dangerous goods

Both in respect of the liability for loss and damage and the indemnity for claims etc imposed by clause 18, the damage or claim etc, must arise in connection with the goods as identified in the clause. This requires some causal connection[920] between the dealing with or handling of the goods and the damage or claim. When considering the level of connection, the courts have, on occasion, required there to be a direct causal connection. More usually and, it is submitted, more likely in respect of this clause, the courts will consider the requirement to be satisfied even if the dealing or handling of the goods is not a direct cause, although the connection will have to be more than the mere fact that the event producing the loss took place in the context of dealing with or handling such goods.[921] In *Total Transport Corp* v. *Arcadia Petroleum Ltd (The Eurus)*[922] it was suggested that, where an indemnity clause "tracks" a contractual obligation,[923] it is subject to the same rules of remoteness as damages for breach of contract. This was said in the context of a clause in a charterparty which did not expressly provide for an indemnity. In the Court of Appeal[924] Staughton LJ felt[925] that the issue should not be split into two, i.e. is the clause an indemnity clause and is it confined to reasonably foreseeable loss? Rather, he considered it a matter of interpretation of the contract. Does the clause provide that there can be recovery even if the loss suffered was not in the reasonable contemplation of the parties? He pointed out that the word "indemnity" may be used simply in the sense of damages for tort or breach of contract or in the sense of referring to all loss suffered which is attributable to a specified cause, whether or not it was in the reasonable contemplation of the parties. Given the fact that the clause in this case was concerned with only one type of breach of contract while other breaches were left to the common law, in a type of contract which is not generally drafted with the degree of consistency to be expected from skilled lawyers, he came to the view that it was not the intention of the parties to provide that a particular breach of contract by the owners would attract strict liability even for unforeseeable consequences, whilst in the case of other breaches of contract the ordinary rules of remoteness would apply. He could not extract it from the wording and even if it were arguably there he noted that courts are now enjoined to have regard to the purpose and aim of a provision as well as the actual words used.[926] It is submitted that given the special nature of dangerous goods and the distinction drawn in clause 18 itself between liability and indemnity the clause should be

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920. In the absence of some other indication this is likely to be implied: *Bahamas Oil Refining Co* v. *Kristiansands Tankredie A/S & Others The Polyduke* [1978] 1 Lloyd's Rep 211.

921. See *Pickfords Ltd* v. *Perma Products Ltd* (1947) 80 Ll L Rep 513; *London and North Eastern Railway Co* v. *Furness Shipbuilding Co* (1934) 150 LT 382; and *Wright* v. *Tyne Improvement Commissioners* [1968] 1 WLR 336, [1968] 1 Lloyd's Rep 113. Compare *The Carlton* [1931] P. 186, *The Lindenhall* [1945] P 8; *Great Western Railway* v. *James Durnford & Sons Ltd* (1928) 139 LT 145. See also *Smith and Others* v. *South Wales Switchgear Ltd* [1978] 1 WLR 165 especially *per* Lord Fraser at p. 173.

922. [1996] 2 Lloyd's Rep 408.

923. As both cl. 18 and cl. 20 (see 2C.20) appear to do, at least in respect of some obligations.

924. [1998] 1 Lloyd's Rep 351, affirming the decision of Rix J.

925. P. 357.

926. *Investors Compensation Scheme Ltd* v. *West Bromwich Building Society* [1998] 1 WLR 896.

construed as providing for recovery beyond reasonable contemplation in respect of those aspects for which an indemnity is provided.

2C.18.3 Scope of indemnity—personal injury and negligence

2.241 In two further respects there may be doubt about the scope of the indemnity:

(a) it does not expressly cover personal injury in addition to loss or damage. The second part of the clause is wide in scope however, and a similar clause in a previous version of the conditions was said to be wide enough to cover claims for personal injury in *Noble* v. *R.H. Group Ltd and Another.*[927] This was said in light of the equivalent of clause 15[928] with its express reference to the risk to life or health;

(b) there is no express reference to negligence of the forwarder or his servants or subcontractors.[929]

2.242 In respect of the construction of exclusion clauses and whether they cover liability for negligence certain principles were expressed by Lord Greene MR in *Alderslade* v. *Hendon Laundry Ltd*[930] and summarised by Lord Morton of Henryton in *Canada Steamship Lines Ltd* v. *Regem*[931] as follows:

(1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called "the proferens") from the consequence of the negligence of his own servants, effect must be given to that provision.

(2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens.

(3) If the words used are wide enough for the above purpose, the court must then consider whether the head of damage may be based on some ground other than that of negligence. The "other ground" must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are *prima facie* wide enough to cover negligence on the part of his servants.

If these are applied[932] there would appear to be plenty of scope for the indemnity to apply to heads of damage other than negligence of the forwarder. Consequently

927. CA, 5 February 1993, unreported.

928. See 2.203.

929. *Cf* cl. 20(C) below, 2.250.

930. [1945] KB 189 at p. 192.

931. [1952] AC 192 at p. 208. See further, Treitel, pp. 257–8, 7–034—035, Carter, " 'Commercial' Construction and the Canada SS Rules" (1995) 9 JCL 69.

932. They clearly have application to indemnity clauses as well as exception clauses (as in *Canada SS*). See the explanation given by Viscount Dilhorne in *Smith*, (fn. 921, above, at p. 167) and see further *E.E. Caledonia Ltd* v. *Orbit Valve Co Europe* [1994] 2 Lloyd's Rep 239. *Cf*, in the more limited context of carriage by sea and the application of the Hague-Visby Rules, *Mediterranean Freight Services* v. *B.P. Oil International Ltd (The Fiona)* [1994] 2 Lloyd's Rep 506. It should be borne in mind that they are guidance rather than a code, *HIH Casualty & General Insurance Ltd* v. *Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, at para. 11. See further their application in *Onego Shipping &*

where negligence of the forwarder or his servants, etc, constitutes the direct cause of the loss, damage or claim etc, it may be arguable that the indemnity is not applicable. The fact of carriage of dangerous goods gives ample scope for the liability of the forwarder towards third parties regardless of whether or not the forwarder is negligent directly or vicariously and without being too fanciful to be outside the contemplation of the parties,[933] an example being the liability of the forwarder to a carrier under the implied warranty of fitness.

The use of the word "whatsoever" may be treated simply as a word of emphasis 2.243
and by no means as an express reference to negligence.[934] On the other hand, whilst it is the case that these principles must be considered and it is not permissible to take at the outset a broad approach to the clause as a simple matter of business intention,[935] it must be remembered that they are aids to construction and not to be interpreted as if they were words in a statute.[936] Furthermore, the words of the clause must be interpreted in light of the immediate context, the subject matter of the contract and in light of the contract considered as a whole.[937] Given that the indemnity arises in the context of, in effect, a prohibition on the carriage of such goods without a special arrangement having been made and enhanced by the fact that the indemnity applies whether the goods are declared or not and so may be said to throw the risks of carriage of such goods upon the customer, it may be thought that there is a clear intention to deny any duty of care arising in relation to them and to throw thereby the whole risk of claims arising from dealing with them on to the customer. This must be set against the fact that other clauses cover negligence more clearly and that there is a clear acceptance of a duty of care in clause 23. It should be noted that if the clause is, in fact, effective to impose an obligation on the customer to make special arrangements, so that by causing the forwarder to deal with the goods he is thereby in breach of contract, then the issue of negligence will be relevant rather to the question whether, as a matter of causation, the loss or damage, etc, can be said to flow from the breach.

2C.19 CUSTOMER OBLIGATIONS—PROMISE NOT TO SUE

BIFA 2005A, clause 19 2.244

19. The Customer undertakes that no claim shall be made against any director, servant, or employee of the Company which imposes, or attempts to impose, upon them any liability in connection with any services which are the subject of these conditions, and, if any such claim should nevertheless be made, to indemnify the Company against all consequences thereof.

Chartering BV v. *JSC Arcadia Shipping (The Socol 3)* [2010] EWHC 777 (Comm), [2010] 2 Lloyd's Rep 221.

933. *Lamport & Holt Lines Ltd* v. *Coubro & Scrutton (M. & I.) Ltd (The Raphael)* [1982] 2 Lloyd's Rep 42.

934. See *per* Lord Fraser in *Smith*, fn. 921 above, at p. 173.

935. Lord Maxwell in *Clark* v. *Sir William Arrol & Co Ltd*, 1974 SLT 90 at p. 92. *Cf* Romer LJ in *James Archdale & Co Ltd* v. *Comservices Ltd* [1954] 1 WLR 459 at p. 463.

936. Viscount Dilhorne in *Smith*, fn. 921 above at p. 168.

937. Lord Cameron, *Evans* v. *Glasgow District Council* 1979 SLT 270 at p. 275. See also Richards J in *Blake* v. *Richards & Wallington Industries Ltd* (1974) 16 KIR 151.

2C.19.1 Clauses used to protect servants, etc

2.245 Forwarders and carriers employ a variety of clauses designed to manage claims brought by customers against other persons in a relation with them such as servants, agents and subcontractors. Among the reasons for this is a desire to prevent the protection built into the conditions being negated by indirect action which may ultimately rebound on them. The clauses used may have the effect of excluding any possible recovery against such persons or of keeping such recovery either within the bounds set by the contractor's conditions or without disturbing the balance created by it. Three types of clauses are commonly in use for these purposes. The first is an undertaking that no claim will be made against certain persons as is illustrated by clause 19 of BIFA 2005A and where expressed in these blanket terms is clearly designed to have the first effect.[938] Implicit within this is a promise by the customer not to sue. A second type of clause, which in common law jurisdictions is known as a Himalaya clause, provides for the persons indicated to have the benefit of the contractor's conditions. On the face of them these appear to have the more limited effect of keeping the recovery within the bounds set by the conditions thus providing for a limited recovery against the relevant person although it is possible for them to be worded in such a way as to exclude recovery at least as an alternative.[939] A third possibility is the use of an indemnity. This may be expressed in terms requiring any excess recovery over the liability provided under the conditions to be indemnified.[940] Since the contractor will often have a matching liability to indemnify another person, such as a subcontractor in case that subcontractor is sued by the first contractor's customer, this scheme of protection is often identified as a scheme of circular indemnities. The first type of clause may (and will normally) also be coupled with an indemnity.

2.246 The need to build in such protection assumes that the customer is in a position to sue the person who is employed by the forwarder or carrier. This will mean, normally, that the customer will seek to establish a liability in tort or bailment. In the case of loss or damage to goods caused directly by the relevant person a personal liability, in addition to that of his employer or contractor, may not be difficult to establish. More difficulty may be encountered in respect of other tortious liability such as that for misstatement. In such a case there may be a need to establish an assumption of personal responsibility separate from the liability of the employing company as demonstrated in *Williams* v. *Natural Life Health Foods Ltd.*[941]

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938. This seems more usual but the undertaking could be a more limited one not to bring a claim in excess of the company's liability, *cf* Freightliner Conditions, cl. 4(c). See 4B.4.

939. See the Himalaya clause considered in *The Starsin* [2003] UKHL 12, [2003] 2 WLR 711and see further 2.247 below. *Cf* also cl. 4 of the DAMCO BL, which attaches a Himalaya provision to an undertaking that no claim will be brought against persons indicated. See further especially cl. 4.2(b)(i) of the Maersk Line Multimodal Transport BL, which provides expressly that "The Subcontractor, agent or servant shall also be entitled to enforce the foregoing covenant against the Merchant;" in addition to more general Himalaya protection.

940. See cl. 20(C) BIFA 2005A, 2.250.

941. [1998] 1 WLR 830 (HL), and S. Todd, "Liability of Agents in Tort" (1998) 14 *Professional Negligence* 136.

2C.19.2 Undertakings not to sue

2.247 The undertaking given by BIFA clause 19 is expressed in typically wide terms and would appear to be intended both to place an obligation on the customer not to sue the persons indicated and to ensure that claims against them are not brought by others. Failure to comply with the clause constitutes a breach of contract although the liability is also coupled with an indemnity. It is somewhat limited in being confined to directors, servants and employees of the forwarding company. Clause 17 of Geologistics GTC is similar but also draws in any of its parent, subsidiary or associated companies unless brought into a direct contract by the forwarder acting as a forwarding agent.[942] TT CLUB 400, clause 16(D)(i) is in wider terms and requires the undertaking in respect of servants, subcontractors and agents of the company.[943] This type of clause must be distinguished from the immunity provided in some forms of Himalaya clause which provide that it is expressly agreed that no servant, agent or independent contractor of the carrier will be under any liability. In *The Starsin* such a sub-clause was regarded in the House of Lords as an exclusion clause and a promise not to sue cannot be extracted from it.[944] In contrast in *Deepak Fertilisers and Petrochemicals Corp* v. *ICI Chemicals & Polymers Ltd*[945] an indemnity clause which included in its terms both the contractor and the relevant third party was construed as an implied term not to sue the third party and was enforceable by the contractor.

2.248 Should the customer make a claim in breach of the undertaking there is a right *prima facie* for the forwarder to apply to a court for a stay of action under section 49(3) of the Senior Courts Act 1981 and to seek to persuade it to exercise its discretion in favour of a stay.[946] To do so the forwarder must show that he has some interest of his own to protect.[947] This can be shown by establishing that the forwarder will himself be faced with a liability to the person who is subject to the

942. *Cf* DAMCO STC, cl. 29(b)(i). In *Enviroco Ltd* v. *Farstad Supply A/S (The Far Service)* [2009] EWCA Civ 1399, [2010] 2 Lloyd's Rep 375, where a company ceased to be an "affiliate"where the holding company had pledged its shares to a bank.

943. *Cf* TT CLUB 100, cl. 5.

944. [2003] UKHL 12, [2003] 2 WLR 711, in contrast to the view taken in the lower courts, see e.g. Lord Bingham of Cornhill, para. 24. Contrast the clause considered in *Whitesea Shipping and Trading Corp* v. *El Paso Rio Clara Ltda (The Marielle Bolten)* [2009] EWHC 2552 (Comm), [2010] 1 Lloyd's Rep 648 where, as is commonly the case in bills of lading there was firstly an undertaking not to sue various third parties and then a Himalaya clause giving them "the benefit of all provisions herein benefiting the carrier as if such provisions were expressly for their benefit, and all limitations of and exonerations from liability provided to the carrier by law and by the terms hereof shall be available to them", Flaux J rejected the view that the promise not to sue was void under Art. III , r. 8 of the Hague Rules. The promise inured only for the benefit of the contracting party and not the identified third parties. The effect of the Himalaya clause was not to give the third parties direct rights under the undertaking. Furthermore, unlike in *The Starsin* the effect of enforcing the clause would not be a breach of Art. III, r. 8 because, unlike in that case, there was no clause "deeming" the third parties to be parties to the bill of lading nor did they perform the sea carriage.

945. [1999] 1 Lloyd's Rep 387.

946. As an alternative to other relief such as an injunction.

947. In *Deepak Fertilisers and Petrochemicals Corp* v. *ICI Chemicals & Polymers Ltd* [1999] 1 Lloyd's Rep 387, at p. 401, the Court of Appeal regarded the basis for the restraint or stay to be that of equitable fraud and noted that the interest had been expressed in the following ways: "some other good reason", "the real possibility of prejudice" and "some legal and equitable right to protect such as an obligation to indemnify the defendant".

action.[948] That is, unless the claimant can establish a triable issue that the claim is independent of the contract with the applicant for the stay.[949] In the *Elbe Maru*,[950] the applicant was able to point to an express agreement to indemnify the subcontractor who was being sued. Presumably an implied obligation to do so would be sufficient as also a right of contribution under the Civil Liability (Contribution) Act 1978. No obligation could be implied in favour of a servant or director in view of the fact that their liability is likely to have arisen due to their own negligence or breach of contract towards their employer or company.[951] It may be possible, however, for sufficient prejudice to be established by the fact that the applicant feels a moral or other obligation or a wish to stand by its employee etc, and to compensate the latter's liability. Some support for a wider basis may, perhaps, be obtained from *Snelling* v. *John G. Snelling*[952] which has been said to be within the spirit of *Beswick* v. *Beswick*.[953] In *Deepak Fertilisers*,[954] however, it was thought that in commercial cases it is likely that the applicant will not establish that he has a sufficient interest unless it is a substantial one. This does not mean that the applicant must establish conclusively that it will definitely incur a liability to the defendant. For the Court of Appeal in *Deepak Fertilisers* the fact that a claim for an indemnity (initiated by a third party notice) had been made demonstrated a sufficient interest unless the claim is obviously bad following Rix J in the lower court who thought that there was a serious issue to be tried and went on to observe that:[955] "If there is a promise not to sue, and a sufficient interest to justify the promisee in taking steps to vindicate the promise, it does not seem to me to matter that it might turn out to be the case at the end of the day that the plaintiff's breach of his promise has not harmed the promisee. It may be otherwise, however, where it is perfectly obvious at the stage of an application to stay, that the promisee can suffer no prejudice at all from breach of the promise".

2.249 Ackner J pointed out in the *Elbe Maru*,[956] that the reference to an indemnity in a clause such as this "is merely providing in express terms for the remedy which should follow if there is a breach of the undertaking, a breach of contract". This was in answer to an argument that the existence of the indemnity was in itself the remedy

948. *Nippon Yusen Kaisha* v. *International Import and Export Co Ltd* (*The Elbe Maru*) [1978] 1 Lloyd's Rep 206, applying *Gore* v. *Van der Lann* [1967] 2 QB 31. See also *Whitesea Shipping and Trading Corp* v. *El Paso Rio Clara Ltda (The Marielle Bolten)* [2009] EWHC 2552 (Comm), [2010] 1 Lloyd's Rep 648.

949. *Neptune Orient Lines Ltd* v. *J.V.C. (UK) Ltd* (*The Chevalier Roze*) [1983] 2 Lloyd's Rep 438.

950. Fn. 948, above.

951. The implied indemnity moving the other way: *Lister* v. *Romford Ice & Cold Storage Co Ltd* [1957] AC 555.

952. [1973] 1 QB 87. Criticism is made of the case in Yates and Hawkins, para. 8F(1) and (2) on the basis that it did not appear that there was any potential circuity of action notwithstanding that this was the ground for the decision. It is not entirely clear that this was the ground for the decision. Any "circuity" may be seen merely in the assumption that there is a right to enforce the promise thus rendering the action against the defendant nugatory.

953. [1968] AC 58, see *Treitel*, p. 639, 14–038.

954. See above 2.247.

955. [1998] 2 Lloyd's Rep 139 at p. 166. *Cf P.S. Chellaram & Co Ltd* v. *China Ocean Shipping Co*, [1989] 1 Lloyd's Rep 413 at p. 430 (Australia, Sup Ct NSW) where a defence of circuity of action failed since the assumption of liability was not litigated before the judge.

956. Fn. 948 above, at p. 210.

available to the applicant as opposed to the exercise of a stay. The learned judge also indicated that the indemnity probably carries the advantage that it would provide the applicants with an indemnity against the costs properly incurred by them in dealing with any claim which was made following the breach of contract.[957]

2C.20 CUSTOMER OBLIGATIONS—GENERAL INDEMNITIES

BIFA 2005A, clause 20[958] 2.250

20. The Customer shall save harmless[959] and keep the Company indemnified from and against:—
(A) all liability,[960] loss, damage, costs and expenses[961] whatsoever (including, without prejudice to the generality of the foregoing, all duties, taxes, imposts, levies, deposits and outlays of whatsoever nature levied by any authority in relation to the Goods) arising out of the Company acting in accordance with the Customer's instructions, or arising from any breach by the Customer of any warranty contained in these conditions, or from the negligence of the Customer, and
(B) without derogation from sub-clause (A) above, any liability assumed, or incurred by the Company when, by reason of carrying out the Customer's instructions, the Company has become liable[962] to any other party, and
(C) all claims, costs and demands whatsoever[963] and by whomsoever made or preferred, in excess of the liability of the Company under the terms of these conditions, regardless of whether such claims, costs, and/or demands arise from, or in connection with, the breach of contract, negligence[964] or breach of duty of the Company, its servants, sub-contractors or agents, and
(D) any claims of a general average nature which may be made on the Company.[965]

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957. See, however, *P.S. Chellaram* fn. 955 at p. 429 for the difficulties in the way of a counterclaim based on this indemnity.

958. See also Geologistics GTC, cl. 18 which is in the same terms as the equivalent clause of the 1981 edition (cl. 22) of the IFF Conditions, and which encapsulates the indemnities into a single clause rather than separate them into sub-clauses as does the BIFA clause and TT CLUB 400, cl. 16. See also DAMCO STC, cl. 20(a), DHL Express, cl. 15. In bills of lading there is commonly a merchant's responsibility clause bringing together (or linked to) undertakings of the customer and indemnities arising in relation to the goods, see e.g. TT CLUB 100, cl. 7, DAMCO BL, cl. 15, Maersk terms and conditions cl. 15.

959. The words "save harmless" are considered at 2.252.

960. The word "liability" is considered at 2.254.

961. The word "expenses" is considered at 2.253.

962. Theword "reasonably" before the words "become liable" has been excised since BIFA 2000, as also have the words "or may become liable".

963. Despite such wide words the scope is not unlimited. It appears from *Boughen* v. *Frederick Attwood Ltd and Cryoplants Ltd* [1978] 1 Lloyd's Rep 413 that the clause does not regulate the liability of a carrier for injury caused to his employee. In *Shell Chemicals UK Ltd* v. *P&O Roadtanks Ltd* [1995] 1 Lloyd's Rep 297 a similar clause did not regulate liability for damage caused by delivery of the wrong goods. The likely role of the clause as part of a scheme of circular indemnity is considered below at 2C.205.

964. Since this sub-clause expressly includes liability for negligence, whether directly or vicariously established, it is unnecessary to consider the heads of liability rule, see 2.242, *cf Gillespie Brothers & Co Ltd* v. *Roy Bowles Transport Ltd* [1973] 1 QB 400.

965. This covers those circumstances where a forwarder is made liable for general average whether as shipper, *Walford* v. *Galindez* (1897) 2 Com Cas 137, or as consignee, e.g. *Scaife* v. *Tobin* (1897) 3 B&A 523, see generally Scrutton, Art. 147. See also cl. 22 which requires the customer to provide security to the forwarder where a liability for general average arises, which clause applies whether the forwarder is being held to a claim or the customer.

2C.20.1 Scope of general indemnities and effect of particular words

2.251 The sub-clauses in clause 20 of BIFA 2005A move from the general to the particular. They provide for protection that, on the one hand, may look outward in the sense of protecting the forwarder from claims and expenses arising from activity in which the forwarder is engaged on behalf of the customer. On the other hand, it may look inward in the sense of seeking to preserve the balance of interest between the customer and forwarder created by the conditions.[966] The extent to which they add to the forwarder's rights at common law is discussed below. One function of the clause which illustrates the first aspect of protection is the provision of an indemnity through sub-clause (A) for those charges and expenses which are not already in the express or implied contemplation of the parties as payable under the contract. Where the forwarder is contracting as a principal for a package of services for an agreed price, it may not be possible to see an additional expense incurred by the forwarder as being at the risk of the customer and not included in the price. On the other hand, where a forwarder, acting as an agent, has quoted a rate of freight, it may be easier to see an increase of the rate as being at the risk of the customer and subject to an indemnity unless the forwarder is considered to have given a guarantee as in *Harlow and Jones* v. *P.J. Walker Shipping and Transport*.[967]

2.252 The words "save harmless and keep the Company indemnified" are apt words to provide an indemnity in respect of third party claims.[968] Whilst the remaining parts of the clause appear apt to cover reimbursement of moneys paid by the forwarder, and amounts claimable in respect of liability which will be discussed below, the words may not be apt to cover party-to-party claims. This may be so unless the words "loss" and "damage" in sub-clause (A) are considered sufficient to expand the sense that might normally be associated with the earlier words so as to include either a claim made by the customer in respect of loss or damage to his own goods or a claim made by the forwarder to cover damage to his equipment etc.[969] In *Farstad Supply A/S* v. *Enviroco Ltd (The Far Service)*[970] the Supreme Court acknowledged that much depends on the context and that the words "defend, indemnify and hold harmless" can be wide enough to exclude liability for loss. In that case the clause continued to provide cover from and against any and all claims, demand, liabilities, and causes of action and was held sufficient to exclude party to party claims as well as third party claims. Geologistics GTC, clause 18 and previous editions of the IFF Conditions, e.g. clause 22 of the 1981 edition, referred to "damages (including physical damage)" which might give more impetus to the idea that they should be taken as covering damage caused directly to the forwarder, although they might equally well refer to physical damage caused to third parties. It

966. *Cf* the disinction between a prevent loss indemnity and a redress loss indemnity made by R Zakrzewski "The Nature of a Claim on an Indemnity" (2006) 22 JCL 54. See further W. Courtney, "The Nature of Contractual Indemnities" (2011) 27 JCL 1.

967. [1986] 2 Lloyd's Rep 141.

968. *The Carlton* [1931] P. 186 *per* Bateson J at p. 195.

969. See, however, *Airline Engineering Ltd* v. *Intercon Cattle Meat Ltd*, CA, 24 January 1983, unreported, but *cf Deepak Fertilisers and Petrochemicals Corp* v. *ICI Chemicals & Polymers Ltd* [1999] 1 Lloyd's Rep 387. See further *Great Western Railway* v. *James Durnford* (1928) 139 LT 145 (*cf A.E. Farr Ltd* v. *Admiralty* [1953] 1 WLR 965, *James Archdale & Co Ltd* v. *Comservices Ltd* [1954] 1 WLR 459).

970. [2010] UKSC 18 (Scotland), [2010] 2 Lloyd's Rep 387.

would seem at least arguable that the words could not be treated as an exclusion of liability given the existence of the general exclusion of liability in clause 24.[971]

2.253 In respect of "expenses" it was held in *Chandris* v. *Union of India*,[972] a case where charterers agreed to pay "expense incurred by the shipowners", that this covered out of pocket expenses but not loss of time or loss of profits. In *Kala Ltd* v. *International Freight Services (UK) Ltd*,[973] the right of the forwarder to pass on charges for customs documentation was recognised.

2.254 In respect of "liability" provided for in sub-clauses (A) and (B) of the clause, the view taken by McNair J in *Bosma* v. *Larsen*[974] may mean that the right to obtain an indemnity, and the cause of action in respect of it, may arise from the incurring of the liability rather than the ascertainment of it.[975] This can be contrasted with the view taken by Swanick J in *County & District Properties Ltd* v. *C. Jenner & Sons Ltd*.[976] In *Gromal (UK) Ltd (in liquidation)* v. *W.T. Shipping Ltd*,[977] it was accepted that this decision and the decision of Dillon J in *Green Silly Weir Ltd* v. *British Railways Board*,[978] in respect of the possible application of the equivalent clause of an earlier edition of the IFF Conditions, "might have presented formidable obstacles to any argument that the provisions . . . (being strictly in the nature of an indemnity) had given rise to any cause of action . . . before the liability (if any) . . . had been both established and ascertained".[979] This view may well produce considerable difficulty when seeking to construe the second part of sub-clause (B) which refers to some potential future liability which by definition cannot be established and ascertained when the protection of the provision is invoked.[980] If this wording does permit the forwarder to seek protection against a potential liability it may be possible to capitalise it if estimable: *Stoomvaart Maatschappij "Zeeland"* v. *Horlock*.[981]

2.255 On the other hand the intention behind the wording may well be simply to provide cover for a liability arising from the forwarder carrying out the instructions of the customer but becoming established only after the forwarder is *functus officio*. In that case, as in the case of a more direct liability, the liability will need to be established and ascertained before the indemnity can operate. It has been suggested that the word "loss" in this context may be insufficient to cover the settlement of a

971. *Airline Engineering*, above, fn. 969, above. See, however *Deepak*, above, fn. 969 at p. 397, and note the warning given by Staughton LJ in *The Eurus* [1998] 1 Lloyd's Rep 351 at p. 357 that the presumption against surplusage is of little value in the interpretation of commercial contracts (see also the comments of Lord Hoffmann in *The Starsin*, above fn. 944 at para. 112).

972. [1956] 1 WLR 147. *Cf Western Credit Ltd* v. *Alberry* [1964] 1 WLR 945, in respect of the meaning of "loss".

973. QBD, 7 June 1988. See further below, 2.263.

974. [1966] 1 Lloyd's Rep 22.

975. See above, 2.238.

976. [1976] 2 Lloyd's Rep 728.

977. CA, 13 July 1984.

978. [1985] 1 All ER 237, [1985] 17 BLR 94.

979. *Cf The Catherine Helen* [1998] 2 Lloyd's Rep 511.

980. Compare where the cause of action is based on a breach of warranty or misrepresentation, see *Gromal*, above, fn. 977.

981. (1929) 33 Ll L Rep 319.

claim to cover a potential liability, unless liability has been or can be established.[982] If so, it may be doubted that such settlement could be brought within any of the other words in the clause,[983] although following *The Elbe Maru*,[984] it seems that the costs of handling a claim would be recoverable. Such a claim for costs may also have to be qualified by the need to show that liability can be established. Even if a wider view can be taken of the clause so as to include costs of dealing with claims which fail or are settled without liability being fully established, it will still be necessary to find the requisite connection between the claim and the carrying out of the customer's instructions etc.[985]

2C.20.2 Need for notice of claim?

2.256 Where a claim is made against the forwarder and he compromises it or incurs costs in handling it, the question could arise as to whether the forwarder must give notice of the claim to the customer and the consequences of doing so or failing to do so. In *Ben Shipping Co (Pte) Ltd* v. *An-Board Bainne*, (*The C. Joyce*)[986] it was claimed that there was a principle of law[987] that if the indemnifier is put on notice and refuses to act he will, in general, be estopped from denying the validity of the judgment or the reasonableness of the compromise, and it will be difficult for him to show that any costs incurred in the proceedings were improperly incurred. Conversely, if notice is not given, or the indemnifier is not joined as a third party, it will be open to him to impugn the judgment or the compromise. Bingham J[988] rejected this as a rule of law as opposed to a common sense tactical practice. Bingham J was emphatic in respect of the case in hand, which concerned an implied indemnity, whereas the authorities cited were focused on an express indemnity.[989] He did consider[990] that the authorities may support a much more limited principle, although he did not state what that principle should be or whether it was confined to an express indemnity. In respect of the difficulty of challenging liability for costs and in particular the reasonableness of defending the claim, see *The Milwall.*[991] Quite possibly any "rule" as such may operate as a presumption so as to place an onus of showing reasonableness or unreasonableness depending upon whether or not notice has been given.

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982. *Per* Steyn J, *Hancock Shipping Co Ltd* v. *Deacon & Trysail (Private) Ltd (The Caspar Trader)* [1991] 1 Lloyd's Rep 550 at p. 552; *cf* Mocatta J in *The White Rose* [1969] 1 WLR 1098, [1969] 2 Lloyd's Rep 52 at p. 1109 and p. 60.

983. Given the wording of the clause in *The Caspar Trader*, see previous footnote.

984. [1978] 1 Lloyd's Rep 206.

985. See *Richardson* v. *Buckinghamshire County Council*, *Sidney Green (Civil Engineering) Ltd*, *and Roads Reconstruction (Contracting) Ltd* [1971] 1 Lloyd's Rep 533. Some causal connection will need to be established, see the discussion at 2.240 above.

986. [1986] 2 Lloyd's Rep 285.

987. Indicated in Halsbury's *Laws* (4th edn), vol. 20, para. 313.

988. At p. 293.

989. *Duffield* v. *Scott* (1789) 3 Term Rep 374, *Smith* v. *Compton* (1832) 3 B&Ad 407, *Jones* v. *Williams*, (1841) 7 M. & W. 493, and the important *dicta* of Mellish J in *Parker* v. *Lewis* (1873) LR 8 Ch. App. 1035 at pp. 1059–1060.

990. At p. 293.

991. [1905] P. 155. See also *Tatem Steam Navigation Co Ltd* v. *Great Western Railway Co & South Wales Siemens Steel Association (Third Parties)* (1942) 73 Ll L Rep 89.

2C.20.3 Covering liability for negligence?

2.257 In respect of sub-clauses (A) and (B) it appears to be the intention that the indemnity provided for is not meant to cover circumstances where the liability etc, arises by reason of the forwarder's own negligence, in light of the fact that there is an express extension to cover such negligence in sub-clause (C).[992] Furthermore, the equivalent general indemnity clause in previous editions of the IFF Conditions expressly covered the negligence of the forwarder.[993] Thus if, for example, the forwarder were to fail to follow instructions to clear goods through customs at a particular time and by reason of this was required to pay a higher rate of duty, he could not recover the excess by means of the indemnity.[994] In *Noble* v. *R.H. Group Ltd and Another*,[995] a clause in the same terms as clause 22 of the IFF Conditions 1981 edition was held wide enough to cover the liability of a road haulier to his own employee injured in the course of unloading the customer's goods, the accident being due to the haulier's negligence. Neither sub-clause (A) nor (B) will be effective in such circumstances if the liability to the employee arises as a consequence of the forwarder's negligence. Furthermore, both these sub-clauses are formulated in narrower terms than clause 22 in respect of the connecting circumstances which in clause 22 were to be ". . . suffered or incurred by the Company in the performance of their obligations . . .". Sub-clause (C) is not available to cover similar circumstances since the sub-clause only regulates the carriage of goods and the rights and liabilities arising out of that carriage.[996] In *Shell Chemicals UK Ltd* v. *P & O Roadtanks Ltd*,[997] the Court of Appeal held that the same principle applies where the indemnity sought under such a clause is in respect of liability arising from the damage caused by delivery of the wrong goods by a road carrier as opposed to the goods which were the object of the contract of carriage.

2C.20.4 How far is protection extended beyond common law?

2.258 It may be helpful to determine the extent to which the indemnity in sub-clauses (A) and (B) is likely to extend the protection available under an implied indemnity at common law in relation to carrying out instructions.[998] Since both sub-clauses require a connection with the carrying out of the customer's instructions[999] and since by clause 23 the company is required to perform its duties with reasonable care and skill, it might seem that the indemnity does little more than confirm the

992. *Cf E.E. Caledonia Ltd* v. *Orbit Valve Co Europe* [1994] 2 Lloyd's Rep 239.
993. E.g. 1981 edn, cl. 22.
994. *Cf* Hill, p. 277, and note the kinds of circumstances which occurred in *Commonwealth Portland Cement Co Ltd* v. *Weber, Lohmann & Co Ltd* [1905] AC 66, *London Calais Shipping Co Ltd* v. *J. & B. Harding Ltd* (1924) 18 Ll L Rep 272, and *World Transport Agency Ltd* v. *Royte (England) Ltd* [1957] 1 Lloyd's Rep 381.
995. CA, 5 February 1993, unreported.
996. *Boughen* v. *Frederick Attwood Ltd and Cryoplants Ltd* [1978] 1 Lloyd's Rep 413.
997. [1995] 1 Lloyd's Rep 297.
998. See generally *Bowstead and Reynolds*, Art. 62, *cf F.H. Bertling* v. *Tube Developments Ltd* [1999] 2 Lloyd's Rep 55 (Scotland, Court of Sessions, Commercial Court).
999. Which will mean that some causal connection will be required, see 2.240 above, although it should be noted that sub-cl. (A) is expressed in wider terms than sub-cl. (B).

implied indemnity that will arise from an agent acting reasonably in accordance with his authority. Thus, where a payment is required by a statutory body before goods can be exported as instructed, this will be recoverable.[1000] Furthermore, a forwarder may recover the costs of the premium to insure his liability under a bond which he has been required to provide to customs authorities.[1001] Similarly, where the forwarder acts reasonably in storing goods in the event of delay in transport, he can recover the storage charges.[1002] Nevertheless if a wide discretion is given to the forwarder of the type provided by clause 7 of BIFA 1989,[1003] this may justify the forwarder in taking action which involves added expense without necessarily having to show its reasonableness provided that it bears some relation to his obligations in carrying out instructions and is not necessitated by negligence.

2.259 It would seem possible also for the forwarder to pass on an increase in freight or charges not contemplated at the time the contract was made, provided that any quotation given by the forwarder was not taken as a guarantee and that the increase was not occasioned by the forwarder's negligence, both under common law[1004] and under the clause. Previous editions of the IFF Conditions, such as clause 7 of the 1981 edition,[1005] provided that "Quotations are given on the basis of immediate acceptance and subject to the right of withdrawal or revision. If any changes occur in the rates of freight, insurance premiums or other charges applicable to the goods, quotations and charges shall be subject to revision accordingly with or without notice". Hill[1006] pointed out the ambiguity in this clause as to whether it is intended to apply to the period before acceptance by the customer or could be applied after acceptance. If the latter it might justify the forwarder passing on an increased charge, even if the increase is due to the forwarder's negligence or might have been avoided by the exercise of care.[1007]

2.260 Sub-clause (A) separates out two further bases of cause for which indemnity is provided: breach of warranty and negligence of the customer. In these cases, the clause provides an express indemnity where the common law would provide protection via an action for damages.

2.261 Sub-clause (B) provides an important additional protection where the forwarder has become liable to another person. Two circumstances have especial relevance:

(i) is where the forwarder has assumed a personal liability to a third party such as a transport operator. At common law he would need to justify this

1000. *P.S.A. Transport Ltd* v. *Newton Landsdowne & Co Ltd* [1956] 1 Lloyd's Rep 121.

1001. *Club Speciality (Overseas) Inc* v. *United Marine (1939) Ltd* [1971] 1 Lloyd's Rep 482.

1002. *Immediate Transportation Co Ltd* v. *Speller, Willis & Co* (1920) 2 Ll L Rep 645. The forwarder must not include any element of profit in this, see p. 647.

1003. See above, 2.124.

1004. See Hill, p. 246.

1005. *Cf* Geologistics GTC, cl. 4.

1006. P. 246.

1007. Provision for review and increase in charges might be more appropriate in contract logistics where an extensive time-scale might be envisaged, see e.g. DHL Express, cl. 10 which provides for increases made by DHL, *cf* TT CLUB 600, cl. 15.1 which provides that if the LP considers it reasonably necessary, in the light of any new logistics profile or material change in actual flows, the parties will negotiate in good faith to vary the charges.

by showing that the liability is within the forwarder's express or implied authority,[1008] e.g. where it is a custom of the trade for forwarders to undertake personal liability when booking freight space as in *Anglo Overseas Transport Co Ltd* v. *Titan Industrial Corp (UK) Ltd*,[1009] and *Perishables Transport* v. *N. Spyropoulos*.[1010] In *Cory Brothers Shipping Ltd* v. *Baldan Ltd*,[1011] Judge Diamond QC took into account the findings in these two cases adding to the general evidence available at the trial, in coming to the conclusion that there is a usage, in the context of a shipment from Felixstowe to Dar-es-Salaam, that forwarding and shipping agents who book cargo space incur personal liability for the freight. This was decided in favour of a sub-forwarder, who had made the booking, against the principal forwarder who had instructed them to make it. Had it been found that the forwarder had given the instruction "as agents only" this would have been inconsistent with the custom and would have amounted to an exclusion of personal liability.[1012] Alternatively to the finding of usage, the judge found that the principal forwarders, having accepted a quotation that named them as the customer had incurred personal liability.[1013] The equivalent sub-clause in BIFA 2000 made reference to when the company has reasonably become liable, the word reasonable having been excised from the current edition. The removal of this word may do little to extend the clause much beyond the protection at common law since any "unreasonable" adoption of liability would most probably amount to a breach of duty anyhow. However, this may be useful in ensuring that the burden of proof is on the customer.

(ii) is a more difficult situation and arises where the forwarder incurs a liability in conversion or breach of contract to, for example, the owner of the goods, by delivering the goods to[1014] the customer or to another principal who has a right of lien or stoppage which has been defeated by the act of the forwarder in delivering the goods to his customer. At common law there is said to be a principle that when an act is done under the express directions of the defendant which occasions an injury to the rights of third persons, and provided such act is not manifestly illegal, but is done honestly and *bona fide* in compliance with the direction, the defendant is

1008. *Cf Hair and Skin Trading Co Ltd* v. *Norman Airfreight Carriers Ltd and World Transport Agencies* [1974] 1 Lloyd's Rep 443.

1009. [1959] 2 Lloyd's Rep 152.

1010. [1964] 2 Lloyd's Rep 152.

1011. [1997] 2 Lloyd's Rep 58 (CLCC Bus. List).

1012. See, however, Bugden p. 69, 3–09, who argues that since the custom is one as to the agent's personal liability use of these words is arguably insufficient. A disclaimer "without any personal liability whatsoever on our part" or words to the same effect would be less ambiguous.

1013. *Cf The Santa Carina* [1977] 1 Lloyd's Rep 478.

1014. Or enabling goods to be obtained by, see *Brown, McFarlane* v. *Shaw Lovell* (1921) 7 Ll L Rep 36.

obliged to indemnify the plaintiff against the consequences.[1015] It is not always possible, however, to imply an indemnity merely from the request to act,[1016] and it is necessary to go further and consider what was meant by the request.[1017] Even in an agency context, the liability and payment to the owner of the goods which arises as a consequence of delivering the goods to the customer may well be considered outside the scope of the agency with the customer and so not subject to an implied indemnity as in *J. O. Lund Ltd* v. *Anglo Overseas Transport Co Ltd.*[1018] It will be possible, however, to establish liability on an implied contract based on a warranty where the forwarder is given an assurance by the customer that he is safe in releasing the goods to him.[1019] In these situations it would seem likely that the indemnity provided in sub-clause (B) could protect the forwarder unless a strict view is taken of the words "by reason of . . . the instruction" so that a direct causal link is required. Thus if, as in *Lund*, above, liability to the third party arises because the forwarder has voluntarily accepted a relationship with that party, it may be argued that the liability is not incurred by reason of the instruction. Furthermore, it might be argued that the liability arises before the forwarder obeys the instruction of the customer. However, the liability in fact arises after or at the time that the forwarder obeys the customer's instruction, since it is by obeying the instruction that he breaches the prior obligation, although on a "common sense analysis",[1020] the prior relationship might well be thought to be the dominant cause, given the fact that liability arising from the acceptance of an instruction from another customer would normally be foreseeable. Even if use of the word "reasonably" used in BIFA 2000 could suggest that a wider causal base is possible it is hard to see how a liability can be "reasonably" accepted when it arises from an obligation assumed prior to the performance of the instruction. Nevertheless, apart from these considerations, it was accepted in *Gromal*,[1021] that an indemnity against liability etc, in that case, which was expressed to apply when the liability etc, was " . . . suffered or incurred by the Company in the performance of their obligations under any contract to which these conditions apply"

1015. *A/S Hansen-Tangens Rederi III* v. *Total Transport Corp (The Sagona)* [1984] 1 Lloyd's Rep 194 at p. 205, referring to *Strathlorne Steamship Co Ltd* v. *Andrew Weir & Co* (1934) 50 Ll L Rep 185, applying the principle stated in *Dugdale* v. *Lovering* (1875) LR 10 CP 196 at p. 200. See also *Sheffield Corp* v. *Barclay* [1905] AC 392. Note, however, that in *Yeung Kai Yung* v. *Hong Kong and Shanghai Banking Corp* [1981] AC 787 (PC), it was suggested, at p. 799, that the implication of an indemnity from a request acted on by the party requested may have to be reviewed in light of the Civil Liability (Contribution) Act 1978.

1016. See *Donald Stewart & Co* v. *John Lofthouse & Co et al.* (1921) 9 Ll L Rep 386.

1017. *Naviera Mogor SA* v. *Société Metallurgique de Normandy (The Nogar Marin)* [1988] 1 Lloyd's Rep 412. In *Triad Shipping Co* v. *Stellar Chartering and Brokerage Ltd (The Island Archon)* [1994] 2 Lloyd's Rep 227, the Court of Appeal confirmed, in the context of a time charterparty, that a promise to indemnify can be implied even where an order is given which a charterer is contractually entitled to give.

1018. [1955] 1 Lloyd's Rep 142.

1019. *Gromal (UK) Ltd (in liquidation)* v. *W.T. Shipping Ltd* fn. 977. As is indicated in this case there may also be liability for negligent misrepresentation.

1020. See Staughton LJ in *The Eurus* [1998] 1 Lloyd's Rep 351, at p. 361.

1021. Fn. 977.

would have been sufficient to give protection to the forwarder, against the consignee, if relied upon.

2.262 Apart from these difficulties, two further restrictions on the effectiveness of sub-clause (B) may be identified. First, the liability must follow from the instruction. Where, as in *Lund*,[1022] the forwarder is instructed by the consignee to clear goods through customs but has not been told to deliver them and he does so by mistake, the delivery may be considered too remote from the instruction to clear and so not within the indemnity. Secondly, there is a more fundamental consideration. Where the forwarder is acting as an agent, whether for a principal forwarder or for a consignor in effecting delivery to the consignee, there may be no contractual nexus between him and the consignee so that the conditions fail to latch on to the relationship in respect of the particular transaction.[1023] Consequently the forwarder must ensure that contractual acts take place sufficient to raise an express indemnity.[1024] The forwarder will not be safe in trusting to an implied indemnity nor is it likely that the courts will construe a contract out of the mere fact that trading conditions have been sent to a consignee, who then requests delivery, when the act of delivery is equally referable to the initial contract with the consignor.[1025] In *Gromal*,[1026] this does not appear to have been considered as a difficulty, in respect of the forwarder's possible reliance on trading conditions when delivering goods to the consignee in contravention of a stop imposed by the consignor. However, the facts in that case were quite sufficient to raise a contractual nexus between the two parties in respect of the release of the goods.

2.263 In *Kala*,[1027] it was held that a similar indemnity in a previous edition of the IFF Conditions[1028] was sufficient to enable the forwarder to recover an indemnity for demurrage paid to a carrier arising by reason of the forwarder exercising a right of lien on the goods against the customer. It should be noted, however, that the indemnity in that case was expressed to cover "all liabilities . . . in connection with the Customer's instructions or their implementation or the goods . . . ". In light of the wording in sub-clauses (A) or (B) it may be arguable that such liability, incurred by reason of the exercise of a right of lien, can be said not to arise out of the company acting in accordance with the customer's instructions or by reason of carrying them out, but rather by reason of the company exercising its rights in respect of the goods. At any rate it was accepted in *Kala* that the indemnity could not cover a claim for demurrage incurred by reason of the wrongful act of the forwarder, for example by the assertion of a right to detain which they did not have at the relevant time nor where there was a mere claim by the carrier for demurrage and not an actual liability. Comparison should also be made with TT CLUB 400, clause 16(E) which provides for the liability of the customer in respect of *inter alia*

1022. Fn. 1018.
1023. *Societa Anonima Angelo Castelletti* v. *Transmaritime Ltd* [1953] 2 Lloyd's Rep 440, *Anglo Overseas Transport Co Ltd* v. *David Zanellotti Ltd* [1952] 1 Lloyd's Rep 232.
1024. See e.g. *Societa Anonima Angelo Castelletti* v. *Transmaritime Ltd*, previous footnote, at p. 452.
1025. *Cf Von Traubenberg* v. *Davies, Turner & Co* [1951] 2 Lloyd's Rep 462.
1026. Fn. 977.
1027. Fn. 973.
1028. Clause 23 of the 1974 Conditions.

detention or demurrage of property (including, but not limited to, containers) caused by the customer or owner etc.

2C.20.5 Circular indemnity

2.264 Sub-clause (C) is an example of an inward looking clause in that its function is to preserve the balance created by the conditions. The forwarder seeks protection from claims made indirectly which might have the effect of taking his liability beyond that contracted for.[1029] The reference to "excess of liability" is mainly, but not necessarily exclusively, directed to providing an indemnity against the forwarder being made liable beyond the limit of liability contained in clause 26.[1030] A particular danger is that if action is taken against a subcontractor this might rebound on the forwarder who may be required under the contract with the subcontractor to provide a similar indemnity. For this reason this type of clause is likely to be regarded as forming part of the scheme of protection known as a "circular indemnity".[1031] Nevertheless, it may be necessary to make this abundantly clear as did clause 22 of the 1981 edition of the IFF Conditions. This contained the additional words "including any liability to indemnify any other person against claims made against such other person by the Customer or by the Owner".[1032] The absence of these words creates the danger that the indemnity will not be considered to extend to such claims as in *Chas. Davis (Metal Brokers) Ltd* v. *Gilyott & Scott Ltd*,[1033] but rather[1034] to claims by owners of the goods with whom they have no contractual relationship.[1035] It may be possible to point to the clear warranty given in clause 3 of the BIFA Conditions[1036] as dealing sufficiently with any claim by the owner of the goods,[1037] thus leaving ample space for a circular indemnity.[1038] The

1029. But it may also be taken to exclude liability since it might make no sense as a contractual provision not to provide also for the preservation of the contractual scheme by preventing a direct claim from the party giving the indemnity, see Lord Mance in *Farstad Supply A/S* v. *Enviroco Ltd (The Far Service)* fn 970, at [57].

1030. 2. see also TT CLUB 400, cl. 16(D)(iii), DAMCO STC, cl. 29(b)(iii), TT CLUB 100, cl. 5(3), DHL Express, cl. 15.3, CIFFA, cl. 16. *Cf*, however, an older provision from cl. 7(D) P&O Nedlloyd STC which provides for a warranty that no claim shall be made by any person, other than in accordance with the conditions, seeking to impose any liability whatever.

1031. See 2.245.

1032. See also Geologistics STC, cl. 18. *Cf* UKWA logistics conditions, cl. 4.3 and UKWA General Conditions, 4.(ii).

1033. [1975] 2 Lloyd's Rep 422.

1034. As stated at p. 429.

1035. It appears, however, that it is inapt to provide a remedy against one customer in respect of a claim by another customer if the definition of "Customer" in cl. 1 (see 2.19) can encompass more than one person, *Shell Chemicals* v. *P&O* [1993] 1 Lloyd's Rep 114 (as affirmed by the CA).

1036. As opposed to the somewhat less clear provision in cl. 3(1) of the RHA Conditions of Carriage 1967, which were the relevant conditions in *Chas. Davis*, which provision was not considered by the court.

1037. See *Sonicare International Ltd* v. *East Anglia Freight Terminal Ltd* [1997] 2 Lloyd's Rep 48 (CLCC Bus. List).

1038. *Cf* DHL Express, cl. 15.5. If this is possible then the indemnity may be effective to negative such decisions as *L. Harris (Harella)* v. *Continental Express and Burns Transit Ltd* [1961] 1 Lloyd's Rep 251, and *Lee Cooper Ltd* v. *C.H. Jeakins & Sons Ltd* [1967] 2 QB 1, [1964] 1 Lloyd's Rep 300, see Yates and Hawkins, para. 8(C)3.

danger did not materialise in *Spectra International plc* v. *Hayesoak Ltd*,[1039] where His Honour Judge Hallgarten considered (*obiter*) that, in light of the use of the word "whatsoever" and that the BIFA 1989 equivalent sub-clause to sub-clause 20(C) was plainly drafted as a "catch all" there was no reason to limit it to claims in respect of the conduct of the carrier or others for whom he is vicariously responsible.[1040] He also considered that, where the claim was made against the subcontractor outside the limitation period in the equivalent clause to sub-clause 27(B) of BIFA 2005A, which was in the same terms,[1041] the freight forwarder is entitled to recover the entirety of any sum which it has had to pay to the subcontractor. The decision in *Chas. Davis*, can also be contrasted with the decision of Bean J in *Hair and Skin Trading* v. *Norman Airfreight Carriers*[1042] where he was prepared to accept an implied right of indemnity on the part of a forwarder as against his customer in respect of the liability of the forwarder to indemnify the road haulier against claims in excess of the road haulier's limit of liability. This appears to be based on the limits on the forwarder's liability in his trading conditions and the fact that the forwarder looked to the customer for his outgoings.[1043]

Where the customer is a consumer the indemnity, whether express or implied, will be subject to the reasonableness test under section 4 of the Unfair Contract Terms Act 1977. Naturally, the effectiveness of the clause will itself be dependent on the effectiveness of the limit of liability to withstand attack.[1044] Furthermore, where the CMR Convention is applicable, the clause is liable to be rendered null and void by the operation of Article 41.[1045] *2.265*

2C.21 CUSTOMER OBLIGATIONS—PAYMENT

BIFA 2005A, clauses 21[1046] and 12(B)[1047] DAMCO STC, clause 35(c) *2.266*

21.(A) The Customer shall pay to the Company in cash, or as otherwise agreed, all sums when due, immediately and without reduction or deferment on account of any claim, counterclaim or set-off.
(B) The Late Payments of Commercial Debts (Interest) Act 1998, as amended, shall apply to all sums due from the Customer.

1039. [1997] 1 Lloyd's Rep 153 (CLCC Bus. List, reversed in part on different grounds [1998] 1 Lloyd's Rep 162 (CA)).
1040. See further Glass [1997] LMCLQ 478.
1041. See 2.302.
1042. [1974] 1 Lloyd's Rep 443.
1043. On which basis the view of the learned judge may be criticised since the need for an indemnity would arise only on an assumption that the forwarder was not acting as agent for the customer and on that basis the forwarder should have been considered as a contracting carrier rather than an agent with a right to look to the customer for indemnity.
1044. See 2C.23.5.
1045. *Shell Chemicals* v. *P&O*, fn. 1035, above. The Court of Appeal, [1995] 1 Lloyd's Rep 297, did not consider it necessary to deal with this point.
1046. See also Geologistics GTC, cl. 12, TT CLUB 400, cl. 17(a) and (c), DAMCO STC, cl. 35(a) and (d).
1047. Formerly cl. 22 of BIFA 2000. See also Geologistics GTC, cl. 13, TT CLUB 400, cl. 17(B), DHL Express, cl. 9.6, DAMCO STC, cl. 35(b).

12(B) Despite the acceptance by the Company of instructions from the Customer to collect freight, duties, charges, dues, or other expenses from the Consignee, or any other Person, on receipt of evidence of proper demand by the Company, and, in the absence of evidence of payment (for whatever reason) by such Consignee, or other Person, the Customer shall remain responsible for such freight, duties, charges, dues, or other expenses.

35(c) Full Charges shall be considered completely earned on receipt of the Goods by the Company and shall be paid and non-returnable in any event. Charges are payable based on particulars furnished by the Customer. If such particulars are incorrect, the Customer shall be liable for the correct Charges, and any expenses incurred in connection with such correction, including examining, weighing, measuring or valuing the Goods.[1048]

2C.21.1 Payment of sums when due

2.267 As a preliminary to imposing the payment of interest on overdue amounts or placing restrictions on rights of set off etc, it is common for forwarders' terms to make reference to the sums due from the customer. In *Gromal (UK) Ltd (in liquidation)* v. *W.T. Shipping Ltd*,[1049] it was said that to say that a sum is "due", according to the use of ordinary language presupposes that an ascertained or immediately ascertainable sum is presently payable. The words are *prima facie* not apt to include a mere claim for unliquidated damages which are neither ascertained nor presently ascertainable, citing *Re Collbran*[1050] in partial support.[1051] In *Kala Ltd* v. *International Freight Services (UK) Ltd*,[1052] where a similar clause to clause 21(A) of BIFA 2005A was under consideration, it was accepted by employees of a forwarding company giving evidence that where the invoice issued by the forwarder stated "Payment is due on receipt of this invoice",[1053] it would have been reasonable for the customer to have made payment within 10 to 14 days of receipt of the invoice.

2.268 Presumably the clause is to be read as referring to sums due to the company and not to other sums that might be due to a third party such as e.g. a sending forwarder or consignor.[1054] In the absence of an agreed date for the debt the Late Payment of Commercial Debts (Interest) Act 1998 (see further sub-clause (B) below) in section 4(5) provides that the relevant day is the last day of the period of 30 days beginning with:

(a) the day on which the obligation of the supplier to which the debt relates is performed; or

1048. *Cf* P&O Ferries Freight Terms & Conditions, DAMCO BL, cl. 16.2.

1049. CA, 13 July 1984, unreported.

1050. [1956] Ch. 250.

1051. An interpretation which enabled the judge to restrict the application of the general lien clause. See, however, *Geldof Metaalconstructie NV* v. *Simon Carves Ltd* [2010] EWCA Civ 667, [2011] 1 Lloyd's Rep 517, where Rix LJ at para. 54 considered that the phrase "all amounts lawfully due" meant amounts which were claimed to be due and which were recognised or recognisable at law. It did not mean amounts which had been adjudicated or agreed to be due. See further as to issues of oral waiver of a written agreement providing for a "settlement sum": *AS Klaveness Chartering* v. *Pioneer Freight Futures Co Ltd* [2009] EWHC 3386 (Comm), [2010] 2 Lloyd's Rep 613.

1052. QBD, 7 June 1988, unreported.

1053. *Cf* P&O Ferrymasters Ltd General Conditions, 8.4 which requires payment in full 30 days from the invoice date.

1054. See further Hill, p. 222.

(b) the day on which the purchaser has notice of the amount of the debt or (where that amount is unascertained) the sum which the supplier claims is the amount of the debt, whichever is the later.

2.269 The sums due will depend on the agreement made with the forwarder apart from the standard trading conditions since they do not normally regulate the basis of charges made by forwarders. It will be a matter of construction of the agreement. Perhaps more commonly than carriers, forwarders will need to quote a rate for the job based on information supplied by the customer rather than on their own opportunity to see or check the load.[1055] Where the specification is inaccurate the forwarder has the benefit of a warranty of the type given in clause 17(A)(i) of BIFA 2005A,[1056] so that if the goods are in excess of the specification supplied, the customer will be liable for excess freight.[1057] A unilateral attempt to increase charges may well be set aside on the grounds of economic duress.[1058]

2.270 It is for the customer to specify the size of lorry required if he does not want to be troubled with or have to pay for more than one vehicle, and the forwarder is not in breach of contract in arranging for more than one vehicle.[1059] Nevertheless if the forwarder's charges are based on a rate per ton and the forwarder wishes to ensure a minimum weight per vehicle he must make sure that this is clearly expressed. In *S. Zimmerman & Son Ltd* v. *Baxter, Hoare & Co Ltd*,[1060] McNair J was not prepared to construe a quotation which, having indicated a rate per ton, went on to state a minimum of 10 tons per lorry as meaning that the customer should guarantee a minimum weight. Specification of the nature of the goods[1061] put the forwarder on notice that there might be a problem regarding the volume/weight ratio.[1062] Neither could the forwarder rely on a previous course of dealing where a volume rate had been specified, since the schedule of rates in which this rate appeared had been given in connection with transactions concerned with domestic carriage and not international carriage as in the instant case. It has also been held that a forwarder cannot rely on a customary weight/volume ratio where this custom is not known to the customer and where the quotation was itself misleading.[1063]

2.271 The clause could only cover payment obligations actually owed by the customer. Where payment was made to a forwarder on the basis of invoices raised in respect of fictitious supplies of transport, a claim in restitution was successful in part, based on payment made under a mistake of fact in *Maersk Air Ltd* v. *Expeditors International (UK) Ltd*.[1064] Original invoices had been raised by the claimant's own employee under a fraudulent scheme designed to exploit a complex arrangement

1055. See Hill, p. 147.
1056. See 2. See also *Brushfield Sargent & Co Ltd* v. *Holmwright Engineering Co Ltd* [1968] 1 Lloyd's Rep 439.
1057. Hill, p. 149.
1058. *Atlas Express Ltd* v. *Kafco (Importers and Distributors) Ltd* [1989] QB 833. See, however, clauses in related contracts which provide for increased charges, see e.g., DHL Express, cl. 10.
1059. *E.W. Taylor & Co (Forwarding) Ltd* v. *Bell* [1968] 2 Lloyd's Rep 63.
1060. [1965] 1 Lloyd's Rep 88.
1061. Tentage and tarpaulins.
1062. As transpired.
1063. *Alliance Transportation Co Ltd* v. *Pike Ltd*, *Lloyd's List*, 18 January 1922, Mayor's Court, see Hill, p. 148.
1064. [2003] 1 Lloyd's Rep 391.

whereby the defendant forwarder operated a payment and billing service in support of a chain of transport suppliers, including the claimant, delivering a distribution service to the ultimate customer. Those invoices, on payment by the defendant, were the basis for billing of the claimant along with an uplift of 10–11 per cent as an "administration charge". A restitution claim based simply on the absence of consideration supplied by the defendant was rejected since provision of the payment and invoicing service was sufficient consideration. A claim for return of the payments was only partially successful since the defendant could rely on the defence of change of position in respect of money paid out to the fraudster although not in respect of the "uplift".[1065] Furthermore, all monies paid by the claimant became recoverable from the time when the defendant should have become aware of the fraud having been put on notice of it.

2C.21.2 The right of set-off under the general law

2.272 Clause 21(A) of BIFA 2005A and similar clauses in other trading conditions usually seek to restrict any attempt to deduct from sums due to the forwarder money said to be owing to the customer on the basis of a claim usually based on some failing of the forwarder in the performance of the contract. To operate otherwise than as a mere declaration presupposes that a right to make such a deduction exists. This is not necessarily the legal position since the law may place a restriction on this right in the sense that it may permit the forwarder to enforce his claim for payment without deduction and require the customer to take separate proceedings to enforce any opposing claim that might be available. The position depends, in general, on the conditions necessary to establish a right of set-off which will be considered first. Apart from this there is also the possibility that the rule restricting deductions from freight might apply which is then considered before turning to the effectiveness of the restriction contained in the clause itself.

2.273 A right of set-off exists at law[1066] if both claims are for liquidated sums and in equity if there is sufficient degree of connection between the two claims whether or not either or both are for unliquidated damages.[1067] Sums can be considered to be liquidated notwithstanding that there may be disputed issues as to quantum, provided that the claim is such that the existence and amount must be taken to be known to the claimant so that he can give credit for the amount and so avoid the

1065. In respect of this defence the adequacy of the consideration was relevant and whilst such a mark-up might fairly have been made if freight forwarding services had been provided, making it thereby unjust to require re-payment, here no real service was provided at all.

1066. Legal set-off is distinguishable from equitable set-off. In addition a slightly wider distinction derived from Wood, *English and International Set-Off* (1989) was adopted by Hoffmann LJ in *Aectra Refining and Marketing Inc* v. *Exmar NV (The New Vanguard)*, see below, fn. 1068, at p. 200. Independent set-off derives from s. 13 of the Insolvent Debtors Relief Act 1729 as amended by the Debtors Relief Amendment Act 1735. It operates as a procedural device designed to avoid circuity of action either by express or implied agreement or through the judicial process by which the account is taken (see further *Glencore Grain Ltd* v. *Agros Trading Co Ltd* [1999] CLC 1696). Transaction set-off is a cross-claim arising out of the same transaction or one so closely related that it operates in law or in equity as a complete or partial defeasance of the plaintiff's claim.

1067. *Axel Petroleum*, fn. 1091.

costs of set-off.[1068] The mere existence of a cross-claim is insufficient to create the right in equity. The claim and the cross-claim must arise out of the same transaction or one so closely related as to make it unjust to allow the one to be enforced without taking account of the other.[1069] In *Bim Kemi AB* v. *Blackburn Chemicals Ltd*,[1070] Potter LJ[1071] noted the test propounded by Lord Brandon in *Bank of Boston Connecticut* v. *European Grain & Shipping Co Ltd*,[1072] which, whilst it emphasises that the degree of closeness required is that of an "inseparable connection", makes clear that it is not necessary for the cross-claim to arise out of the same contract. All that is required is that it should flow from the dealings and transactions which gave rise to the subject of the claim. This is apt to cover a situation where there are claims and cross-claims for damages in respect of different but closely connected contracts arising out of a long-standing trading relationship which is terminated. That fact will not per se establish the requisite "inseparable connection" but, in an appropriate case, it may well be manifestly unjust to allow one claim to be enforced without taking account of the other.[1073] Indeed more recently Rix LJ in *Geldof Metaalconstructie NV* v. *Simon Carves Ltd*[1074] did not consider the "inseparable connection" formulation as the only formulation of a close connection and not all that helpful in single contract claims. He reinforced the idea that there is not a two stage test, rather that there is both a formal element (i.e. the close connection which ensures that the doctrine is based on principle and not discretion) and a functional element (i.e. the injustice, which shows that the ultimate rationality of the regime is

1068. See *Aectra Refining and Marketing Inc* v. *Exmar NV (The New Vanguard)* [1995] 1 Lloyd's Rep 191, [1995] 1 All ER 641.

1069. *Dole Dried Fruit and Nut Co* v. *Trustin Kerwood Ltd* [1990] 2 Lloyd's Rep 309. See also the judgment of Morris LJ in *Hanak* v. *Green* [1958] 2 QB 9 at p. 23, and *British Anzani (Felixstowe) Ltd* v. *International Marine Management (UK) Ltd* [1980] QB 63. See further *Benford Ltd* v. *Lopecan SL* [2004] EWHC 1897 (Comm), [2004] 2 Lloyd's Rep 618. *Cf Esso Petroleum Co Ltd* v. *Milton* [1997] 1 WLR 938, *Metal Distributors (UK) Ltd* v. *ZCCM Investment Holdings plc* [2005] EWHC 156 (Comm), [2005] 2 Lloyd's Rep 37. Whether arbitrators are able to consider transaction set-off will depend on the terms of the arbitration agreement and any incorporated rules which might confine the jurisdiction of the arbitrators to claims under the subject agreement only or otherwise exclude the right of set-off, see *Econet Satellite Services Ltd* v. *VEE Networks Ltd* [2006] EWHC 1664 (Comm), [2006] 2 Lloyd's Rep 423. See also 2.274.

1070. [2001] EWCA Civ 457, [2001] 2 Lloyd's Rep 93.

1071. At pp. 100–101.

1072. [1989] 1 AC 1056 at 1102, [1989] 1 Lloyd's Rep 431 at 437.

1073. Even if a set-off is not permitted there might yet be the possibility, where the defence and counterclaim are so inextricably entwined for there to be a stay of execution to avoid the injustice of permitting the claimants to take a bite at the case in their favour leaving the defendants to pursue their remedy separately, see *Benford*, fn. 1069 at p. 625.

1074. [2010] EWCA Civ 667, [2011] 1 Lloyd's Rep 517 at [43]. In this case, where the claimant was a supplier under two contracts with a main contractor for the building of a bioethanol plant, by insisting on the payment of invoices under one contract (for the supply of pressure vessels—the supply contract) as a pre-condition of returning to work on the other contract (the installation of storage tanks—the installation contract), the claimant was bringing the two contracts into intimate relationship with one another, even if unjustifiably, and that relationship became inseparable and irrevocable when the defendant brought the installation contract to an end. That made it manifestly unjust to enforce payment under the supply contract without taking into account the cross-claim for repudiation of the installation contract. Although the two contracts were formally separate, there were practical links between them, and it was considered not to be fair for the claimant to be able to enforce payment under the supply contract if the defendant's responsibilities as the plant's main contractor were prejudiced by the claimant's repudiation of its performance obligations under the installation contract.

equity) to the test and that the two elements ultimately cannot be divorced from each other. Consequently he preferred the test propounded by Lord Denning[1075] "freed of any reference to the concept of impeachment, as the best restatement of the test, and the one most frequently referred to and applied, namely: 'cross-claims so closely connected with [the plaintiff's] demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim'. That emphasises the importance of the two elements identified in *Hanak* v. *Green*; it defines the necessity of a close connection by reference to the rationality of justice and the avoidance of injustice; and its general formulation, 'without taking into account', avoids any traps of quasi-statutory language which otherwise might seem to require that the cross-claim must arise out of the same dealings as the claim, as distinct from vice versa".

2.274 The difference between a set-off and counterclaim was explained by Lord Denning MR in *Federal Commerce* v. *Molena Alpha Inc.*[1076] However, one must be cautious of his view that a set-off or defence properly so called is never defeated by the lapse of time, in light of the view of Lord Wilberforce in *Aries Tanker Corpn* v. *Total Transport*.[1077] The answer may well depend on whether the customer's complaint can truly be categorised as a defence or is in reality a cross-claim.[1078] It should be noted that an independent set-off will be defeated where the effect of an arbitration clause or jurisdiction clause is to require the claim on which the set-off is based to be litigated in a forum other than that in which it is pleaded.[1079]

2C.21.3 The rule against deductions from freight

2.275 Where the forwarder is acting as a carrier he will be able to take advantage of the rule of common law confirmed in *Aries Tanker Corp* v. *Total Transport Ltd*,[1080] that no set-off is available against a claim for freight. Lord Wilberforce said,[1081] that there was no case of the rule permitting abatement having been extended to contracts of any kind of carriage, and in *R.H. & D. International Ltd* v. *S.A.S. Animal Air Services Ltd*,[1082] the rule against deduction was applied in respect of international carriage by road. In carriage by sea the rule applies to bill of lading freight and freight under a voyage charterparty but not, according to the Court of Appeal, to hire under a

1075. In *The Nanfri,* see fn. 1083 at pp. 974G to 975A.
1076. Fn. 1083 at pp. 973–974.
1077. Fn. 1080, above, at p. 191 and p. 338; *cf* however, the view of Lord Salmon at p. 196 and p. 342.
1078. *Cf* further, Hoffmann LJ in *The New Vanguard* (above) at p. 200.
1079. *The New Vanguard,* previous footnote.
1080. [1977] 1 WLR 185, [1977] 1 Lloyd's Rep 334. See also, *Cleobulos Shipping Co Ltd* v. *Intertanker Ltd, (The Cleon)* [1983] 1 Lloyd's Rep 586 and *Freedom Maritime Corp* v. *International Bulk Carriers SA and Mineral and Metals Trading Corp of India Ltd (The Khian Captain (No.2))* [1986] 1 Lloyd's Rep 429.
1081. At pp. 190 and 338.
1082. [1984] 1 WLR 573.

time charterparty.[1083] At least this is the case where the shipowner has wrongfully deprived the charterer of the use of the vessel or has prejudiced him in the use of it, but possibly not in the case of other breaches such as negligent damage to cargo.[1084]

The rule against deduction will apply even where the plaintiff has committed a repudiatory breach provided that this has not been accepted so as to bring the contract to an end prior to the right to freight having accrued,[1085] unless the breach is such as to provide an entire defence. Where the forwarder, although acting as an agent, is in effect collecting freight, or seeking reimbursement of freight paid over to a carrier, there would seem to be no reason for the rule in *Aries Tanker*[1086] not to apply.[1087] In *Britannia Distribution Co Ltd* v. *Factor Pace Ltd*,[1088] a forwarder was held entitled to recover freight charges without set-off whether acting as carrier or as agent. It was thought that it would be an anomaly on an anomaly if the mere fact that the forwarder chose or was compelled in accordance with normal commercial practice to pay freight would mean any modification upon or inroad into the freight rule. Given that the actual carriage was that contemplated there was no question of breach of authority such as to amount to a failure of consideration. Any claim for delay arising from abortive attempts to arrange carriage by rail or in respect of any additional charges were merely claims for damages arising from a breach of the alleged obligations on the part of the plaintiff. It was not a case where there was a repudiatory breach of contract which was accepted prior to the time when the claim or the obligation to pay freight was due. In such a case the forwarder is a conduit between the customer and the carrier.[1089] Where the forwarder's charges are not constrained by the rule it is at least arguable that, apart from the operation of a clause restricting the right, the more general rules that would permit a right of set-off could be applied, at least on a basis of mutuality with the usual right of an agent to a set-off against money owed to his principal.[1090] Consequently a more general claim for commission or in respect of other liabilities or costs incurred[1091] may be susceptible to a right of set-off.[1092] In *Shaftesbury International*,[1093] Hirst LJ thought

2.276

1083. See *Federal Commerce and Navigation Ltd* v. *Molena Alpha Inc and Others (The Nanfri, The Benfri, The Lorfri)* [1978] QB 927, (but left open in the House of Lords [1979] AC 997, [1979] 1 Lloyd's Rep 201. See also, *The Kostas Melas* [1981] 1 Lloyd's Rep 18, and *The Cebu* [1983] QB 1005, [1983] 1 Lloyd's Rep 302.

1084. *Per* Lord Denning MR in *Molena Alpha*, above p. 976, and see *The Teno* [1977] 2 Lloyd's Rep 289.

1085. *Bank of Boston Connecticut* v. *European Grain and Shipping Ltd (The Dominique)* [1989] AC 1056, [1989] 1 Lloyd's Rep 431. See also *Elena Shipping Ltd* v. *Aidenfield Ltd (The Elena)* [1986] 1 Lloyd's Rep 425.

1086. Fn. 1080.

1087. See *E.W. Taylor & Co (Forwarding) Ltd* v. *Bell* [1968] 2 Lloyd's Rep 63 at p. 72.

1088. [1998] 2 Lloyd's Rep 420.

1089. See as a case with facts converse to this possibility: *James & Co Scheepvaarten En Handelmij BV* v. *Chinecrest Ltd* [1979] 1 Lloyd's Rep 126.

1090. See *Bowstead and Reynolds*, Art. 62.

1091. Such as demurrage, see *Axel Johnson Petroleum A.B.* v. *M.G. Mineral Group AG (The Obelix)* [1992] 2 All ER 163.

1092. *Cf Britannia*, above, at p. 421.

1093. Fn. 1097.

that it would be extremely difficult for freight forwarders to show that their claim for services fell within the *Aries* rule.

2C.21.4 Restricting the right of set-off

2.277 Clause 21(A) of BIFA 2005A seeks to restrict any right of abatement or set-off. There is neither any general rule of public policy nor restriction contained in section 49(2) of the Senior Courts Act 1981 to prevent a right of set-off being excluded by contract.[1094] Such a restriction is, however, open to challenge under the Unfair Contract Terms Act 1977 by the combined effect of section 3 and section 13 as in *Stewart Gill Ltd* v. *Horatio Myer & Co Ltd.*[1095] In that case the restrictive clause limited the right of set-off even where an amount was owing to the defendant in respect of an overpayment. This was held to be unreasonable and the whole clause was struck down even though the claimant was not seeking to rely on the part of the clause considered to be unreasonable.[1096] The BIFA clause is more limited and may not be subject to the same challenge of unreasonableness. There was said to be an arguable case in *Shaftesbury International Freight & Transport Ltd* v. *BKR Gesellschaft Für Export und Import m.b.H.*[1097] However, in *Schenkers Ltd* v. *Overland Shoes Ltd*[1098] the exclusion was upheld in light of the facts that: conditions such as those of BIFA are likely to be anticipated; they have been in operation for over 10 years; similar terms are in use and approved internationally; there was no reason to conclude that the parties' bargaining strengths were significantly unequal and whilst clause 23(A)[1099] was not a necessary part of a freight forwarder's business, as an alternative to demanding "cash up front" it was reasonable.[1100] This decision was upheld in the Court of Appeal,[1101] where Pill LJ noted that a decision at first instance as to reasonableness is close to a discretionary decision and that the function of the appellate court was confined. However, the affirmation of the judgment was based on: recognition that BIFA conditions are the product of combined efforts of those associated with the shipping industry; the clause is in common use and well known; it reflects a general view of what is reasonable; the failure by the defendants, over a course of long and substantial dealings to put their minds to it could not be relied

1094. *Coca Cola Financial Corp* v. *Finsat International Ltd* [1996] 2 Lloyd's Rep 274, [1996] 3 WLR 849, [1998] QB 43. See also *Re Kaupthing Singer & Friedlander Ltd (In Administration)* [2009] EWHC 740 (Ch), [2009] 2 Lloyd's Rep 154, which considered further that where a clause in respect of a certificate of deposit required repayment "without set-off, counterclaim or other deduction, save as required by law" it applied to both legal and equitable set-off.

1095. [1992] 1 QB 600. *Cf Skipskredittforeningen* v. *Emperor Navigation* [1998] 1 Lloyd's Rep 66 in respect of s. 3 of the Misrepresentation Act 1967. See also *Axa Sun Life Services plc* v. *Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep 1.

1096. *Cf The Hong Kong and Shanghai Banking Corp* v. *Kloeckner & Co AG* [1990] 2 QB 514, [1989] 2 Lloyd's Rep 323.

1097. CA, 29 October 1992, unreported.

1098. [1998] 1 Lloyd's Rep 498. See also the similar decision in *Röhlig (UK) Ltd* v. *Rock Unique Ltd* [2011] EWCA Civ 18, [2011] 2 All ER (Comm) 1161.

1099. The 1989 edition equivalent to cl. 21(A) of BIFA 2005A.

1100. *Cf Skipskredittforeningen* v. *Emperor Navigation*, above and *Surzur Overseas Ltd* v. *Ocean Reliance Shipping Co Ltd* [1997] CLY No. 906, *John Dee Group Ltd* v. *WMH (21) Ltd* [1997] BCC 518, and *WRM Group Ltd* v. *Wood* [1998] CLC 189 (CA).

1101. [1998] 1 Lloyd's Rep 498.

upon; where there is no significant inequality of bargaining power, the customs of the trade are an important factor; the fact that the clause was rarely relied on reflected more the give and take conducive to a good business relationship than a recognition that the clause was unreasonable; the high level of disbursements that the plaintiffs were required to make and that the clause does not restrict liability or the right of recovery but in practical terms only affects cash flow.

2C.21.5 Payment of interest

2.278 Forwarders' trading conditions commonly make express provision for the payment of interest on amounts overdue. In BIFA 2000 clause 21(B) provided for a rate of eight per cent above base rate which is the rate provided for under the Late Payment of Commercial Debts (Interest) Act 1998. The current clause also refers to the Act but without indicating a rate. The context for this requires explanation. Apart from an express term it is not normally possible to imply a term at common law for the payment of interest based on business efficacy,[1102] although in some cases interest may have been payable under trade custom. It can be possible to obtain interest as special damages provided the rules of remoteness are satisfied.[1103]

2.279 Where there is no express or implied term, apart from statute, there is no power in the courts under the common law[1104] to award interest on a debt or as part of an award of damages.[1105] The position was mostly governed by section 35A of the Senior Courts Act 1981.[1106] This also made provision in respect of county courts and arbitrators.[1107] The court was permitted to award simple interest on all or any part of the debt or damages up to the date of judgment or date of payment if the sum is paid before judgment. There was no power under this section to award interest if the debt was paid before proceedings were begun.[1108] This "gap" has now been filled by the Late Payment of Commercial Debts (Interest) Act 1998 which, by section 1(1) implies into *inter alia* contracts of this type a term that the contract carries simple interest. The rate is set by order and is currently eight per cent over the official dealing rate.[1109] The general reference to the Act made in the current sub-clause will enable the rate to change as amending orders are made. Express contractual rates may be set so long as they provide a substantial contractual remedy

1102. See e.g., *Freedom Maritime Corp* v. *International Bulk Carriers SA and Metals Trading Corp of India Ltd (The Khian Captain) (No. 2)* [1986] 1 Lloyd's Rep 429.

1103. *Wadsworth* v. *Lydall* [1981] 1 WLR 598.

1104. Apart from limited powers under Admiralty law and in equity. On the latter see e.g. *Mathew* v. *T.M. Sutton Ltd* [1994] 1 WLR 1455.

1105. *London, Chatham and Dover Railway Co* v. *South Eastern Railway Co* [1893] AC 429, affirmed in *President of India* v. *La Pintada Compania Navigacion SA* [1985] 1 AC 104, [1984] 2 Lloyd's Rep 9. *Cf* however, *Kuliachor Sweater Industries Ltd* v. *Frans Maas (UK) Ltd*, QBD, 4 April 2000, unreported.

1106. Added by s. 15 and Sch. 1 to the Administration of Justice Act 1982.

1107. As to arbitrators, *cf Re an Arbitration between the Podar Trading Co Ltd, Bombay and Francois Tagher, Barcelona* [1949] 2 KB 277 and *Chandris* v. *Istbrandtsen-Moller* [1951] 1 KB 240.

1108. The "gap" noted in *La Pintada*, above, see also Law Commission report No. 88, 1978, Cmnd. 7229 and *I.M. Properties plc* v. *Cape & Dalgleish* [1998] 3 WLR 457 [1998] 3 All ER 203.

1109. Late Payment of Commercial Debts (Rate of Interest) (No. 3) Order 2002/1675.

for late payment.[1110] The need for a substantial remedy was appropriate when the Act began as a protection for small business but the scope of the Act has since been expanded to cover all businesses so that the need for protection might be thought now to run the other way to prevent too high a rate of interest from being imposed.

2.280 In *Derby Resources AG* v. *Blue Corinth Marine Co Ltd (No. 2) (The "Athenion Harmony")*[1111] the amount of interest was reduced in light of the delay of the claimant in pursuit of the action during a particular period of time. The rate of interest was reduced, as distinct from isolating a period of delay and depriving the claimant of all interest for that period, thus avoiding problems of calculation and fluctuating rates.[1112] Apart from some exceptions[1113] clauses in the industry seem generally to provide for simple rather than compound interest.[1114]

2C.21.6 Collection of freight etc from consignee—continuing duty of the customer

2.281 At common law, where the consignor is the contracting party, in the absence of an express agreement, it will be difficult for the consignor to establish an implied term that the forwarder is to collect charges against the consignee without recourse to the consignor, not least because, *a fortiori*, there is no contract with the consignee.[1115] Furthermore, merely asking the consignee to pay does not amount to a novation of the contract.[1116] Where there is an express instruction or where the forwarder is given the right to collect from the consignee, a clause in terms of clause 12(B) of BIFA 20005A (formerly clause 22 of BIFA 2000) will be effective to secure the right of recourse against the contracting consignor.[1117] Where the consignor is not the contracting party the effectiveness of the clause will depend on the effectiveness of other clauses in binding the consignor to the contract.[1118] Clause 13(ii) of Geologistics GTC, seeks also to bind persons other than the customer, such as the sender, consignee or owner, to the payment of sums due from or the liability of the customer. It could be effective only if binding on such persons although it might

1110. DAMCO STC also provides for 3% above the minimum lending rate set by the national or central bank, as applicable, of the country or territory of the relevant currency. TT CLUB 400, cl. 17(c) follows BIFA 2000. DHL Express provides for 4% above base rate, such interest to be accrued and compounded on a daily basis. The clause goes on to indicate that this is a substantial remedy.

1111. [1998] 2 Lloyd's Rep 425.

1112. *Cf* s. 5 of the Act which allows for remission of statutory interest for a period should the interests of justice require it by reason of conduct before or after the debt was created.

1113. E.g. DHL Express, cl. 9.2.

1114. See further, Law Commission Consultation Paper No. 167, *Compound Interest* (2002), for later developments in respect of the 1998 Act, and the proposals made in respect of compound interest in the Law Commission Report No. 287 (2004). For an example of implication of compound interest where this is an established usage, see *Habib Bank Ltd* v. *Central Bank of Sudan* [2006] EWHC 1767 (Comm), [2006] 2 Lloyd's Rep 412.

1115. *E.W. Taylor & Co (Forwarding) Ltd* v. *Bell* [1968] 2 Lloyd's Rep 63 at p. 70.

1116. *The Universal Shipping and Forwarding Co Ltd* v. *The Commercial and Industrial Co Ltd ("Anglo-Russ" Petrograd)* (1919) 1 Ll L Rep 635.

1117. *Kala Ltd* v. *International Freight Services (UK) Ltd*, QBD, 7 June 1988, unreported. *Cf* TT CLUB 400, cl. 17(b), DHL Express, cl. 9.6, DAMCO STC, cl. 35(b).

1118. See 2C.1.2.

have some use in negating the implication of a term in the contract with the customer not to seek recovery from them.

2C.22 EXCLUSION OF LIABILITY[1119]

BIFA 2005A clauses 24 and 25 2.282

24 The Company shall be relieved of liability for any loss or damage[1120] if, and to the extent that, such loss or damage is caused by:—
(A) strike,[1121] lock-out, stoppage[1122] or restraint of labour,[1123] the consequences of which the Company is unable to avoid by the exercise of reasonable diligence; or

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1119. This section focuses on clauses which clearly seek to exclude the liability of the forwarder and so defeat directly the claim of the customer for loss, damage or delay to the goods. Other clauses may seek to restrict the remedies available to the customer or restrict the ability of the customer to make use of evidential rules to support a claim e.g. cl. 5 of the RHA Conditions 2009, which puts the burden of proving the quantity of the goods notwithstanding the carrier providing a signed receipt. An even more indirect restriction of a customer's rights through seeking to preserve the supplier's rights is the use of non-waiver clauses which have received the attention of the courts recently. Although there is no such clause in the BIFA conditions some logistics conditions contain such a clause which may provide that a company's failure to insist on strict compliance with any provision does not amount to a waiver or estoppel (e.g. cl. 13 of First GB Logistics Terms & Conditions). Whilst this clause might not prevent the supplier from pursuing the customer for damages for breach of the customer's obligation it seems that it cannot prevent the customer from proving, as a matter of fact that the supplier has elected to affirm the contract notwithstanding the non-compliance. See *Tele2 International Card Co SA* v. *Post Office Ltd* [2009] EWCA Civ 9, 2009 WL 6118.

1120. Despite the recognition of the different senses of the word "loss" by Lord Morton of Henryton in *G.H. Renton & Co Ltd* v. *Palmyra Trading Corp of Panama* [1957] AC 149 at p. 169 in the context of the words "loss or damage to or in connexion with goods" in Art. III, r. 8, of the Hague Rules, there may be some doubt whether the words "loss or damage" in this clause can extend beyond physical loss or damage, see *W. Young and Son (Wholesale Fish Merchants) Ltd* v. *B.T.C.* [1955] 2 QB 177, *per* McNair J at p. 194. The words are clearly used in the widest sense in cl. 26, (2.292 below,) but the fact that delay and other forms of economic loss are treated separately might lead to the inference that the exclusion in this clause is not meant to cover them. This inference appears to be even stronger in respect of TT CLUB 400, cl. 27. The BIFA Conditions contrast particularly with Geologistics GTC which, in addition to providing in cl. 27 for an exclusion in respect of loss or damage to goods, also excludes liability for loss or damage caused by non-compliance or miscompliance with the customer or owner's instructions and for failure to perform unless due to negligence. This is unlikely to mean that the BIFA Conditions will produce a difference of effect given that the overall tenor of the conditions, in the light of cl. 23, is to accept a duty of care rather than any stricter duty.

1121. A strike has been defined, in the context of carriage by sea, as "a general concerted refusal by workmen to work in consequence of an alleged grievance", *per* Sankey J in *Williams* v. *Naamlooze etc.* (1915) 21 Com Cas 253 at p. 257; see *Scrutton*, A113. As pointed out in *Scrutton* at p. 211, n. 297, the definition did not claim to be exhaustive, and a strike in sympathy with a grievance of other workers is within the definition: see *Seeberg* v. *Russian Wood Agency* (1934) 50 Ll L Rep 146. Other circumstances may be more doubtful, e.g. refusal to work through fear of disease or desire to take a holiday (see further *Scrutton*, 11–064). It would not seem to be possible to include these within the phrase "restraint of labour" since this phrase appears to refer to action taken to avert a strike, *per* McNair J in *Young & Son (Wholesale Fish Merchants) Ltd* v. *B.T.C.* [1955] 2 QB 177, at p. 194.

1122. A "stoppage" is brought about by an external event such as a bomb scare, *Tramp Shipping Corp* v. *Greenwich Marine Inc* [1975] 1 WLR 1042, [1975] 2 Lloyd's Rep 314 at p. 1046 and p. 317, see Palmer, 2nd edn, p. 1032, *cf* 3rd edn, p. 946, 16–037). It is normally interpreted as meaning complete stoppage and not partial stoppage: *Miguel de Larrinaga Steamship Co Ltd* v. *D.L. Flack & Son* (1925) 21 Ll L Rep 284. (*Cf* RHA Conditions 2009, cl. 9(2)(b)(viii) (see Clarke & Yates, 1.288), which refers to "general or partial stoppage").

1123. See fn. 1121.

(B) any cause or event which the Company is unable to avoid, and the consequences of which the Company is unable to prevent by the exercise of reasonable diligence.
25 Except under special arrangements previously made in writing by an officer of the Company so authorised,[1124] the Company accepts no responsibility with regard to any failure to adhere to agreed[1125] departure or arrival dates of Goods.[1126]

2C.22.1 Exclusion clauses and context of BIFA clause 24

2.283 Forwarding and carriage conditions commonly contain clauses excluding liability for loss, damage or delay. They may take the form of excluding liability for specified causes of loss or indicate more general criteria[1127] as a basis for exclusion or, as does clause 24 of BIFA 2005A, mix specified causes and general criteria.[1128] Different patterns may owe much to their historical development especially given the association of forwarding with carriage.[1129] Clause 24 of BIFA 2005A may be unusual in that it really operates as the reverse side of the obligations of the forwarder expressed in clause 23[1130] and provides for the exclusion which reflects this. The clause is a simplification of the provision in clause 36 of the IFF 1984 Conditions in that it removes some of the specific exceptions which are superfluous

1124. The reference to an officer of the Company has been added since BIFA 2000.

1125. The equivalent clause in BIFA 2000 referred simply to departure or arrival dates of goods.

1126. *Cf* TT CLUB 400, cl. 15. The possible function of the clause in the context of liability for delay in the general law is considered at 2.291. Whilst, given its wording, this clause may be thought of as a clause defining the performance that the forwarder is prepared to accept, rather than an exclusion clause, there may be an argument for it to be treated as controlled by s. 3(2)(b) of the Unfair Contract Terms Act 1977. *Cf Anglo-Continental Holidays Ltd* v. *Typaldos Lines (London) Ltd* [1967] 2 Lloyd's Rep 61. See the discussion of the Act at 2C.2.2. *Cf* further, DHL Express (UK), cl. 13.7 which restricts liability for delay to where there is an undertaking to deliver on or before a specific time and the higher rate for Time Definite Deliveries has been charged. Even in that case the sole remedy for the delay is a refund of the difference between the higher charge for Time Definite Delivery and the standard charge.

1127. *Cf* Geologistics GTC, cl. 27.

1128. *Cf* TT CLUB, cl. 27(A) which, in addition to strikes, stoppage or restraint of labour from whatsoever cause, refers also to several causes deriving from the acts or omissions of the customer and also makes reference to riots (see *London and Lancashire Fire Insurance Co Ltd* v. *Bolands Ltd* [1924] AC 836, *R.* v. *Sharp* [1957] 1 QB 552 at p. 560. *Cf Richmond Metals Ltd* v. *J. Coales & Son Ltd* [1970] 1 Lloyd's Rep 423), and civil commotions (see *Cooper* v. *General Accident etc. Corp* [1922] 2 Ir R 214, *Spinney's* v. *Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep 406). *Cf* also P&O Nedlloyd STC, cl. 8(B). It also includes fire, floods or storm.

1129. The traditional context of much early contractual development was a background of strict liability as the usual default position so that one intention behind listing specified causes was to add to the list of defences otherwise available under the common law. A further possibility was to specify certain causes excusing liability even where occasioned by the negligence of the carrier or his servants or agents. Extensive use of this invites regulation (as was the case in carriage by sea with the introduction of the Hague Rules) as does the use of wider forms of exclusion. Where a general liability in negligence is accepted the use of a clause which, in effect, simply indicates this may be considered sufficient (see e.g. Geologistics GTC, cl. 27). The intention behind the identification of specific causes may not be entirely clear. They might be construed as accepting a background of strict liability or as affecting the burden of proof against a background of negligence liability (see e.g. RHA Conditions 2009, cl. 9(2)(b)) which appears to reflect strict liability and the interpretation of the 1961 version of these conditions in *Richmond Metals Ltd* v. *J. Coales & Son Ltd* [1970] 1 Lloyd's Rep 423. *Cf* OOCL Logistics Business Terms and Conditions, which identify specific causes but appears ultimately to be based on negligence liability given the final exclusion of "any act, neglect or default not caused solely by the Company". See further the discussion at 2.286.

1130. See 2.295.

in light of a general responsibility for the exercise of due care.[1131] Clause 36 in turn represented a sea change in respect of previous editions which were considerably more restrictive. Thus the 1981 Conditions by clause 18 excluded liability unless the loss or damage was due to the wilful neglect or default of the company or its servants.

2.284 Previous editions were even more restrictive in that they required proof that the loss or damage occurred while the goods were in the custody or control of the company as well as being due to wilful neglect or default.[1132] The phrase appears to mean the same as wilful misconduct.[1133] Such a clause is clearly adequate to exclude liability for negligence.[1134] That is unless the precise wording is found to be limited in terms of its scope as was the case in respect of an earlier version of the Conditions,[1135] whereby an exception in respect of "failure (not amounting to wilful negligence) to carry out the instructions . . ." was considered in *Marston Excelsior Ltd* v. *Arbuckle, Smith & Co Ltd*[1136] not to exempt liability for negligence in supervision for which the forwarder was held not to be liable. In *Monarch Airlines* v. *Luton Airport*,[1137] an airport used a clause which excluded liability unless loss or damage arose or resulted directly or indirectly from any act, neglect or default done with intent to cause damage or recklessly and with knowledge that damage would probably result. This was construed in the same way as in the Warsaw Convention, thus producing a highly restrictive exclusion.

2.285 The current clause is expressed in a more general way in comparison with previous editions which separated out various types of loss,[1138] and specifically referred to failings in respect of instructions as well as other failings.[1139] This last was necessary to deal with decisions such as *Hunt & Winterbotham Ltd* v. *Morny & Co*,[1140] whereby an exclusion in general terms was insufficient to cover liability for a breach of instructions. Apart from where a departure from instructions is justified, any failure to carry out instructions is likely to mean that the loss or damage cannot be due to an avoidable cause within sub-clause (B) so that there is no need to refer to such failings. In respect of misdelivery, however, it seems that the word "loss" is normally sufficient to include a loss by misdelivery.[1141] Some doubt may arise as to

1131. *Cf* TT CLUB 400, cl. 27(A).

1132. E.g. cl. 13 of 1974 Conditions. *Cf* cl. 15 of the AAI Conditions.

1133. See further Palmer (2nd edn), p. 1021 (see also, in the 3rd edn, 17–10 *et seq*.). See also *Re City Equitable Fire Insurance Co Ltd* [1925] 1 Ch. 407 at p. 434. In *Swiss Bank Corp* v. *Brink's Mat* [1986] QB 853, [1986] 2 Lloyd's Rep 79, it was held that "wilful default" meant such default in the course and scope of the servant's employment, *cf H.C. Smith* v. *Midland Ry* (1914) LJKB 868 and *W. Young & Son (Wholesale Fish Merchants) Ltd* v. *British Transport Commission* [1955] 2 Q.B 177. As to proof of wilful misconduct compare *H.C. Smith* v. *G.W. Ry* [1922] 1 AC 178 with *H.C. Smith* v. *Midland Ry* (1919) 88 LJKB 868. See also *Datec Electronic Holdings Ltd* v. *UPS Ltd* [2005] EWCA Civ 1418, [2006] 1 Lloyd's Rep 279, affirmed [2007] UKHL 23, [2007] 1 WLR 1325, discussed in Palmer, 17–102.

1134. *Cohen* v. *Brantford International Ltd and Others*, CA, 8 December 1987, unreported, *cf Monarch Airlines* v. *Luton Airport* [1998] 1 Lloyd's Rep 403.

1135. Clause 12 of the Institute of Shipping and Forwarding Agents Conditions.

1136. [1971] 2 Lloyd's Rep 306, *per* Lord Denning MR (*obiter*) at p. 311.

1137. [1998] 1 Lloyd's Rep 403.

1138. E.g. loss, damage, non-delivery, misdelivery, see cl. 13, 1974 Conditions.

1139. See cl. 18, 1981 Conditions.

1140. (1922) 12 Ll L Rep 286.

1141. *Skipwith* v. *G.W. Ry* (1888) 59 LT 520.

whether a breach such as misdelivery resulting in economic loss rather than physical loss of the goods is within the terms of the current clause (see further below). Where a misdelivery amounts to a conversion, the clause may amount to an exclusion in the unlikely circumstance that an operator is found liable for a conversion even in the absence of negligence. Clauses used in other trading conditions may have wider effect. TT CLUB 400, clause 27.C, for instance, excludes all liability for loss or damage to property other than the goods themselves however caused,[1142] and also, in sub-clause (d), economic loss in any form such as indirect or consequential loss or damage, loss of profit, delay, deviation, however caused. Such economic loss is also excluded by clause 26(C) of BIFA 2005A and Geologistics GTC, clause 14(i), but these clauses operate largely as a limitation rather than an exclusion and so are discussed at 2C.23 below. Liability for delay is discussed below at 2.291.

2C.22.2 Specified causes

2.286 Apart from the exclusion based on general criteria, clause 24 of BIFA 2005A also indicates specific causes as providing an exclusion of liability for loss or damage. These arise in the context of labour relations and the question arises whether the intention is to provide for exclusion where the events occur even though they arise directly from the forwarder's actions and as such might have been avoidable. Presumably the term will cover strikes by the forwarder's own employees.[1143] It may be argued, however, that it does not cover a strike caused by the negligence of the forwarder since this would conflict with the duty in clause 23.[1144] On the other hand, however, this is not a case where the exception is used as part of a list of causes within the background of a strict liability,[1145] nor a case where the exceptions are listed and then followed by a general clause which indicates a general duty of care which may be taken to relate back to the listed exceptions.[1146] The carefully structured nature of the clause[1147] and the precise wording[1148] suggest that the intention is to exclude strikes, etc, within the forwarder's sphere of operation whether or not avoidable by him,[1149] which might include a strike caused by the lack of care of the forwarder in respect of the goods themselves. The damage may be recoverable, however, as distinct damage occurring prior to and separate from the

1142. Which might be thought unlikely to survive the test of reasonableness where the Unfair Contract Terms Act 1977 is applicable. Even more restrictive clauses can still be found, *cf* cl. 2 of the Global Logistics Terms & Conditions of Trade.

1143. *W. Young & Son (Wholesale Fish Merchants) Ltd* v. *B.T.C.* [1955] 2 QB 177.

1144. And given the absence of the words "from whatever cause" or "however" which may be attached to this type of exclusion, *cf* RHA Conditions 2009, cl. 9(2)(b)(viii).

1145. As with cl. 9(2)(b)(viii) of the RHA Conditions 2009, see Clarke & Yates, 1.288. On the principles discussed at 2.242, such clauses, without the addition of words such as "from whatever cause" (see previous footnote), are unlikely to cover negligence.

1146. As in the case of the Hague Rules, *cf* IFF Conditions 1984, cl. 36.

1147. *Cf Elderslie S.S. Co* v. *Borthwick* [1905] AC 93.

1148. Especially the fact that the consequences of the event are specifically brought back within the general duty of care, see also 1984 Conditions, cl. 36.

1149. *Cf W. Young*, above and *B. & S. Contracts and Design Ltd* v. *Victor Green Publications Ltd* [1984] ICR 419.

damage caused by the strike.[1150] The clause might well include, however, damage due to a lack of care itself caused by the strike.[1151]

2.287 Presumably the event specified would need to be a sufficient cause of the loss or damage so that the forwarder could not, for example, avoid liability in circumstances where the event is already in existence but could be avoided, and the forwarder fails to take steps to prevent the event from operating on the goods.[1152] A difficulty could arise where the strike is not the proximate cause, as where other measures are taken, for example by government, as a response to a strike, as, for example, the circumstances in *Taylor* v. *Lewis*.[1153] Such circumstances may be adequately dealt with by sub-clause (B).

2C.22.3 Burden of proof

2.288 Although the forwarder might not be a bailee in respect of a particular movement of goods, so that the normal imposition of the burden of proving an exception might not be implied,[1154] it seems likely that, nevertheless, the burden of proof will be on the forwarder.[1155] It might be arguable that a contrary intention can be derived from the specific development of BIFA clauses over time. Unlike clause 24 of BIFA 2005A, clause 36 of the 1984 edition of the former IFF Conditions specifically placed the burden of proof on the forwarder.[1156] This possible inference may be countered by the fact that the more recent conditions appear to be a simplification of the older conditions and may not be intended to alter them in substance. No such possibility suggested itself in *Euro Cellular (Distribution) plc* v. *Danzas Ltd*,[1157] where, in the context of BIFA Conditions applied to a case involving loss of goods stored in the forwarder's warehouse, the judge considered that the claimants need only allege and prove a loss of the goods whilst in the possession of the defendants in their warehouse. That would give rise to an inference of negligence in the performance of their duties in breach of their obligation under clause 23 of the BIFA

1150. Examples of the exertions required of an operator to avoid the consequences of these types of event may be found in carriage by sea: *Bulman* v. *Fenwick* [1894] 1 QB 179 at p. 185, and *Dampskibsselskabet Danmark* v. *Poulsen* 1913 SC 1043, *Scrutton*, 9–084, n. 240.

1151. See *per* Brandon J in *The Arawa* [1977] 2 Lloyd's Rep 416 at p. 426 (reversed on other grounds [1980] 2 Lloyd's Rep 135 (CA)).

1152. *Cf B. & S. Contracts and Design Ltd* v. *Victor Green Publications Ltd*, fn, above. *Cf* where a shortage of labour continues after the strike but as a direct consequence of it: see *Reardon Smith Line* v. *Ministry of Agriculture* [1960] 1 QB 439, [1959] 2 Lloyd's Rep 229, *cf Salamis Shipping (Panama) SA* v. *Meerbeech & Co* [1971] 2 QB 550, [1971] 2 Lloyd's Rep 29.

1153. (1927) 28 Ll L Rep 329.

1154. See the comment by Gatehouse J, in *Metaalhandel J.A. Magnus BV* v. *Ardfields Transport Ltd* [1988] 1 Lloyd's Rep 197, in respect of the position of "quasi bailment", at p. 202. The fact that the defendants were not bailees was said to affect the onus of proof.

1155. See also *Sutcliffe* v. *G.W. Ry* [1910] 1 KB 478, *per* Vaughan Williams LJ at p. 493.

1156. *Cf* TT CLUB 400, cl. 27.b which has a complex provision which, whilst in general placing the burden of proof on the company, gives it the benefit of a presumption where it establishes that the loss or damage could be attributed to certain of the specific causes indicated, such as insufficiency of packing. See also DAMCO STC, cl. 45. This is reminiscent of the division of proof made in Art. 17 of the CMR Convention, see Clarke para. 76. It is also common in combined or multimodal transport bills of lading and is discussed further at 3.63.

1157. [2003] EWHC 3161, [2004] 1 Lloyd's Rep 521.

terms which can be rebutted by the defendants proving that the goods were lost despite the exercise of reasonable care.[1158]

2C.22.4 Reasonableness

2.289 Exclusion clauses of the type illustrated by clause 24 of BIFA 2005A will be subject to the reasonableness test imposed by the Unfair Contract Terms Act 1977 where it applies.[1159] However, since there is no purported exclusion of liability for negligence, except perhaps in the case of strikes etc, as discussed above, section 2 of the Act is irrelevant. Section 3 of the Act may have some relevance in so far as the clause excludes a strict liability which might otherwise be applicable, for example if the forwarder acts as a common carrier,[1160] provided that the forwarder's action amounts to a breach of contract.

2.290 More restrictive clauses of the type considered above at 2.284, may have less success in being considered reasonable. This is not inevitably the case, however. In *Monarch Airlines* v. *Luton Airport*[1161] a similar clause used by an airport was held to be reasonable in light of its common use, without objection, in the market and the availability of insurance cover. A restrictive clause also succeeded in passing the test of reasonableness in *Keeton Sons & Co* v. *Carl Prior Ltd.*[1162]

2C.22.5 Liability for delay

2.291 Apart from any restrictive provisions made in the standard terms, a forwarder who contracts as a carrier will have the duty of a carrier to exercise reasonable care to deliver the goods within a reasonable time as established in *Raphael* v. *Pickford.*[1163] A similar rule applies when acting as an agent since an agent is required to carry out the mandate within a reasonable time.[1164] The mere specification of a time for departure or delivery is likely to be treated as an indication of a reasonable time requiring explanation if exceeded rather than a guarantee.[1165] Clearer words may be required to produce a responsibility in the nature of a guarantee.[1166] The possibility of making a special arrangement in writing, which is indicated by clause 25 of BIFA 2005A,[1167] presumably enables the customer to impose strict liability on the

1158. *Cf* DHL Express, cl. 13.1 which excludes liability other than for loss or damage arising as a result of DHL's proven negligence, which appears to put the burden of proof on the claimant. In cl. 45 of DAMCO STC the burden of proving specific causes is generally on the company, but it is also stated in cl. 47 which deals with limitation of liability (see below 2.292), that liability is subject to the exclusions and is to the extent only that it is proved that the claim arises from the negligence of the company. *Cf* further, UKWA, cl. 3.(iii) and UKWA Logistics Conditions 3.3.

1159. See generally 2C.2.2.

1160. See 2.105.

1161. [1998] 1 Lloyd's Rep 403.

1162. [1986] BTLC 30.

1163. (1843) 5 Man & G 551.

1164. *Bowstead and Reynolds*, Art. 39.

1165. *Horne* v. *Midland Ry* (1873) LR 8 CP 131.

1166. See, however, Clarke, para. 225c, who considers that more modern views of contractual obligation suggest that specification of a time engages a strict liability.

1167. Compare the 1981 edn of the IFF Conditions, cl. 18(b) which excluded liability for delay although cl. 20 provided a time limit for claims made in respect of delay.

forwarder. However, clause 25 of BIFA 2005A also ensures that any departures or arrival dates agreed other than under special arrangements are not to be treated as indicators of a reasonable time since it is clear from clause 26(B)[1168] that a responsibility for delivery within a reasonable time is accepted.[1169] More specifically, failure to achieve a particular departure or arrival date might produce a specific loss or damage which might be foreseeable, for example in the case of perishable products and covering this possibility may be a chief object of the clause.[1170] Where the damage that might be occasioned by this type of failure or by delay generally is economic rather than physical it is likely to be excluded anyhow by a clause excluding liability for indirect or consequential loss.[1171]

2C.23 LIMITATION OF LIABILITY

BIFA 2005A clause 26,[1172] DAMCO STC clauses 47 & 48. *2.292*

26 (A) Subject to clause 2(B)[1173] and 11(B) above and sub-clause (D)[1174] below, the Company's liability howsoever arising[1175] and, notwithstanding that the cause of loss or damage be unexplained,[1176] shall not exceed

(i) in the case of claims for loss or damage to Goods[1177]

(a) the value of any loss or damage,[1178] or

1168. See 2.292.

1169. *Cf* Geologistics GTC, cl. 14(ii).

1170. TT CLUB 400, cl. 15 more clearly excludes liability for such failure even if due to negligence.

1171. See cl. 26(C) of BIFA 2005A, TT CLUB 400, cl. 27.d, Geologistics GTC, cl. 14(i).

1172. See also Geologistics GTC, cll. 14(ii) and 15, TT CLUB 400, Clauses 28–30, DAMCO STC, cl. 47–48 (reproduced), DHL Express, cl. 13.

1173. This specific reference to cl. 2(B) may support an argument that where compulsory legislation imposes a lower limit of liability, the forwarder can take advantage of that limit and is not to be taken to have agreed a higher limit, the right to limit, to the extent provided by such legislation, being a "right . . . under such legislation". Such a possibility would seem most unlikely, the only obvious example being provided by the original Hague Rules where these rules are applied by virtue of legislation. Since the original Hague Rules no longer have the force of law in England they could not apply where the contract is sued upon within the jurisdiction, especially in light of cl. 28, below, 2.315. If sued, e.g., in the United States in respect of carriage by sea to or from the USA and the US court were to disregard cl. 28, then this point may be relevant but only if the forwarder issues or is held bound by a bill of lading.

1174. This reference forward to sub-cl. (D) has especial relevance to the issue of reasonableness under UCTA and is dealt with below, 2C.23.5.

1175. As to the relevance of these words in covering potential liability in negligence see 2.295.

1176. See the discussion at 2.297.

1177. This would seem to include economic loss consequent upon such loss where this is not excluded by reason of cl. 26(C), *cf* Burton J in *The Limnos* (see fn. 1181) at [37].

1178. The equivalent clause in BIFA 2000 referred to the value of any goods lost or damage.

(b) a sum at the rate of[1179] 2 SDR[1180] per kilo of the gross weight of any Goods lost or damaged[1181] whichever shall be the lower.

(ii) subject to (iii) below, in the case of all other claims:[1182]

(a) the value of the subject Goods of the relevant transaction between the Company and its Customer, or

(b) where the weight can be defined,[1183] a sum calculated at the rate of two SDR per kilo of the gross weight of the subject Goods of the said transaction,[1184] or

(c) 75,000 SDR in respect of any one transaction,[1185]

1179. The words "at the rate of" make clear that the limit is to be applied pro rata and overcomes the difficulty of interpretation to which some early Conditions of Carriage were prone as in *F.S. Stowell Ltd* v. *Nicholls & Co (Brighton) Ltd* [1963] 2 Lloyd's Rep 275. In this case the court had to apply a limit of £200 per ton to a consignment of just over a ton and decided that the limit was £400, i.e. reading the limit as one ton or part of a ton (see also *Kilroy Thompson Ltd* v. *Perkins & Homer Ltd* [1956] 2 Lloyd's Rep 49; *cf Spaner Bros.* v. *Central Canadian Express Co* (1918) 43 DLR 400 (Canada, District Court, Edmonton); Hill, p. 146). Modern RHA Conditions such as 2009, cl. 11 (see also *David Taylor & Son Ltd* v. *Bowden Transport Ltd* [1966] 1 Lloyd's Rep 287**)** and BIFA Conditions, resolve this problem. Compare, however, TT CLUB 400, cl. 28.a. BIFA, sub-cl. (A)(i)(b) further simplifies matters by expressing a limit per kilo rather than by tonne (*cf* RHA Conditions) which is more in line with international carriage regimes. The limit is the same as the weight limit expressed in the Hague-Visby Rules (Art. IV, r. 5).

1180. SDR is a reference to the Special Drawing Right (see cl. 1 at 2.19) which is the unit of account used by the International Monetary Fund as an accounting medium as opposed to the previous use of gold. References to limits of liability expressed in gold in international liability regimes have largely been replaced by references to SDRs (see further Bristow, "Gold Franc-Replacement of the Unit of Account" [1978] 1 LMCLQ 31). The use of the SDR in these conditions reflects the international context of freight forwarding and would not appear to put the customer in any difficulty in respect of calculating the limit since the daily value of an SDR is published in the press. The calculation of the value of an SDR as at the date when the claim is received in writing contrasts with, and would be subject to, the provisions for calculation in liability regimes where they are compulsorily applicable and which may require such calculation to take place on the date of judgment and which may not permit of derogation, at least to the detriment of the claimant (see in respect of the Hague-Visby Rules, s. 2(5) of the Merchant Shipping Act 1981). Compare s. 4 of the Carriage by Air and Road Act 1979 in respect of the amendment to Art. 23 of the Carriage of Goods by Road Act 1965. This introduced SDRs into the CMR Convention. In addition to identifying the date of judgment it also makes reference to the date agreed by the parties. Consequently it would seem possible for the last sentence of sub-cl. (A) to be effective in respect of the CMR Convention. Since, however, CMR can be relevant not only to the original contracting parties but also to others such as a consignee or successive carrier, it would be preferable to indicate the date referred to in the sub-clause on the CMR consignment note.

1181. It is possible that a similar interpretation would be given to the words "goods lost or damaged" to that adopted in respect of the Hague Rules Art. IV, r. 5(a) in *Serena Navigation Ltd* v. *Dera Commercial Establishment (The Limnos)* [2008] EWHC 1036 (Comm), [2008] 2 Lloyd's Rep 166. Burton J held that these words confined the weight limitation to the goods physically lost or damaged notwithstanding the potential liability for economic loss to other undamaged goods consequent upon the physical damage.

1182. Including, presumably, claims in tort and claims in respect of where a contract is made with the forwarder after a misrepresentation is made by him.

1183. This reference to defining of the weight has been added since BIFA 2000.

1184. *Cf* Geologistics GTC, cl. 15 which provides for a limit of £1,600 per tonne of 1,000 kilos or the value of the goods whichever is less and TT CLUB 400, cl. 28.a, which leaves open the amount which is to be specified by the individual forwarder.

1185. This provides for an additional global limit in respect of claims not involving loss or damage to goods. The reference to one transaction reflects the wider context of forwarding operations so that a reference to e.g. "one consignment" would be inadequate to cover all possibilities (in respect of these words see *Gillespie Brothers & Co Ltd* v. *Roy Bowles Transport Ltd*, *Rennie Hogg Ltd (Third Party)* [1973] 1 QB 400, [1973] 1 Lloyd's Rep 10, at p. 419 and p. 19, see also the definition of consignment used in the RHA Conditions 2009, cl. 1 and in some logistics conditions). The application of these words may be problematic where a series of goods are despatched under one set of instructions or where a series of instructions relate to one consignment of goods. It might be argued that "transaction" should be treated as equivalent to "contract" which could seriously limit the liability of the forwarder where (as in *Pringle of Scotland Ltd* v. *Continental Express Ltd* [1962] 2 Lloyd's Rep 80) the forwarder is considered to have

whichever shall be the least.

(iii) in the case of an error and/or omission, or a series of errors and/or omissions which are repetitions of or represent the continuation of an original error and/or omission

(a) the loss incurred, or

(b) 75,000 SDR in the aggregate of any one trading year commencing from the time of the making of the original error, and/or omission,

whichever shall be the lower.[1186]

For the purposes of Clause 26(A), the value of the Goods shall be their value when they were, or should have been, shipped.[1187] The value of SDR shall be calculated as at the date when the claim is received by the Company in writing.[1188]

(B) Subject to clause 2(B) above, and sub-clause (D) below, the Company's liability for loss or damage as a result of failure to deliver, or arrange delivery of goods, in a reasonable time, or (where there is a special arrangement under Clause 25) to adhere to agreed departure or arrival dates, shall not in any circumstances whatever exceed a sum equal to twice the amount of the Company's charges in respect of the relevant contract.[1189]

(C) Save in respect of such loss or damage as is referred to at sub-clause (B), and subject to clause 2(B) above and sub-clause (D) below, the Company shall not in any circumstances

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bound itself contractually to accept duties in respect of future consignments until the contractual relationship is terminated. This could be more properly analysed as a case of a standing offer automatically accepted as each consignment is made until termination of the offer (*Great Northern Railway Co* v. *Witham* (1873) LR 9 CP 16). Given that cl. 26(B) refers to the relevant contract (whereas BIFA 2000 in the equivalent clause referred to transaction), and so distinguishes them it would seem that the provision can be construed more narrowly to relate to a particular instruction or consignment of goods. In most cases, however, such an issue would be largely resolved by application of sub-cl. (iii) (see next footnote).

1186. This sub-clause is an addition from BIFA 2000. It is understood that the object of the sub-clause is not to separate out claims for errors and omission but to provide an annual limit on liability for repetitions of the same error. Errors and omissions still fall within sub-cl. (ii) and are likely to provide a common example of claims covered by the words "all other claims".

1187. The clause requires the value of the goods to be determined as at the beginning of transit for the purposes of fixing compensation for loss or damage to goods or other claims within cl. 26(A). This differs from the usual rule at common law which fixes the destination as the point for determining the value of the goods. Some trading conditions (e.g. Geologistics GTC (cl. 15)) may leave the point open and presumably will be read so as to follow the common law rule. TT CLUB 400, cl. 29.a provides for calculation by reference to the ex works invoice value of the goods plus the carriage charges and insurance if paid but in 29.b applies the value of the goods at the place and time of delivery or should have been delivered in the absence of an invoice value (*cf*., DAMCO STC, cl. 48). Presumably the reference in the BIFA clause to the value "when they were or should have been shipped" is not to be taken as confining the provision to carriage by sea or as referring only to the time when the goods are loaded on to a ship but rather is a reference to the commencement of the transit as the relevant time regardless of how they are transported. The determination of value by cl. 26(A) has the effect of excluding certain items from the normal measure of compensation (see the discussion at 2C.23.4 and amounts, in fact, to a limitation, see *George Mitchell (Chesterhall) Ltd* v. *Finney Lock Seeds Ltd* [1983] 2 AC 803, [1983] 2 Lloyd's Rep 272 and *R.W. Green Ltd* v. *Cade Bros Farm* [1963] 1 Lloyd's Rep 602. It will be subject to the reasonableness test in the Unfair Contract Terms Act. This could produce the difficulty that, quite apart from the reasonableness of the overall limit in the rest of the sub-clause, should this restriction be held to be unreasonable then the whole sub-clause, including the general limit, will fall also, as *per Stewart Gill Ltd* v. *Horatio Myer & Co Ltd* [1992] 1 QB 600, see also *George Mitchell (Chesterhall) Ltd* v. *Finney Lock Seeds Ltd*, above (in respect of the earlier Supply of Goods Act 1973). Possibly the sub-clause only amounts to a term and not the whole of cl. 26, although it might be arguable that the different elements of cl. 26 are so interconnected that it should be treated as a single term. Where the compulsory rules contained in international carriage Conventions are applicable to the contract the definition of value in this clause may well contradict the relevant Convention definition and so be liable to be displaced by it (see e.g. Art. IV, r. 5(b), of the Hague-Visby Rules, *cf* Art. 23(1) of the CMR Convention).

1188. See fn.1180.

1189. This limit of twice the company's charges, appears to be generous when compared with similar limits in some trading conditions (*cf* RHA Conditions 2009, cl. 11(2) and especially DHL Express (UK), cl. 13.7 above fn.), and even in comparison with the CMR Convention: see Art. 23(5). However, the

whatsoever be liable for indirect or consequential loss[1190] such as (but not limited to) loss of profit, loss of market, or the consequences of delay[1191] or deviation,[1192] however caused.[1193]

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reference to the relevant contract could, in some circumstances, reduce the limit considerably. See also TT CLUB 400, cl. 28.b, DAMCO STC, cl. 47(d) (reproduced). Geologistics GTC, cl. 14(ii) is at the same level and also applies to deviation. The right granted in BIFA, cl. 26(D) may go far to persuade a court of the reasonableness of the limit. The limit will not, however, displace that laid down in Art. 23(5) of the CMR Convention, where this is compulsorily applicable to the contract, both by reason of Art. 41 of CMR and also by reason of cl. 2(B) of the conditions. Clause 2(B) will also be available to the forwarder to maintain other Convention limits should these prove, in a particular case, to produce a lesser limit than the limit stated here (e.g. Art. IV, r. 5, of the Hague-Visby Rules, and Art. 22(3) of the Montreal Convention).

1190. In *Saint Line Ltd* v. *Richardsons, Westgarth & Co Ltd* [1940] 2 KB 99 it was held that an exclusion of "indirect and consequential damages" did not prevent recovery of loss of profits etc. which were a direct and natural result of the breach (see also *Croudace Construction Ltd* v. *Cawoods Concrete Products Ltd* [1978] 2 Lloyd's Rep 55, *British Sugar plc* v. *Nei Power Projects Ltd* [1997] CLC 622, *Deepak Fertilisers* v. *Petrochemicals Corp* v. *ICI Chemicals and Polymers Ltd* [1999] 1 Lloyd's Rep 387 (CA), *BHP Petroleum Ltd* v. *Brtitish Steel plc* [1999] 2 Lloyd's Rep 583 affirmed, without consideration of this issue [2000] 2 Lloyd's Rep 277 and *Ferryways NV* v. *Associated British Ports* [2008] EWHC 225 (Comm), [2008] 1 Lloyd's Rep 639 where Teare J noted (at [82]) that he was not strictly bound by previous decisions on the issue of construction unless they were dealing with the same clause but nevertheless (at [83]) considered that in the light of the well-recognised meaning which has been accorded to such words in a variety of exemption clauses by the courts from 1934 to 1999 it would require very clear words indeed to indicate that the parties' intentions when using such words was to exclude losses which fall outside that well-recognised meaning. A useful discussion of this approach can be found in *Hotel Services Ltd* v. *Hilton International Hotels (UK) Ltd* [2000] 1 All ER (Comm) 750 where the critical view expressed in *McGregor on Damages* (16th edn, 1997, paras 25 and 26) was rejected (contrast also, Berg, [2000] LMCLQ 20). Although the clause is more specific than the clause in that case in referring to loss of profit etc., these examples would all seem to be qualified by the earlier reference to the general words (*cf* TT CLUB, cl. 27.d). Furthermore, the clause could have more clearly excluded liability for all forms of economic loss by referring expressly to economic loss (as does TT CLUB 400, cl. 27.d), see *The Zinnia* [1984] 2 Lloyd's Rep 211 at p. 222. See further *Shell Chemicals* v. *P&O* [1993] 1 Lloyd's Rep 114. In many cases, however, economic loss will be excluded by operation of the limitation as a result of confining the value of the goods to the value as at the beginning of transit (see 2.298). This sub-clause may assist the argument that a claim for consequential loss is not a claim for loss or damage to the goods and must necessarily be separately excluded.

1191. In respect of delay, the relationship between the exclusion of liability in this sub-clause and the limit of liability in cl. 26(B) will need to be established. The fact that the limit is referred to will prevent the sub-clauses from being treated as contradictory, but it will still be necessary to reconcile them (*cf* Geologistics GTC, cl. 14, which both excludes consequential loss but provides a limit for delay although without prejudice to other conditions). Arguably the reference over might mean that any damage for delay can be recovered subject to the limit, whether direct or indirect (provided, presumably, such damage falls within the rules of remoteness) so that the effect of the exclusion is not to confine recovery for delay to direct damage but to exclude liability for delay beyond the limit in sub-cl. (B).

1192. This exclusion in respect of "deviation" cannot here be taken as a general exclusion in respect of deviation and may add little in the way of limitation. This is because a common consequence of deviation is delay. However, it might cover additional losses of the customer as a result of the deviation which might not follow as a natural consequence of it, such as, e.g., loss of bargain by a seller due to failure to adhere to the buyer's requirements as to route, see e.g. *Bergerco* v. *Vegoil* [1984] 1 Lloyd's Rep 440.

1193. Although expressed as an exclusion the sub-clause really forms part of an overall limitation of liability (see also fn) and may be treated as such for the purpose of construction and the reasonableness test, see *George Mitchell (Chesterhall) Ltd* v. *Finney Lock Seeds Ltd* [1983] 2 AC 803, [1983] 2 Lloyd's Rep 272, *R.W. Green Ltd* v. *Cade Bros Farm* [1978] 1 Lloyd's Rep 602, see also 2.295. The exclusion of liability for "economic loss" was held to be reasonable by Staughton J in *The Zinnia*, fn.1190, above. At p. 223, the learned judge adopted the sentiment of the statement of Lord Wilberforce in *Photo Production Ltd* v. *Securicor Transport Ltd* [1980] AC 827, [1980] 1 Lloyd's Rep 545 at p. 843 and p. 549 to the effect that in commercial matters, where the parties are of equal bargaining power, there is everything to be said for leaving them free to apportion the risks as they think fit and for respecting their decisions. Should this

(D) On express instructions in writing declaring the commodity and its value,[1194] received from the Customer, and accepted by the Company, the Company may accept liability in excess of the limits set out in sub-clauses (A) to (C) above upon the Customer agreeing to pay the Company's additional charges for accepting such increased liability. Details of the Company's additional charges will be provided upon request.

47. Subject to the exclusions of liability elsewhere in these Conditions, and to the extent only that it is proved that the claim arises from the negligence of the Company, the Company shall be liable for the type of loss or damage set out below subject to the financial limits stated:

(a) Physical loss of or damage to the Goods or other property owned or leased by the Customer (including any Containers, Vehicles or premises) or delivery of the Goods to an incorrect party, but not exceeding the least of:

(i) the value of the relevant Goods;

(ii) the reasonable cost of repair in the case of damage;

(iii) 2 SDR per kg of the relevant Goods; and

(iv) 75,000 SDR each event or events arising from a common cause.

(b) Carriage of the Goods to the incorrect destination, but not exceeding the cost of Carriage of the Goods to the correct destination by the originally contemplated mode of Carriage.

(c) Any other loss or damage arising out of or in relation to the Services or Goods, but not exceeding the least of:

(i) the amount of the Company's Charges in respect of the Services in relation to which the claim arose; and

(ii) 75,000 SDR in aggregate in respect of any event or events arising from a common cause.

(d) If, notwithstanding clauses 23, 44, and/or 45, the Company is liable for delay, its liability shall in no circumstances exceed the amount of the Company's Charges in respect of the relevant Services.

48. For the purposes of clause 45:

(a) the value of Goods is the ex works invoice value plus freight and insurance if paid, plus any customs duty or tax incurred on the Goods in respect of their Carriage and not recoverable from any Authority.

(b) if there is no ex works invoice value for the Goods, compensation shall be calculated by reference to the value of such Goods at the place and time when they are delivered in accordance with the Customer's Instructions or should have been so delivered. The value of the Goods shall be fixed according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

(c) the value of the Customer's property (other than Goods) is (i) if leased by the Customer, its lease value or (ii) if owned by the Customer, its market value at the place where the loss or damage occurred.

49. The Customer is advised to obtain appropriate insurance cover at its own cost if the Customer considers the limits of liability set out in these Conditions to be inadequate.

50. The defences and limits of liability provided for by these Conditions shall apply in any action whether such action be founded in contract, tort, negligence, or bailment or otherwise.

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exclusion have the effect of restricting the liability of the forwarder in derogation of the compulsory rules contained in international Conventions applicable to the carriage of goods, it will be displaced. Accordingly this may be the case where, for example, there is sufficient knowledge of some special consequential loss to bring it within the reasonable contemplation of the forwarder/carrier. Notwithstanding the lack of a special agreement in writing, such loss might form a permissible element in a claim contained in an international Convention. This appears to be the case both under the Hague-Visby Rules and the Montreal Convention (subject to the general limits of liability provided for in these Conventions). *Cf*, however, Art. 23 of the CMR Convention.

1194. BIFA 2000 read simply "By special arrangement agreed in writing, . . . ".

2C.23.1 Limitation of liability clauses—interrelationship of limits

2.293 Forwarders' and carriers' conditions commonly seek to limit the amount of compensation payable to a customer in the event that a liability has been incurred. The chief focus of carriers' conditions will be on claims for loss, damage or delay to the particular goods being transported. Forwarders and logistics operators' conditions need to take account of the wider range of activities in which they may be engaged. Clause 26 of BIFA 2005A typically seeks to limit liability in respect of three types of claim: claims for loss or damage, claims for delay and other claims. It is common to provide for an exclusion of liability for consequential losses which acts as a further limitation on recovery.[1195]

2.294 Where delay has occurred and this has produced physical damage it would seem natural to bring this within sub-clause (A) rather than sub-clause (B) so that the more restrictive limit could not be used to reduce the compensation that would be available in respect of damage where there has been no delay. This is the interpretation commonly applied to similar provisions in international liability regimes.[1196] A more difficult issue is whether each limit is mutually exclusive. There would appear to be no reason why, where goods arrive damaged and late, there cannot be a claim for both and application of each limit to both. Presumably, where goods are lost, they do not arrive and so cannot be delayed. Other claims, in sub-clause (A)(ii), especially given the exclusion of consequential loss, means other types of claim not consequent upon loss, damage or delay to the goods. This would, but for clause 11(B), have covered the failure to arrange or negligence in arranging insurance.[1197] It covers negligent advice.[1198] It could also cover claims for an indemnity for example where this is an express term of the contract. In *Rhône Poulenc Rorer Ltd* v. *Trans Global Group Ltd*[1199] Colman J accepted that clause 29(A) of BIFA 1989[1200] would restrict an express indemnity provided in an umbrella agreement with the consequence that under a conflict clause the BIFA clause was excluded, although Waller LJ, in the Court of Appeal,[1201] was doubtful whether he would have agreed. Clause 29(A) deals with a limitation by reference to "goods" and the indemnity in the umbrella agreement could be read as subject to clause 29(A) so far as individual transactions actually arranging the carriage and handling of goods are concerned, i.e. subject to the same limitation that had always existed so far as ad hoc transactions were concerned. Claims in respect of cash on delivery arrangements are dealt with under sub-clause (A)(ii),[1202] whereas under BIFA 1989 they were dealt with under A(i).

1195. E.g. BIFA, cl. 26(C), discussed at fn. 1190.

1196. E.g. in respect of CMR, see Clarke, paras 59a and b.

1197. See 2.178. See further, *Overseas Medical Supplies Ltd*, fn. 1248. *Cf Lacey's Footwear (Wholesale) Ltd* v. *Bowler International Freight Ltd* [1997] 2 Lloyd's Rep 369 where, unlike cl. 13 of BIFA 1989 Conditions, the terms failed expressly to link the limit of liability to the requirement to obtain insurance, so that despite the apparently wide wording of the limit ("In no case whatsoever shall any liability of the Company, howsoever arising . . . exceed . . . .") it did not apply to such a failure.

1198. See cl. 13, above, 2.192.

1199. QBD, 18 June 1997, unreported.

1200. In the same terms as cl. 26(A).

1201. 18 February 1998, unreported.

1202. See cl. 12(C), above, 2.187.

2C.23.2 Limiting liability for negligence, collateral undertakings and fundamental breach

The limits specified in clause 26(A) of BIFA 2005A[1203] are not expressly stated as applying to loss or damage occasioned by the negligence of the forwarder.[1204] Nevertheless, the clear intention is that they should cover such liability since negligence is the basis of the responsibility accepted by the forwarder in clauses 23 and 24.[1205] This seems likely to be the case given the fact that the strict principles applicable to exclusion and indemnity clauses,[1206] are not applicable in their full rigour to limitation clauses.[1207] Even apart from clauses 23 and 24 the basis of liability of the forwarder is likely to be negligence so that the clause is likely to lack subject-matter if it does not cover negligence, as in *Alderslade* v. *Hendon Laundry Ltd*.[1208] Furthermore, even if it were possible to displace clause 24 and to find the forwarder strictly liable as, for example, were he to act as a common carrier, the words "howsoever arising" in clause 26(A) may well be a sufficient indication that all potential causal bases of liability are intended to be covered as in *Joseph Travers & Son Ltd* v. *Cooper*.[1209] Finally note *Gillespie Brothers & Co Ltd* v. *Roy Bowles Transport Ltd*, *Rennie Hogg Ltd (Third Party)*,[1210] where the Court of Appeal upheld an indemnity clause designed to preserve a limitation clause despite the finding by 2.295

1203. See fn. 1191 for consideration of the more specific limit for delay in cl. 26(B) and fn. 1190 for the exclusion concerning consequential loss in cl. 26(C).

1204. *Cf* DAMCO STC, cl. 50.

1205. See also *Gallaher Ltd* v. *B.R.S. Ltd and Containerway & Roadferry Ltd* [1974] 2 Lloyd's Rep 441, *per* Kerr J at p. 449.

1206. In particular the principles laid down in *Canada Steamship Lines Ltd* v. *R.* [1952] AC 192, [1952] 1 Lloyd's Rep 1, at p. 208 and p. 8, see 2.242.

1207. *Per* Lord Fraser of Tullybelton in *Ailsa Craig Fishing Co Ltd* v. *Malvern Fishing Co Ltd and another* [1983] 1 WLR 964 at p. 970, see further *BHP* v. *British Steel* [2000] 2 Lloyd's Rep 277. *Cf*, however, *HIH Casualty & General Insurance Ltd* v. *Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, at [63].

1208. [1945] KB 189.

1209. [1915] 1 KB 73, *cf The Imvros* [1999] 1 Lloyd's Rep 848. At the other end of the scale, these words, in the light of the commercial context and the contractual scheme led Gross J to conclude that BIFA, cl. 27(A) (the equivalent of cl. 26(A) at that time), covers the wilful default of an employee of the forwarder in assisting the theft of the goods in *Frans Maas (UK) Ltd* v. *Samsung Electronic Ltd* [2004] EWHC 1502 (Comm), [2004] 2 Lloyd's Rep 251. See also *Astrazeneca UK Ltd* v. *Albemarle International Corp* [2011] EWHC 1574 (Comm), [2011] 2 CLC 252, where Flaux J held that an exclusion and limitation clause covered a deliberate repudiatory breach of contract. He rejected the view expressed by Moss QC sitting as deputy judge in *Internet Broadcasting Corp* v. *MAR LLC* [2009] EWHC 744 (Ch) that there is a presumption against deliberate repudiatory breaches being covered unless there are express words to that effect (see www.onlinedmc.co.uk). Contrast further *Mitsubishi Corp* v. *Eastwind Transport Ltd* [2004] EWHC 2924 (Comm), [2005] 1 Lloyd's Rep 383 at [31] for the view that even very wide exclusion clauses containing such words as, "however caused", "or otherwise howsoever" and "arising or resulting from . . . any other cause whatsoever", "when considered in their context as parts of contracts for the carriage of goods from one port to another, do not operate to relieve the carrier of liability for any and every breach of contract. These words bear a restricted meaning. They do not cover, for example, loss or damage caused by dishonesty on the part of the carrier. Whether this is because of a rule of law, or a principle of construction does not matter: the result is that the carrier would be liable for a breach of contract caused by its dishonesty. Moreover the words would not be strong enough to relieve the carrier from liability for loss of or damage to the goods caused by it arbitrarily refusing to ship them to the port of discharge at all. The clause shifts most risks which might result in loss of or damage to the goods shipped from the carrier to the holder of the bill of lading. But that is not inconsistent with the purpose of a commercial contract of carriage where the bearer of a risk can insure against it".

1210. [1973] 1 QB 400, [1973] 1 Lloyd's Rep 10.

the judge at first instance of other possible heads of damage. Although there was criticism of the dicta of Buckley and Orr LJJ[1211] in *Smith* v. *South Wales Switchgear Ltd,*[1212] the decision was not disapproved and Lord Fraser expressed himself in agreement with it.[1213] Furthermore, Bingham J accepted that a limitation clause such as this would cover liability for negligence in *Airspeed Cargo (London) Ltd* v. *Stag Instruments Ltd.*[1214]

2.296 Despite the seeming width of the clause it must be noted that such a clause is liable to be displaced where the forwarder is in breach of a collateral undertaking which is considered not to be subject to the standard terms, as in *Gallagher Ltd* v. *B.R.S. Ltd and Containerway and Roadferry Ltd,*[1215] *J. Evans & Son (Portsmouth) Ltd* v. *Andrea Merzario Ltd,*[1216] and *Mendelssohn* v. *Normand Ltd.*[1217] These cases involved emphatic undertakings which could clearly be seen as overriding standard conditions. Where there is no such clear undertaking but rather an unauthorised action such as an unjustified departure from an instruction a different result is likely. There being no longer any substantive concept of fundamental breach,[1218] whilst it is possible that a serious breach might be treated as not being covered by the clause, as a matter of construction, the limitation clause may well be regarded as clear in apportioning the risk between the customer and the forwarder. Regardless of the seriousness of the breach, the clause might well be taken as covering all risks apart from where there is a collateral undertaking.[1219] Any argument that the limitation clause is intended to apply only where the forwarder is carrying out his instructions and not departing from them may well be met with the criticism that it comes dangerously near to re-introducing the doctrine of fundamental breach by the back door.[1220] Where the forwarder is engaged as a carrier there may be a further issue

1211. At pp. 204, 205 and pp. 20, 21.

1212. [1978] 1 WLR 165, see *per* Viscount Dilhorne at p. 169 and *per* Lord Fraser of Tullybelton at p. 173.

1213. At p. 173. See further the discussion of *Gillespie* by Lord Cameron in *Evans* v. *Glasgow District Council*, 1979 SLT 270 at p. 275.

1214. QBD, 8 October 1982, unreported.

1215. [1974] 2 Lloyd's Rep 441. An oral agreement might not be of an overriding nature but might be regarded as part and parcel of the services to be provided, as in *Frans Maas (UK) Ltd* v. *Samsung Electronic Ltd* [2004] EWHC 1502 (Comm), [2004] 2 Lloyd's Rep 251 at p. 266.

1216. [1976] 1 WLR 1078, [1976] 2 Lloyd's Rep 165. Note the discussion of this case in *Daewoo Heavy Industries Ltd* v. *Klipriver Shipping Ltd* [2003] EWCA Civ 451, [2003] 1 All ER (Comm) 801, [2003] 2 Lloyd's Rep 1, at [19].

1217. [1970] 1 QB 177.

1218. See generally *Treitel*, pp. 248 *et seq*., 7–024.

1219. *Photo Productions Ltd* v. *Securicor Transport Ltd* [1980] AC 827, [1980] 1 Lloyd's Rep 545.

1220. Longmore LJ in *Daewoo Heavy Industries Ltd* v. *Klipriver Shipping Ltd* [2003] EWCA Civ 451, [2003] 1 All ER (Comm) 801, [2003] 2 Lloyd's Rep 1, at para. 11, drawing on a note by Davenport ((1989) LQR 521) of the decision in *Wibau Maschinenfabric Hartman SA and Another* v. *Mackinnon Mackenzie & Co (The Chanda)* [1989] 2 Lloyd's Rep 494. In a case of unauthorised stowage on deck in a carriage by sea, Hirst J held that the limit of liability in the Hague Rules, which were applicable under the terms of the bill of lading as a matter of contract, did not apply (despite the fact that the bill of lading expressly applied the terms to cases of deviation). The case contrasted with an opposite conclusion drawn in *The Nea Tyhi* [1982] 1 Lloyd's Rep 606 and the Court of Appeal in *Daewoo,* on similar facts, took the opportunity to expressly overrule *The Chanda*. The court emphasised the words used in the Hague Rules limit in Art. IV, r. 5 that they apply "in any event". See further, however, *Garnham, Harris & Elton* v. *Alfred W. Ellis Transport* [1967] 1 WLR 940, [1967] 2 Lloyd's Rep 22 (in respect of a limitation of action clause, (see below, 2.307) and *Hunt & Winterbotham Ltd* v. *Morny & Co* (1922) 12 Ll L Rep 286 (in respect of an exclusion clause).

as to whether a deviation from the contractual route has the effect of displacing the limits of liability.[1221]

2C.23.3 Unexplained causes and fundamental or serious breach

2.297 Clause 26(A) of BIFA 2005A also seeks to apply the limits of liability notwithstanding that the cause of the loss is unexplained.[1222] This might be thought to answer the vexed question at common law, at least in respect of bailment, as to whether the burden is on the plaintiff to prove a deviation or fundamental or serious breach or on the defendant to disprove it in order to be able to rely on an exclusion or limitation. It might be arguable, however, that this cannot be the case where the clause is, as a matter of construction,[1223] considered not to be capable of applying to a fundamental (or collateral) breach or deviation since if there is such a breach the clause cannot apply at all.[1224] Thus the question of the burden of proving such a breach should be considered without regard to the clause. Whereas it is clear that the burden of proving the absence of negligence is on a bailee, there is a conflict of authority where the issue is whether the bailee must prove the absence of a fundamental breach to justify his right to rely on the clause.[1225] It is often suggested that the weight of authority is in favour of the burden of proof being on the defendant bailee,[1226] although there is much to be said for the argument that there should be some evidence to enable an inference of fundamental breach to be drawn.[1227] It may, however, be necessary for the plaintiff to at least plead a deviation or fundamental breach.[1228] In *Euro Cellular Distribution plc* v. *Danzas Ltd* the limitation in clause 27 of BIFA 2000 was amended by the parties so that it would not apply in the case of negligent release of "goods on hold"[1229] but would apply to other eventualities leading to the loss of the goods. The judge did not regard the special provision regarding negligent release to be an exception upon an exception.

1221. See generally, Gaskell *et al.*, s. 6B.

1222. *Cf Kells* v. *Clyde S.S.* (1920) 3 Ll L Rep 243.

1223. See, however, the discussion above at 2.296.

1224. This point was not taken in *Euro Cellular Distribution plc* v. *Danzas Ltd* [2003] EWHC 316, [2004] 1 Lloyd's Rep 521, where the judge considered that these words in the BIFA clause make sense where the limitation on liability for loss or damage is not subject to an exception, although not where the limitation applies to some but not all causes of loss or damage.

1225. *Hunt & Winterbotham (West of England) Ltd* v. *B.R.S. (Parcels) Ltd* [1962] 1 QB 617, [1961] 2 Lloyd's Rep 422, *cf Levison* v. *Patent Steam Cleaning Co Ltd* [1978] QB 68. See also *United Fresh Meat Co Ltd* v. *Charterhouse Cold Storage Ltd* [1974] 2 Lloyd's Rep 286, *cf J. Spurling Ltd* v. *Bradshaw* [1956] 1 WLR 461, [1956] 1 Lloyd's Rep 392, at pp. 466, 470 and pp. 396, 399. See further Handford, 38 MLR 577 and Males [1978] CLJ 24. All are cited by Treitel, p. 247 (7–023) fn. 68, who also notes the Australian decision in *The Antwerpen* [1994] 1 Lloyd's Rep 213.

1226. See *Treitel*, p. 247, 7–023 and Palmer, pp. 1829 *et seq.*, 38–038 *et seq.*

1227. See Palmer, p. 1834, 38–041. In some circumstances this may not be too difficult, *cf H.C. Smith* v. *Midland Ry* (1919) 88 LJKB 868, in respect of wilful misconduct. Criticism of *Levison* (fn. 1225) was noted in *Euro Cellular Distribution plc* v. *Danzas Ltd* (fn. 1224) but the judge considered that he should give effect to the arguments based upon justice and common sense which persuaded the Court of Appeal in *Levison* to hold that the burden of proof lay upon the defendants in that case.

1228. See especially *per* Donovan LJ in *Hunt & Winterbotham*, above fn. 1225, at pp. 636–637 and p. 431. *Cf* the comments of Lord Buckmaster in *H.C. Smith* v. *G.W. Ry* [1922] 1 AC 178 at p. 185. See also Yates and Hawkins, para. 10B(19).

1229. Goods not to be released to the consignee without an authorised written release instruction from the claimant.

Rather, the clause was providing that the defendant's liability was limited in some circumstances but not in others, the burden being upon the defendant to prove that the cause of the loss was an event other than negligent release in order to be able to rely upon the limitation provision.

2C.23.4 The value of the goods for the purpose of fixing compensation

2.298 For the purposes of assessing damages in respect of loss or damage to goods in the course of carrying out a contract of carriage, the usual rule at common law is to base the assessment on the market value of the goods at the place of delivery.[1230] In the absence of evidence of the market price, the cost price plus carriage charges plus an element of profit to the importer is a possible measure, at least in respect of carriage by land.[1231] Frequently, in the absence of other evidence, the invoice price, as between a seller and buyer, is taken as the measure, plus the transit charges, regardless of adjustments as between them.[1232] The rule, in effect, expresses an idea of a loss or reduction of value which would naturally be within the reasonable contemplation of the parties to a contract of carriage within the principles as expressed by Alderson B in *Hadley* v. *Baxendale*.[1233] Since a forwarder may be engaged to despatch rather than carry the goods to a particular point it may be more appropriate to express the rule in terms of the knowledge that the forwarder has as to the destination.[1234] This will normally produce much the same result in respect of both carriage and forwarding. As with carriage this knowledge would enable transit charges (and the forwarder's charges) to be recoverable as part of the value of the goods at common law. In respect of both forwarders and carriers, recovery of any further loss occasioned by the fact that the goods have a higher value at a destination point further from the delivery point for which the carrier is engaged or to which the forwarder was engaged to dispatch will depend on whether they have knowledge of it. A clause such as 26(A) of BIFA 2005A, which requires value to be assessed at the beginning of transit, will have the effect of excluding or limiting some of these elements identified as falling within the normal measure of damages for loss or damage to the goods and will raise issues of whether this falls foul of requirements of reasonableness under the Unfair Contract Terms Act 1977 or other compulsory rules that might apply to a particular transit.

2.299 Where delay rather than loss or damage to goods is the object of a claim the difference in value between the time of arrival and the time the goods should have arrived can also form the basis for fixing damages. That is provided that the carrier should realise that it is not unlikely that the goods are sent by way of trade so that

1230. *Rice* v. *Baxendale* (1861) 7 H. & N. 96, and see *per* Devlin J, *Heskell* v. *Continental Express Ltd and Another* (1950) 83 Ll L Rep 438 at p. 459. See also, in carriage by sea, *The Texaco Melbourne* [1993] 1 Lloyd's Rep 471, at p. 475 (upheld on appeal, [1994] 1 Lloyd's Rep 473).

1231. *O'Hanlan* v. *Great Western Ry* (1865) 6 B. & S. 484.

1232. *The Charlotte* [1908] P. 206; *The Sanix Ace* [1987] 1 Lloyd's Rep 465; and *The Chanda* [1989] 2 Lloyd's Rep 495; *Landauer & Co* v. *Smits & Co* (1921) 6 Ll L Rep 577. *Cf Luigi Riva Di Fernando* v. *Smits & Co* (1920) 2 Ll L Rep 279 (affirmed (1920) 4 Ll L Rep 264).

1233. (1854) 9 Ex 341.

1234. *Cf Heskell*, fn. 1230 above, at p. 460.

a fall in market value is within his reasonable contemplation.[1235] A clause which seeks to confine value to the beginning of transport would seem to be irrelevant to this and thereby incapable of limiting a claim for delay based on this measure. Possibly this is reflected in there commonly being a separate clause to provide a limit for delay.[1236]

2C.23.5 Reasonableness and compulsory rules

2.300 The reasonableness of the limits imposed by clauses such as clause 26(A) of BIFA 2005, for the purposes of the Unfair Contract Terms Act 1977, will be determined in part by section 11(4) of the Act. This requires consideration of the resources available to the defendant to meet the liability and the extent to which it was possible for him to obtain insurance cover. The availability of insurance is a central factor.[1237] Issues in this context may resolve themselves into the question of who is the better insurer, which certainly involves the question of the availability of insurance to the customer and even the appropriateness of requiring him to insure.[1238] Indeed, the factors indicated in this subsection are by no means decisive and may be outweighed by other factors.[1239] As made clear in *Singer Co (UK) Ltd and Another* v. *Tees and Hartlepool Port Authority*,[1240] the lack of knowledge of the operator as to the nature of the goods was also relevant as was the fact that, at the time with which the case was concerned, most cargoes would be under the relevant limit. It should be noted that the current BIFA limit in clause 26(A)(i)(b) is equivalent to the Hague-Visby Rules limit.[1241] In *Sonicare International Ltd* v. *East Anglia Freight Terminal*[1242] even a limit described as derisory was held to be reasonable in light of commercial reality and, in particular, the allocation of risk by insurance.

2.301 The factors to be considered are those relevant at the time the contract is made[1243] and, whilst not technically applicable, it may be permissible to have regard to the guidelines in schedule 2 of the Act provided that regard is had to the fact that a commercial as opposed to a consumer transaction may be involved.[1244] In respect of these criteria, within paragraph (a) of schedule 2 of the Act, an important factor

1235. *Koufos* v. *C. Czarnikow Ltd (The Heron II)* [1969] 1 AC 350.

1236. E.g. BIFA, cl. 27(B). *Cf* cl. 7(1) of the P&O Nedlloyd BL.

1237. *Cf* the advice given in DAMCO SCT, cl. 49. See *Singer Co (UK) Ltd and Another* v. *Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 at p. 169, where it was also pointed out that indemnity insurance is, generally speaking, less expensive than liability insurance. See also *Flamar Interocean Ltd* v. *Denmac Ltd* [1990] 1 Lloyd's Rep 434 and *White Cross Equipment Ltd* v. *Farrell*, 22 March 1982, unreported, see further Jacobs, pp. 159–160.

1238. *Woodman* v. *Photo Trade Processing Ltd*, Exeter County Court, 3 April 1981, see R. Lawson, *Exclusion Clauses* (2nd edn, 1983), p. 161.

1239. *Singer,* above, fn. 1237, at p. 170.

1240. Above, fn. 1237, See also *Wight* v. *British Railways Board* [1983] CLY 424.

1241. See *Singer,* above, fn. 1237, at p. 170. *Cf Patec* v. *Translink* (2 December 2002, Singapore HC) summarised by David Martin-Clark (www.onlinedmc.co.uk).

1242. [1997] 2 Lloyd's Rep 48.

1243. S. 11(1).

1244. *Singer*, above, fn. 1237, at p. 169. See also *Granville oil & Chemicals Ltd* v. *Davies Turner & Co Ltd* [2003] EWCA Civ 570, [2003] 2 Lloyd's Rep 256. *Cf Stag Line Ltd* v. *Tyne Shiprepair Group Ltd and Others (The Zinnia)* [1984] 2 Lloyd's Rep 211 at p. 222.

pointing towards the reasonableness of the limit of the BIFA clause is the fact that sub-clause (D) makes an increase available to the customer subject to arrangement in writing and payment of increased charges.[1245] It is not made clear when arrangements must be made in writing, i.e., whether before or at the time instructions are given to the forwarder or before performance of them is commenced or carried out. If the condition works in such a way as to leave too little time to make the arrangement this could cancel it out as a factor indicating reasonableness.[1246] Furthermore the opportunity to increase the level of liability must be a genuine alternative so that the additional charge must not be so high as to discourage customers from opting for it.[1247] The need for such opportunity to be effective was noted in *Overseas Medical Supplies Ltd* v. *Orient Transport Services*.[1248] The Court of Appeal held this limit to be unreasonable in the context of the failure of the forwarder to effect agreed insurance in respect of the 1989 Conditions which made such failure subject to the limit contained in the equivalent to clause 26 (clause 29). This link was removed by BIFA 2000. The Court of Appeal approved the analysis made by the judge at first instance.[1249] The plaintiff was a supplier of medical equipment and sent goods for exhibition in Iran. The forwarder was a specialist in exporting such exhibition equipment. Whilst the plaintiff's employee knew of the formal existence and extent of the term limiting liability she did not fully comprehend its implications. Although there existed the possibility of making a special arrangement, it was unlikely that this would be availed of given the unlikelihood that such a straightforward task would not be performed. No formal proof was given of the special arrangements or of other alternatives that might have been available. Further, a distinction was possible between a limit in respect of loss or damage to goods which would most likely be covered by owners' insurance and a limit applicable to the failure to arrange this insurance since, in the ordinary world of business, people do not take out indemnity insurance to cover the risk of failure to effect insurance. The fact that, in the circumstances, the likelihood was that only the defendant would be employed for this task and the fact that a customer would likely utilise their tailor-made insurance arrangements rather than seek to obtain it for themselves, demonstrated the unequal relative bargaining strength of the parties.

2.302 Where the forwarder acts as a principal in respect of an operation, he may fall within a compulsory rule applicable to carriage of goods.[1250] In such a case limits of liability imposed by the trading conditions will be subject to such compulsory rules and be nullified by them to the extent that they do not permit departure from them. Thus where the CMR Convention as scheduled to the Carriage of Goods by Road

1245. A factor considered in *Patec* v. *Translink*, above fn. 1241, in respect of the Singapore Freight Forwarders Association Standard Trading Conditions 1986. See also *Frans Maas (UK) Ltd* v. *Samsung Electronic Ltd* [2004] EWHC 1502 (Comm), [2004] 2 Lloyd's Rep 251.

1246. *Cf Phillips Products Ltd* v. *Hyland* [1987] 1 WLR 659. *Cf* condition 11(2) of the RHA Conditions 2009, and the lack altogether of any such opportunity in the BRB Conditions, see condition 6.

1247. *Cf Peek* v. *North Staffordshire Railway Co* (1863) 10 HLC. 473 decided under s. 7 of the Railway and Canal Traffic Act 1854, see Jacobs, p. 158. See also Yates and Hawkins, paras 2F(1)–2H(3).

1248. [1999] 2 Lloyd's Rep 273. *Cf*, however, *Granville Oil & Chemicals*, above fn. 1244.

1249. See Potter LJ, especially at paras 20–21.

1250. See 2.25.

Act 1965 applies to the contract made by the forwarder in respect of the international carriage of goods by road the limit of 8.33 SDR per kilo expressed in Article 23(3) of the Convention will displace the contractual limit which will be nullified as a derogation from the Convention in accordance with Article 41 in respect of a claim subject to the Convention limit. Similarly, this contractual limit may result in a lessening of the liability of a forwarder to less than the limits expressed in Article IV, rule 5 of the Hague-Visby Rules scheduled to the Carriage of Goods by Sea Act 1971 and Article 22 of the Warsaw Convention as amended by the Montreal Protocol No. 4 and the Montreal Convention 1999 as scheduled in the Carriage by Air Act 1961 so that in accordance with Article III, rule 8, and Article 23 of these respective Conventions the contractual limit provided here is likely to be displaced.

2.303 A further possibility is that a forwarder might issue a bill of lading made subject to the original Hague Rules, although the carriage by sea is not subject to compulsory legislation. In these circumstances the limit contained in the original Hague Rules will be introduced into the contract by means of a paramount clause in the bill of lading. The paramount clause will need to be clearly expressed to ensure that the limitation in the Rules overrides the limitation in the general trading conditions,[1251] assuming that they are not completely displaced by the bill of lading terms. Otherwise the limit in clause 26(A) of BIFA 2005A may be treated as a contractual increase,[1252] as clause 2(B) will not apply since the Rules are not compulsorily applicable.

2C.24 LIMITATION OF ACTION

BIFA 2005A clause 27 *2.304*

27(A) Any claim by the Customer against the Company arising in respect of any service provided for the Customer, or which the Company has undertaken to provide, shall be made in writing and notified to the Company within 14 days of the date upon which the Customer became, or ought reasonably to have become, aware of any event or occurrence alleged to give rise to such claim, and any claim not made and notified as aforesaid shall be deemed to be waived and absolutely barred, except where the Customer can show that it was impossible for him to comply with this time limit, and that he has made the claim as soon as it was reasonably possible for him to do so.
(B) Notwithstanding the provisions of sub-paragraph (A) above, the Company shall in any event be discharged of all liability whatsoever and howsoever arising in respect of any service provided for the Customer, or which the Company has undertaken to provide, unless suit be

1251. *Cf Adamastos Shipping Co* v. *Anglo-Saxon Petroleum Co* [1959] AC 133, [1958] 1 Lloyd's Rep 73.

1252. *Cf Marifortuna Naviera SA* v. *Government of Ceylon* [1970] 1 Lloyd's Rep 247. See also *Seven Seas Transportation* v. *Pacifico Union Marina Corp* [1984] 1 Lloyd's Rep 588. The assumption is that the BIFA clause, in effect, produces a higher limit than the Hague Rules. To be certain of this, however, any reference to the original Hague Rules in a paramount clause will need to ensure that it excludes the operation of Art. IX of the Rules, see *The Rosa S* [1988] 2 Lloyd's Rep 574 and *The Nadezhda Krupskaya* [1989] 1 Lloyd's Rep 518 (Sup Ct of NSW, CA) and 4.128.

brought and written notice thereof given to the Company[1253] within nine months from the date of the event or occurrence alleged to give rise to a cause of action against the Company.

2C.24.1 Notice of claims and time limits

2.305 Trading conditions commonly require claims to be made within a short period of time. A general object is to enable evidence to be gathered in good time before it is lost through change of personnel etc. Forwarders, in particular, may need to investigate claims through a chain of carriers and other operators. The notice requirements in forwarding conditions commonly operate as a time bar.[1254] This differs from notice clauses commonly found in combined transport bills of lading,[1255] including those used by forwarders.[1256] Rather than impose a time bar they put the burden of proving loss or damage where the goods have been handed over to the customer and no claim has been made within a specified time. As with some other forwarders' conditions[1257] clause 27(B) of BIFA 2005A includes an overall time limit of nine months. The introduction of this time limit[1258] might well reflect the increasing importance of the forwarder's role as a multi-modal transporter, so that in line with the conditions in use with such transport the attempt is made to preserve the recourse position of the forwarder.[1259]

2.306 Notice of claims clauses may attach different times to different types of claim.[1260] Clause 27(A) of BIFA 2005A specifies a standard limit[1261] regardless of the type of claim. Furthermore it has a standard starting point regardless of the type of claim unlike some other forwarder conditions[1262]or clause 20 of the 1981 conditions which attached different starting points dependent on the type of claim.[1263] Typically they indicate the end of transit for damage claims, the time when the goods should have been delivered for delay and, for other claims, the event giving rise to the claim. Clause 27(A) attaches to all types of claim the date on which the customer became or should have become aware of the event or occurrence alleged

1253. This would appear superfluous given that notice of suit would inevitably follow the commencement of an action. Its effect will be to require this notice also to be within the time limit.

1254. As does cl. 27(A) of BIFA 2005A, cl. 16 of Geologistics GTC, TT CLUB 400, cl. 31, DAMCO STC, cl. 51. *Cf* also cl. 13 of RHA Conditions 2009.

1255. E.g. Maersk Line Multimodal Transport BL, cl. 9.

1256. See FBL, cl. 16. Rule 9.1 of the FIATA Model Rules for Freight Forwarding Services is to similar effect. Rule 9.2, however, imposes a bar in respect of claims where the goods have not been handed over.

1257. E.g. TT CLUB 400, cl. 31.a.ii, DAMCO STC, cl. 51.

1258. It is in much the same terms as its equivalent in the 1984 edn (cl. 17) which introduced this time limit.

1259. *Cf* e.g. FBL, cl. 17.

1260. E.g. Geologistics GTC, cl. 16, which requires 7 days' notice after the end of transit for damage claims if transit ends in the British Isles (14 days if elsewhere) and 14 days in respect of delay and other claims.

1261. It differs from the less definite IFF Conditions 1984 (cl. 15) which simply required the customer to make a claim in writing and without delay and relieved the company of liability where the delay had caused prejudice to it. IFF Conditions 1984, cl. 15, itself replaced the more specific provision in previous conditions (see e.g. 1981 Conditions, cl. 20).

1262. Geologistics GTC, cl. 16. *Cf Ferryways NV* v. *Associated British Ports* [2008] EWHC 225 (Comm), [2008] 1 Lloyd's Rep 639 at [90]–[91].

1263. In similar terms to the Geologistics clause noted in the previous footnote.

to give rise to the claim. Such a date may well prove to be difficult to determine. Further a provision of this kind may be difficult to apply where more than one event is relevant to the claim or more than one claim is made. A particular difficulty might arise in identifying the relevant type of event or occurrence. The mere non-arrival of the goods could be an event giving rise to a claim. Where the forwarder has been employed to engage a carrier to deliver the goods the non-arrival of the goods might well lead the customer to believe that he has a claim against the carrier and it may be some time before he discovers other facts leading him to believe that he has a claim against the forwarder, for example negligence in the choice of carrier. Possibly the clause is meant to require the customer to give notice once he becomes aware of an event which could give rise to a claim such as the non-arrival of the goods, rather than awareness of the reasons behind the event which make clear that a claim is possible. This could be supported by the idea noted earlier that the forwarder might need to obtain early notice of any *possible* claim so this could be investigated through the chain of carriers etc, employed by him. The use of the word "alleged" might also reinforce this.[1264]

2C.24.2 Width of notice and time limit clauses

2.307 As forwarders operating under BIFA Conditions accept a liability in negligence there can be little doubt that the limits in clause 27 cover negligence. Clause 27(A) refers to "Any claim . . . arising" and would not therefore be subject to the strict construction adopted in *Garnham Harris and Elton Ltd* v. *Alfred W. Ellis (Transport) Ltd,*[1265] whereby a requirement to give notice in respect of claims for non-delivery was held not to apply to a conversion of the goods. The conversion in that case was constituted by the non-contractual subcontracting of the goods which was also considered to be a fundamental breach. Given the approach to fundamental breach taken in *Daewoo Heavy Industries Ltd* v. *Klipriver Shipping Ltd,*[1266] it seems unlikely that an appeal to the seriousness of the breach could have the effect of displacing the notice requirement. The same is true of the time limit in clause 27(B) which uses the emphatic words "in any event" reminiscent of the use made of such words in Art. III, rule 6 of the Hague-Visby Rules.[1267]

1264. *Cf* cl. 27(B) which, for the purpose of the nine-month time limit, refers to the date of the event or occurrence alleged to give rise to a cause of action against the company.

1265. [1967] 1 WLR 940, [1967] 2 Lloyd's Rep 22.

1266. [2003] EWCA Civ 451, [2003] 1 All ER (comm) 801, [2003] 2 Lloyd's Rep 1, overruling *Wibau Maschinenfabric Hartman SA & Another* v. *Mackinnon Mackenzie & Co (The Chanda)* [1989] 2 Lloyd's Rep 494.

1267. As in *Daewoo*. See also *The Antares (Nos 1 and 2)* [1987] 1 Lloyd's Rep 424. This case applied the one year time limit in the Hague-Visby Rules in favour of shipowners despite the unauthorised carriage of the goods on deck, on the basis that in that case the limit had statutory force and furthermore "was not of a nature which in any way undermined the purpose of the shipowner's obligation to stow below deck" (*cf* the approach taken by Hirst J in *The Chanda*, above fn. 1266). In *The Antares*, the time limit was construed as being wide enough to cover a fundamental breach, Lloyd LJ noting at p. 430 that the later Hague-Visby Rules were more widely expressed than the original Hague Rules by the addition of the word "whatsoever": see also *Compania Portorafti Commerciale SA* v. *Ultramar Panama Inc and Others (The Captain Gregos)* [1990] 1 Lloyd's Rep 310.

2C.24.3 Reasonableness and compulsory rules

2.308 Notice requirements and time limits will be subject to the reasonableness test whenever the Unfair Contract Terms Act 1977 applies.[1268] BIFA clause 27(A) aims to improve the prospects of the notice requirement satisfying the reasonableness test by seeking to ensure that the customer finds it practical to comply with.[1269] This may be furthered by the fact that the clause places emphasis on the awareness of the event or occurrence rather than attaching the commencement of the time for compliance to a specific point of time such as the delivery of the goods.[1270]

2.309 A reason for the nine-month limit in sub-clause (B) has been noted above in that the forwarder will need some time to exercise recourse proceedings against subcontract operators who will seek to rely on a one-year time limit which is the minimum limit laid down in carriage liability regimes. This reason appears to have been treated as significant by the Court of Appeal in *Granville Oils & Chemicals Ltd* v. *Davies Turner & Co Ltd*[1271] which upheld as reasonable the equivalent provision in the 1989 conditions.[1272] In this case the parties were of equal bargaining strength and although the claimants were unaware of the time bar the conditions had been sufficiently brought to their attention and should have been known by them. The clause was not so wide as to cover the possible fraud of the forwarder,[1273] and it was practicable to expect compliance with the limit. This contrasts with a decision of the Singapore High Court, where in *Patec* v. *Translink*[1274] the court held the nine-month time limit in the 1986 Singapore Freight Forwarding Association Conditions to be unreasonable. The forwarder was unable to show that it needed the limit to be able to exercise recourse. The only evidence that any part of the carriage was subject to a time bar of less than six years was in respect of the carriage by sea stage. Here the forwarders had the benefit of Art. III, rule 6 *bis* of the Hague-Visby Rules which would extend the time available for recourse in respect of damage occurring during that stage. Compare further *White Cross Equipment Ltd* v. *Farrell*,[1275] where a six-

1268. Within either s. 2 or s. 3 as extended by s. 13(1)(a). See further generally 2C.2.2. See also *Ferryways NV* v. *Associated British Ports* [2008] EWHC 225 (Comm), [2008] 1 Lloyd's Rep 639 at [93].

1269. *Cf R.W. Green Ltd* v. *Cade Bros Farm* [1978] 1 Lloyd's Rep 602. See also TT CLUB 400, cl. 31.a.i. *Cf* further RHA Conditions 2009, cl. 13(1).

1270. As in some other conditions, see 2.306. On the other hand if the "event or occurrence" is taken to mean a simple event such as, e.g., the non-arrival of the goods rather than the reason behind the event, the customer may be caught by the clause before realising that there are reasons to make a claim against the forwarder. In this case the clause may have the effect of enabling the forwarder to evade a fundamental obligation which might militate against the reasonableness of the clause.

1271. [2003] EWCA Civ 570, [2003] 2 Lloyd's Rep 356.

1272. See also, to the same effect, *Röhlig (UK) Ltd* v. *Rock Unique Ltd* [2011] EWCA Civ 18. Lord Justice Moore-Bick noted (at [21]) that the clause in BIFA 2005A was in the same terms as that considered in *Glanville Oils* and made the point that although whether a term satisfies the statutory requirement of reasonableness is to be judged by reference to the circumstances of each case at the time the contract is made, nevertheless the meaning of the words used, albeit in an earlier edition of the conditions, must be taken to be the same.

1273. *Cf HIH Casualty & General Insurance Ltd* v. *Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349. See also *Frans Maas (UK) Ltd* v. *Samsung Electronic Ltd* [2004] EWHC 1502 (Comm), [2004] 2 Lloyd's Rep 251.

1274. 3 December 1993, noted by David Martin-Clark.

1275. 22 March 1982, unreported.

month time limit for complaints concerning major defects in machinery was held to be reasonable. As the sub-clause (B) does not link the running of time with the delivery of the goods, it may well have an even wider effect than the clause considered in *Ocean Chemical Transport Inc* v. *Exnor Craggs Ltd.*[1276] In that case a claim in respect of a sale of goods contract was time-barred where the cause of action arose after the time limited by reference to the delivery of the goods. However, the approach of Tuckey LJ in *Granville Oils*, in the circumstances of that case,[1277] had the effect of extending the time available to the customer. He took the view that as the forwarders were in breach of a continuing duty to inform their customer, when pursuing a claim on their behalf, they had no cover as soon as the underwriters rejected the claim. The time limit did not start until the time they did inform the customer.

2.310 In so far as the forwarder acts as a principal effecting carriage, he may find himself subject to mandatory rules laid down in respect of the operations of carriage. Such rules may therefore displace these types of provision in the contract.[1278] The CMR Convention, by Article 41, prohibits any derogation from its provisions except to the extent that the provisions themselves admit of some flexibility. Consequently, where the forwarder operates as an international carrier by road and finds himself subject to the Convention in accordance with the Carriage of Goods by Road Act 1965, the time limit of one year in Article 32 will apply in place of the nine-month time limit in the conditions. In addition the forwarder will have the rights granted in Article 30. This requires various reservations to be made to the carrier within various time limits. In respect of loss or damage[1279] a failure to make the reservations will only have an effect on the burden of proof so that the attempt to bar the rights of the customer to take action by reason of failure to give notice will clearly fall foul of Article 41. Similar provisions apply in carriage by sea,[1280] rail and air.[1281] Some compulsory provisions may be more restrictive than a contractual provision. Article 26 of the Warsaw Convention as amended by the Montreal Protocol No. 4 and Article 31 of the Montreal Convention, scheduled to the Carriage by Air Act 1961 bar action against the carrier if no written complaint is made within 14 days of receipt of the cargo. In some circumstances, this may bar a claim which would be permitted under BIFA Conditions. This give rises to the question whether the forwarder has thereby increased the rights of the customer as permitted by Article

1276. [2000] 1 Lloyd's Rep 446.
1277. Fn. 1271, at para. 27.
1278. As contemplated by 2(B) of BIFA 2005A, see 2.24.
1279. *Cf* delay in Art. 30(3).
1280. Art. III, r. 6 of the Hague-Visby Rules, which imposes a one year time limit in respect of claims against the carrier and requires notice of apparent damage at the time of removal of the goods by the person entitled to delivery or, if loss or damage is not apparent, within three days. The absence of notice reverses the burden of proof. *Cf* the Hamburg Rules Arts 19 and 20 and the Rotterdam Rules Arts 23 and 62.
1281. Art. 47 of URCIM, Art. 26 of the Warsaw Convention and Art. 31 of the Montreal Convention.

23 of the Convention.[1282] Where the forwarder's contract is subject to such mandatory provisions it is possible that they will govern the forwarder's right to rely on a clause such as this notwithstanding the fact that the claim against the forwarder is not based on any breach of the Convention as in *Eastern Kayam Carpets Ltd* v. *Eastern United Freight Ltd.*[1283]

2C.24.4 Bringing suit

2.311 Similar issues arise under contractual time limits as in respect of time limits imposed by regimes of liability. Several decisions made in respect of the Hague and Hague-Visby Rules are useful for analysis of possible issues of interpretation and will be drawn on here. The analogy is generally close. First, the form of words used is similar in that the carrier under the Hague Rules limit, as under BIFA clause 27 and similar terms, is expressed to be discharged of liability. Such words are appropriate to a time limit which extinguishes the claim and provides a substantive defence. It is distinguishable from a procedural limitation, as with more general statutorily imposed time limits, which simply bar the remedy.[1284] Secondly, many of these decisions concern a contractual incorporation of the Hague rules time limit,[1285] and, perhaps, can be regarded as appropriate indicators of the likely interpretation of a time limit in forwarders' conditions. On the other hand the strict construction appropriate to contractual defences may make the analogy inexact given that a liability regime may have a wider underlying policy. Arguably, a different approach can and should be taken depending upon whether the Rules apply as a matter of mandatory law or as a matter of contract. It is not entirely clear that this difference has been fully explored in the cases so that some caution, nevertheless, may be necessary in pursuing the analogy.[1286]

2.312 A first issue is whether suit must be brought within the jurisdiction in order to stop time running or whether an action brought in another country is sufficient.

1282. It might, however, be subject nevertheless to the restriction contained in cl. 2(B), see the discussion in 2C.25.3.

1283. QBD, 6 December 1983, unreported.

1284. See Lord Wilberforce in *Aries Tanker Corpn* v. *Total Transport Ltd* [1977] 1 All ER 398 at 402. This was applied in *The Jay Bola* [1992] 2 Lloyd's Rep 48, so as to bar an application to join a new party to a writ after the expiry of the time limit. The principle of relation back in s. 35 of the Limitation Act 1980 did not apply in these circumstances. The decision was doubted, however, in *Nikolay Malakhov Shipping Co Ltd* v. *Seas Sapfor Ltd* (1998) 44 NSWLR 371 (NSW, CA) *per* Shellar and Cole JJA, (see, however, the dissenting judgment of Handley JA). *Cf The Kefalonia Wind* [1986] 1 Lloyd's Rep 273. See also, in the context of carriage by Air: *Hall* v. *Heart of England Balloon Ltd*, Birmingham County Court 13 October 2009, [2010] 1 Lloyd's Rep 373 and *Laroche* v. *Spirit of Adventure (UK) Ltd* [2009] EWCA Civ 12, [2009] QB 778. Contrast where there is an arbitration clause. Barring a remedy or claim, it seems, is distinct from barring the right to arbitrate: *The Seki Rolette* [1998] 2 Lloyd's Rep 638 and *Thyssen* v. *Calypso*, fn. 1287 below.

1285. As in *Aries Tanker*.

1286. It may be desirable to adopt a similar construction to avoid apparent anomalies as noted in *The Finnrose*, see fn. 1295, at p. 573, in respect of s. 39 of the Limitation Act 1980.

Decisions concerning the Hague Rules suggest the former.[1287] It might be thought that, where "suit" is required to be brought in a foreign jurisdiction and no suit is brought there in time, the combined effect of the view taken in *The Nordglimt*[1288] and *The Jay Bola*[1289] would lead an English court to stay proceedings in England even if brought within time. This has not been the result so far.[1290] In general, therefore, the failure to bring suit in time on the correct basis against the correct defendant will be fatal to the claim and an attempt to revive an initially flawed claim after the time limit has expired, by amendment to the writ, may well fail. Nevertheless, in *Continental Fertilizer Co Ltd* v. *Pionier Shipping CV (The Pionier)*,[1291] again in the context of the Hague Rules time-bar, the plaintiffs' particulars of claim had throughout alleged breach of duty as bailees, negligence and breach of contract and the only material variation made by an amendment and re-amendment of the plaintiffs' statement of claim had related to the ambit of the defendants' duties. The court granted the plaintiffs leave to re-amend. The court pointed to the fact that the object of the Hague Rules time limit is to protect shipowners from stale claims and that provided that a suit was brought by the party entitled to sue before a competent court which alleged that the shipowner was liable for breach of duty owed in relation to the cargo carried that suit would be sufficient to satisfy the requirements of the Hague Rules. Similarly in *Anglo-Irish Beef Processors Ltd* v. *Federated Stevedores Geelong (The Reefer Badger)*[1292] it was held to be enough for the plaintiff to sue the defendant in time to enforce the liability of the defendant in respect of the loss or damage to the goods while on board the ship. It was not a necessary condition at that time to frame the action in contract if it could be framed in tort, nor need it be framed as against the carrier in his capacity as contracting carrier. So long as there is no prejudice it is possible to amend the claim to enable the necessary allegations to be made for application of the Hague Rules, i.e., that at the time of the damage the goods were subject to a contract of carriage by sea covered by a bill of lading to which the plaintiff and defendant were parties and that the defendant was a carrier within the meaning of the Rules. *In Heinz-Wattie Ltd* v. *Hamburg Sudamerikanische*

1287. *Cf Compania Colombiana de Seguros* v. *Pacific S.N.* [1965] 1 QB 101, [1963] 2 Lloyd's Rep 479 and *The Nordglimt* [1988] QB 183, [1987] 2 Lloyd's Rep 470 (overruled on different grounds by the House of Lords in *Republic of India* v. *India Steamship Co Ltd* [1997] 3 WLR 818). See also *The Havhelt* [1993] 1 Lloyd's Rep 523, *Thyssen* v. *Calypso* [2000] 2 Lloyd's Rep 243. The fact that cl. 28 of BIFA (see 2.315) requires claims to be subject to the jurisdiction of the English courts would seem to reinforce this interpretation of BIFA, cl. 27(B). TT CLUB 400, cl. 31(A)(.ii), makes clear that suit must be brought in the proper forum.

1288. [1988] QB 183, [1987] 2 Lloyd's Rep 470.

1289. [1992] 2 Lloyd's Rep 48, see above fn. 1284.

1290. See *Mahavir Minerals Ltd* v. *Cho Yang Shipping Co Ltd (The MC Pearl)* [1997] 1 Lloyd's Rep 566 and *Citi-March Ltd* v. *Neptune Orient Lines* [1997] 1 Lloyd's Rep 72. In *Baghlaf Al Zafer Factory Co* v. *Pakistan National Shipping Co* [1998] 2 Lloyd's Rep 229, Phillips LJ preferred the view (over that of Rix J in *Citi-March*) that it is not necessary for the plaintiff to show a strong case for jurisdiction in England apart from the time limit, but rather, where a plaintiff has acted reasonably in commencing proceedings in England and allowing time to expire in the agreed foreign jurisdiction, a stay of the English proceedings should only be granted on terms that the defendant waives the time bar in the foreign jurisdiction (in this case under the Hague Rules).

1291. [1995] 1 Lloyd's Rep 223.

1292. [1997] 1 Lloyd's Rep 207 (Sup Ct of Victoria (CA)).

Dampschifffahrtsgesellschaft (No. 2),[1293] the cargo owner brought suit within time in respect of a through transport alleging damage between the port of loading and port of discharge. An amendment to the claim was permitted out of time to allege damage occurring within the whole period of transport including the land sections. Basing itself on *dicta* of Leggatt J in *The Kapetan Markos*,[1294] the court felt that the minimum requirements are that the correct plaintiff must have validly commenced proceedings before a competent court against the correct defendants and those proceedings are not brought in breach of any agreement as to choice of forum and remain valid and effective. In this case "the parties, terms, duties, breaches, loss and damage remain the same". Consequently, a new "suit" had not been brought by the claimants.

2.313 It was held in *Fort Sterling Ltd* v. *South Atlantic Cargo Shipping* (*The Finnrose*) that once a suit has been dismissed for want of prosecution it is no longer a relevant suit for the purposes of the Hague Rules time limit.[1295] Such reasoning may similarly be applicable to forwarders' time limits although it should be noted that underlying the decision is the principle that Article III rule 6 of the Hague Rules is to be given a broad and purposive construction which, as noted above, might not be an appropriate basis for construction of what was, in that case, a purely contractual provision. The decision, however, does point in the direction of maintenance of a defendant's right to rely on a time bar. Further support for this is provided by *Saris* v. *Westminster Transports SA*,[1296] where the court set aside an order extending time by renewal of a writ. Colman J held that a discretion to grant an extension of time by way of renewal of a writ would not normally be exercised in favour of a plaintiff if to do so would be to deprive the defendant of the benefit of a time limit. It was difficult to identify any logical basis on which the discretion to extend time should be exercised differently in the case of a contractual limit from the case of the statutory time bar. The effect on the time bar is a material fact to be taken into account by the court in weighing the potential prejudice to the defendant.

2.314 The strict application of the limitation period is subject, however, to procedural powers of court which do not affect the substantive basis of a claim such as power to allow the substitution of a party to an action by a new party to whom his interest or liability has been transferred.[1297]

1293. High Court of New Zealand, 24 March 2000, Auckland Registry CP451/96, report assembled by Paul Myburgh, www.maritimelaw.orcon.net.nz.

1294. [1986] 1 Lloyd's Rep 211 at 221.

1295. [1994] 1 Lloyd's Rep 559.

1296. [1994] 1 Lloyd's Rep 115.

1297. See *Industrie Chimiche Italia Centrale* v. *Alexander G. Tsavliris & Sons Maritime Co (The Choko Star)* [1995] 2 Lloyd's Rep 608, [1996] 1 All ER 114. *Cf* in respect of an amendment to correct a mistake as to the identity of the party intended to be sued, the Australian decision in *Seas Sapfor Ltd* v. *Far Eastern Shipping (The Nikolay Malakhov)* (1995) 416 LMLN 2 (Sup Ct of NSW). See further *International Bulk Shipping and Services Ltd* v. *Minerals and Metals Trading Corp of India* [1996] 1 All ER 1017 and, under CPR 1998, *International Distillers and Vintners Ltd* v. *J.F. Hillebrand (UK) Ltd*, (QBD, 17 December 1999, *The Times*, 25 January 2000). For an amendment permitted under CPR 17.4(2) see *P&O Nedlloyd BV* v. *Arab Metals Co (The UB Tiger)* [2006] EWCA Civ 1300, [2007] 2 Lloyd's Rep 148.

2C.25 LAW AND JURISDICTION[1298]

BIFA 2005A clause 28 2.315

28 These Conditions and any act or contract to which they apply shall be governed by English Law and any dispute arising out of any act or contract to which these Conditions apply shall be subject to the exclusive jurisdiction of the English Courts.[1299]

2C.25.1 Express choice of law

Forwarders and other transport operators commonly seek to manage the risk of the imposition of a foreign law on their disputes or of being pursued in a foreign jurisdiction. A clause such as clause 28 in BIFA 2005A,[1300] would appear to be wide enough to amount to a sufficient choice to enable all matters under the contract with the forwarder to be subject to English law as an express choice of law. In particular, the reference to the conditions and any act or contract to which they apply would appear sufficient to negate an argument that the clause is intended to deal only with formation.[1301] There would seem to be no reason why the clause should not represent a sufficient choice of English law under Article 3(1) of the Rome 1 Regulation[1302] and for contracts made prior to 17 December 2009 the Rome Convention scheduled to the Contracts (Applicable Law) Act 1990.[1303] 2.316

1298. This section is focused mainly on choice of law and jurisdiction agreements. Standard terms used in forwarding contracts and standard forms of logistics contracts appear generally not to provide for arbitration or other forms of dispute resolution. Consequently alternative dispute resolution is not treated in detail here. However, it should be noted that with contract/outsourced logistics contracts this may well be more commonly provided for. TT CLUB 600, e.g., in cl. 35.1 provides that if a dispute cannot be settled on site it must be referred to certain identified managers of the Logistic Provider and Customer or other senior representatives and, if they cannot resolve it, by cl. 35.2 the parties will attempt to settle it by mediation in accordance with the Centre for Effective Dispute Resolution ("CEDR") Model Mediation Procedure. Note can be taken also of an instructive case which dealt, in part, with the construction of the arbitration clause in a complex outsourcing agreement: *Vertex Data Science Ltd* v. *Powergen Retail Ltd* [2006] EWHC 1340 (Comm), [2006] 2 Lloyd's Rep 591.

1299. Unlike this clear reference to English law and jurisdiction other forms and especially bills of lading may be more complex in directing exclusivity to different jurisdictions depending on the actual journey evidenced by the bill e.g. TT CLUB 100, cl. 20. For a similar but more problematic arrangement of clauses see *Sideridraulic Systems SpA* v. *BBC Chartering & Logistic GmbH & Co KG (The BBC Greenland)* [2011] EWHC 3106 (Comm), [2012] 1 Lloyd's Rep 230. See further Y Baatz "Mandatory application of the Hague-Visby Rules, Deck Cargo and Jurisdiction" (2012) 9(1) S & TI 10.

1300. See also Geologistics GTC, cl. 29, DAMCO STC, cl. 54, Maersk Line BL, cl. 26, *cf* cl. 19 of the FIATA Model Rules. In *Bhatia Shipping & Agencies PVT Ltd* v. *Alcobex Metals Ltd* [2004] EWHC 2323 (Comm), [2005] 2 Lloyd's Rep 336 a clause in a multimodal transport document applying the law of the country where the loss or damage occurred was characterised as providing for a floating proper law.

1301. *Cf* Yates and Hawkins 1D(2).

1302. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 applicable to contracts concluded as from 17 December 2009. The Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009/3064 modify the law then current and extend Rome I to cover intra-UK conflicts (other than in respect of insurance).

1303. Furthermore the choice of jurisdiction would, at common law, have been a strong indicator of intention: see *Hamlyn & Co* v. *Talisker Distillery* [1894] AC 202 at pp. 212–213. This is less clear under the Rome Convention which requires the choice to be express or demonstrated with reasonable certainty and under the Regulation the choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.

These provisions are likely to apply to most contractual disputes[1304] arising out of forwarding and carriage operations where the action is brought in an English court although there is an exception in respect of questions as to whether an agent is able to bind a principal to a third party.[1305] This exception could be of particular relevance in the context of issues concerning the status and authority of forwarders and may require application of common law rules of conflicts of law.

2.317 In general an express choice of law, sufficiently incorporated into the contract,[1306] will be effective even if, in the absence of an express choice, another law could be considered to be the applicable law.[1307] One exception, provided in Article 3(3) of the Regulation, is that an express choice cannot prejudice the application of provisions of the law of a country where all the elements relevant to the situation are connected with that country and which cannot be derogated from by agreement.[1308] Since a forwarder using BIFA or some other British conditions is likely to have some connection with England, or at least Great Britain, it is unlikely that this exception will often apply to impose the mandatory law of some country outside Great Britain. It should be noted that the Contracts (Applicable Law) Act 1990 by section 2(2) excluded the operation of Article 7(1) of the scheduled Rome Convention which would have permitted the courts to apply the mandatory rules of the law of another country with which the situation has a close connection. However a more limited

1304. For matters relating to insolvency proceedings see Council Regulation (EC) 1346/2000. See further *Syska* v. *Vivendi Universal SA* [2008] EWHC 2155 (Comm), [2008] 2 Lloyd's Rep 636.

1305. Art. 1(2)(g). Other exceptions which might have relevance in the context of forwarding, logistics and carriage relate to: obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments where they arise out of their negotiable character (Art. 1(2)(d)); arbitration agreements and agreements on the choice of court (Art. 1(2)(e)); questions governed by the law of companies (Art. 1(2)(f)); evidence and procedure (Art. 1(3)), although without prejudice to Art. 18 (burden of proof); insurance with the exception of certain insurance designed to provide benefits to certain classes of person in respect of death or sickness (Art. 1(2)(j)).

1306. The issue of incorporation is governed by the law which would apply if the term were incorporated applying Art. 10(1) of the Regulation, unless a party can raise an issue as to the existence of consent under the law of his habitual residence if unreasonable to determine this under the putative law in accordance with Art. 10(2) of the Regulation. See the discussion of the equivalent provision under Art. 8(1) & (2) of the Convention in Cheshire, North and Fawcett including the discussion of the case of *Egon Oldendorff* v. *Liberia Corp* [1995] 2 Lloyd's Rep 64 in this context at pp. 744–746. See also *Horn Linie GmbH & Co* v. *Panamericana Formas e Impresos SA (The Hornbay)* [2006] EWHC 373 (Comm), [2006] 2 Lloyd's Rep 44 which concerned a jurisdiction and choice of law clause in a bill of lading. See further in respect of incorporation of an express choice of law in a charterparty into a bill of lading, *The Dolphina* [2011] SGHC 273 (Singapore HC), [2012] 1 Lloyd's Rep 304. References to English law in one of the contractual documents might only be treated as affecting the interpretation of that document or particular clauses within it where the context of the contract as a whole demonstrates choice of a different law, see *Evialis* v. *SIAT* [2003] 2 Lloyd's Rep 377, 387 (in the context of insurance and possible conflict between the open cover and certificate issued under it).

1307. *Cf* under common law, *Vita Food Products Inc* v. *Unus Shipping Co Ltd* [1939] AC 277. Under Art. 3(2) of the Convention and Regulation a choice of law can be made even after the conclusion of the contract.

1308. Similarly under Art. 3(3) of the Convention the mandatory rules of such a country. Art. 3(4) of the Regulation provides a similar restriction in respect of mandatory community law where all other elements relevant to the situation at the time of the choice are located in one or more Member States. For a case where all the elements were not connected see *Caterpillar Financial Services Corp* v. *SNC Passion* [2004] EWHC 569 (Comm), [2004] 2 Lloyd's Rep 99, discussed in *Cheshire, North and Fawcett*, p. 696.

principle derived from comity of nations might be relevant under English law.[1309] Such a principle might also have relevance to an English court seeking to prevent parties to a contract performing an act illegal by the place of performance.[1310] In this case any need to apply such a principle is much reduced since by Article 9(3) of the Regulation a court can give effect to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed where such provisions render the performance unlawful.[1311]

2.318 A further exception is provided by Article 9(2) of the Regulation[1312] by which overriding mandatory provisions[1313] of the forum are also applicable regardless of the choice of law. This recognises the potential application of mandatory rules whose application is not dependent upon the usual principles of conflict of laws. Nevertheless it is expressed in narrower terms than under Article 7(2) of the Convention[1314] which makes it more doubtful whether it includes rules which have been given the force of law in order to enact into domestic law an international uniform liability regime such as the Hague-Visby Rules.[1315] However, paragraph 41 of the Recital of the Regulation indicates that it should not affect international conventions to which one or more Member States were parties at the time when the Regulation was adopted. This may produce doubt in respect of the Rotterdam Rules.[1316] Should the EU formally adopt the Rotterdam Rules under its shared competence, however, it may prove easier for a court in a Member State to defer to them rather than the provisions of the Regulation.[1317]

2.319 A choice of English law obviously cannot offend any overriding mandatory provisions of English law when a dispute proceeds before an English court. Where proceedings are brought before a foreign court, however, a choice of English law might well offend mandatory laws of the forum.

1309. See *Cheshire, North and Fawcett*, p. 742 and pp. 759–760 and *Regazzoni* v. *K.C. Sethia (1944) Ltd* [1958] AC 301.

1310. Which might not be caught by Art. 8 (material validity) or Art. 16 ("ordre public" of the forum), see the discussion in *Cheshire, North and Fawcett*, pp. 758–761. For the Regulation see Arts 10 & 21.

1311. See also Art. 10(2) of the Convention and the equivalent provision in Regulation 12(2).

1312. Art. 7(2) of the Convention was to similar effect.

1313. Art. 9(1) of the Regulation defines them as "provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation".

1314. Which states that nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

1315. See *The Hollandia* [1983] 1 AC 565, [1983] 1 Lloyd's Rep 1. *Cf The Benarty* [1985] QB 325, [1984] 2 Lloyd's Rep 244. Arguably the definition of overriding mandatory provisions (see fn. 1313) is merely intended to identify such rules as a type of rule rather than to narrow the definition of rules falling within the type. Even if not, it is submitted that, given that a Member State could be regarded as being in breach of its treaty obligations by the failure of its courts of to apply the mandatory rules of an international convention, such rules should be regarded as being within Art. 9(1) (similarly Harris in Ridley p. 16 n. 35).

1316. See 1.40 and 3F.

1317. Harris "The Rotterdam Rules and EU Law" [2010] Autumn/Winter, Academic News (Sweet & Maxwell), 16 at 19.

2C.25.2 Absence of an express choice

2.320 Where there is no choice of law, whether express or demonstrated with, for the Convention, reasonable certainty,[1318] and for the Regulation, clearly demonstrated,[1319] the two regimes take a divergent approach. For the Convention the contract will be governed by the law of the country with which it is most closely connected.[1320] The Rome Convention then employs a number of presumptions to assist a court in finding this country. Under Article 4(2) it is presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of the conclusion of the contract, his habitual residence or, if a company, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.[1321] It is submitted that in a forwarding contract the party whose performance is characteristic of the contract is the forwarder.

2.321 For the Regulation there is no list of presumptions designed to guide the courts towards the place of closest connection. Rather there is a list of contracts for which a specific indication of the applicable law is given. In respect of a contract for the provision of services, into which category a forwarding contract would generally fall, Article 4(1)(b) provides for the application of the law of the country where the service provider has his habitual residence.[1322] Although these contract indicators are not expressed as presumptions, there is nevertheless a gateway to the law of a different country where the contract is manifestly closely connected with that country.[1323] Should a court not be able to ascribe a forwarder's contractual activities to a contract of service or to some other contract identified in Article 4(1) or where

1318. See e.g. *FR Lürssen Werft GmbH & Co KG* v. *Halle* [2010] EWCA Civ 587, [2010] 2 Lloyd's Rep 265. See also *Star Reefers Pool INC* v. *JFC Group Ltd* [2011] EWHC 339 (Comm), [2011] 2 Lloyd's Rep 215.

1319. Note that para. 12 of the Recital indicates that an agreement conferring exclusive jurisdiction on one or more courts or tribunals of a Member State should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.

1320. Art. 4(1).

1321. The presumption in Art. 4(2) does not apply if the characteristic performance cannot be identified, Art. 4(5).

1322. Forwarders and logistics providers might also fall within the different category of distributor under a distribution contract within Art. 4(1)(f) although this provision applies the same rule of habitual residence. Art. 19 prescribes rules to ensure that, in accordance with para. 39 of the Recital, a clear definition is given and that, in particular, a single criterion is provided in respect of companies etc. Consequently the habitual residence of companies, and other bodies, corporate or unincorporated, is the place of central administration. For a natural person acting in the course of his business activity it is his principal place of business. Furthermore where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence (Art. 19(2)). The relevant time for determining this is the time of the conclusion of the contract (Art. 19(3)).

1323. Art. 4(3). Para. 20 of the Recital indicates that a factor that should be taken into account is whether the contract in question has a very close relationship with another contract or contracts. This could often be an important factor in forwarding and logistics contexts.

the elements of the contract would be covered by more than one of them,[1324] then by Article 4(2) the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.[1325] If the applicable law cannot be determined by these rules then by Article 4(4) the contract shall be governed by the law of the country with which it is most closely connected.[1326]

2.322 In respect of contracts of carriage, however, different provision is made in both regimes. For the Convention a different presumption is applied in place of the presumption in Article 4(2). By Article 4(4), in such a contract, if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. This provision goes on to make clear, in its last sentence, that single voyage charterparties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods. In so far as the application of these different presumptions could produce different results[1327] it may well be necessary to determine into which of them a particular forwarding contract falls. It would seem that only a contract of carriage falls within the presumption in Article 4(4). Consequently, only if a forwarder is considered to have made a contract of carriage would that presumption apply unless an agency contract could be regarded as having as its main purpose the carriage of goods.[1328] In *Intercontainer Interfrigo SC (ICF)* v. *Balkenende Oosthuizen BV* the ECJ,[1329] in respect of a contract by which ICF made train wagons available to a customer and agreed to ensure their transport by the rail network, the court held[1330] that one of the aims of the provision in Article 4(4) is to extend the scope of the rule of private international law laid down in Article 4(4) to contracts the main purpose of which is the carriage of goods, even if they are classified as charterparties under national law. The court considered that in a charterparty, the owner who effects such a performance, undertakes as a matter of course to make a means of transport available to the charterer. However, it is conceivable that the owner's obligations relate not merely to making available the means of transport but also to the carriage of goods proper. In such circumstances, the contract in question comes within the scope of Article 4(4) of the Convention where its main purpose is the carriage of goods.

1324. As might well be the case with a logistics contract. Fortunately the remainder of Art. 4(2) indicates, in effect, the same law.

1325. Where a contract consists of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its centre of gravity. See para. 19 of the Recital.

1326. As with para. 20 and Art. 4(3), para. 21 of the Recital supplies the close connection between contracts as a factor to be taken into account.

1327. E.g. the performance of a forwarding contract may be effected through a place of business in country A (arguably within Art. 4(2)) but the forwarder's principal place of business may be in country B which might also be the place of discharge (within Art. 4(4)).

1328. Which might well be unsatisfactory, in the circumstances indicated in the previous footnote where the forwarder is mainly engaged in effecting the commencement of the movement.

1329. Case C-133/08, [2010] 2 Lloyd's Rep 400.

1330. See especially [33]–[35].

2.323 Note further, however, that for the Convention the presumptions shall be disregarded where it appears from the circumstances as a whole that the contract is more closely connected with another country.[1331] For the Regulation, rather than providing expressly for a presumption as is the case under the Convention, Article 5(1) provides that for contracts of carriage the law applicable shall be the law of the country of habitual residence of the carrier[1332] provided that the place of receipt or the place of delivery or the habitual residence of the consignor[1333] is also situated in that country. Otherwise the law of the country where the place of delivery as agreed by the parties is situated shall apply.[1334] Similarly to the Convention, Article 5(3) of the Regulation goes on to indicate that where all the circumstances of the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated in the remainder of Article 5, the law of that other country shall apply.

2C.25.3 Claims in tort and other non-contractual claims

2.324 Where a claim is brought against a forwarder in tort the applicable law is now governed by the Rome II Regulation.[1335] This replaces the Private International Law (Miscellaneous Provisions) Act 1995 which remains applicable to events occurring previously.[1336] The Regulation applies not only to "a non-contractual

1331. Art. 4(5). This may assist a court in avoiding any unsatisfactory consequences of applying either presumption (see fn. 1328). For an example of the operation of this provision see *PT Pan Indonesia Bank Ltd TBK* v. *Marconi Communications International Ltd* [2005] EWCA Civ 422, [2007] 2 Lloyd's Rep 72. See also, in the context of a guarantee, *Commercial Marine & Piling Ltd* v. *Pierse Contracting Ltd* [2009] EWHC 2241 (TCC), [2009] 2 Lloyd's Rep 659. In *Intercontainer Interfrigo SC (ICF)* v. *Balkenende Oosthuizen BV* (fn. 1329) the ECJ confirmed (see [64]) that where it is clear from the circumstances as a whole that the contract is more closely connected with a country other than that determined on the basis of one of the criteria set out in Art. 4(2) to (4) of the Convention, it is for the court to disregard those criteria and apply the law of the country with which the contract is most closely connected. It is not necessary for it to be found that the presumptions in Art. 4(2)–(4) have no genuine connecting value before they can be disregarded.

1332. Para. 22 of the Recital provides that the term "the carrier" should refer to the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself.

1333. Para. 22 of the Recital provides that the term "consignor" should refer to any person who enters into a contract of carriage with the carrier.

1334. Para. 22 of the Recital indicates that no change in substance is intended with respect to Art. 4(4), third sentence of the Rome Convention. Consequently, single-voyage charterparties and other contracts the main purpose of which is the carriage of goods should be treated as contracts for the carriage of goods. As with the Rome Convention, however, characterisation of the forwarder's contract will be necessary where there is a difference between the forwarder's place of habitual residence and the loci relevant to the carriage.

1335. Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). The Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008/2986 modify the law then current and extend Rome II to cover intra-UK conflicts.

1336. The precise time from which the Regulation applies to an event is a matter of doubt. This might be from the date that the Regulation applies which is 11 January 2009. Or it might apply to events occurring after the technical date of entry into force of the Regulation which is 20 August 2009 (i.e. the 20th day following its publication) but litigated after 11 January 2009. These possibilities were explored before Slade J in *Mr Deo Antoine Homawoo* v. *GMF Assurance SA, Ms Adeline Verbeke, Mr Stephane Pecqueur* [2010] EWHC 1941 (QB), 2010 WL 2888056 who referred the issue to the European Court of Justice. See also *Alliance Bank JSC* v. *Aquanta Corp* [2011] EWHC 3281 (Comm), [2012] 1 Lloyd's Rep 181.

obligation arising in tort/delict"[1337] which is the subject of Chapter II of the Regulation, but also to where there is a non-contractual obligation arising out of unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*[1338] which are within Chapter III. Indeed it has been suggested that Chapter II can function as a residual category that can include equitable obligations in so far as they do not fall within Chapter III.[1339] The overall application of the Regulation is confined by the fact that it covers only civil and commercial matters. Excluded from its scope are non-contractual obligations arising out of family relationships, marriage property, bills of exchange and other negotiable instruments in respect of their negotiable character, the law of companies and other bodies corporate or unincorporated, trusts, nuclear damage and violations of privacy and rights relating to personality, including defamation.[1340]

Under the 1995 Act characterisation of the issue was a matter for the court of the forum.[1341] The Regulation now indicates that "non-contractual obligation" should be understood as an autonomous concept.[1342] A variety of claims, brought both against and by forwarders, might well fall within the Regulation. The most obvious case is where a claim is brought against a forwarder for loss or damage to goods in circumstances where there is no direct privity of contract between the forwarder and a person whose interests have been affected in some way by the manner in which the forwarder has performed a service or because the service is gratuitous. However, even where a contractual relationship exists between such a person and the forwarder, if the claim can be characterised concurrently as tortious it seems that it should fall within Rome II rather than Rome I. This may not have much impact since, as will be noted below, the operation of the respective rules may well mean that the same law is applied in such circumstances. Since a common claim in these circumstances might well be based on bailment,[1343] it may matter little, therefore, whether such a claim is characterised as arising in tort or, less obviously, based on a collateral contract suggested by the Court of Appeal as arising where a bailee has the consent of the bailor to enter into a sub-bailment on particular terms and does so.[1344] A distinctly different type of situation arises where the claim relies on an allegation that a misrepresentation has been made by the forwarder. If the claim is of the type where no contract with the defendant follows after the making of the

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1337. See Art. 4(1) and Art. 2(1). Apart from a general rule laid down for tort/delict, special rules are laid down in Chapter II for specialist areas relating to Product liability (Art. 5), Competition (Art. 6), Environmental damage (Art. 7), Intellectual property rights (Art. 8) and Industrial action (Art. 9).

1338. See Arts 2(1),10(1), 11(1) and 12(1).

1339. *Cheshire, North and Fawcett*, p. 778.

1340. Art. 1(2)(a)–(g).

1341. S. 9(2). This does not necessarily mean the direct application of English legal concepts but "the court should examine relevant issues to decide whether they will be characterised as 'relating to tort' not only by reference to English legal concepts and classifications, but by taking a broad 'internationalist' view of legal concepts" *per* Aikens J in *Trafigura Beheer BV* v. *Kookmin Bank Co* [2006] EWHC 1450 (Comm), [2006] 2 Lloyd's Rep 455 [68].

1342. Para. 11 of the Recital.

1343. It seems unlikely that the obligations arising from a bailment relationship can be considered outside the scope of both regulations even if it is correct to regard it as a *sui generis* relationship. If not within Rome I it should fall within Rome II.

1344. *Sandeman Coprimar SA* v. *Transitos Y Transportes Integrales SI* [2003] EWCA Civ 113, [2003] 1 All ER (Comm) 504, at [63].

misrepresentation,[1345] the case falls within Chapter II. Where, however, the claim can be seen as a non-contractual obligation arising out of dealings prior to the conclusion of the contract, it falls within Chapter III.

2.326 For basic loss of or damage to goods involving commission of a tort the general rule is the application of the law of the country where the damage occurred.[1346] It may well be impossible to identify this place where unlocalised damage has occurred, for example in a container. It has been suggested that the solution here is to turn to place of discovery of the damage.[1347] As an alternative, a court has the possibility of applying some other place by virtue of Article 4(3) where it is clear from all the circumstances that a tort is more manifestly closely connected with a country other than that indicated by Article 4(1) & (2). Goods are not likely to be carried in a container supplied or carried by a forwarder without some pre-existing relationship, for example with the owner of the goods and/or the owner of the container. Article 4(3) provides as an example of manifestly closer connection, a pre-existing relationship such as a contract. The existence of a bailment of the container or carriage or supply contract might enable this exception to the primary rule apply. Furthermore, given the reference to acts as well as contracts, it should be possible to regard a clause such as BIFA clause 28 as an agreement between the parties to submit non-contractual obligations to the law of their choice under Article 14(1)(b) so long as it can be regarded as "freely negotiated". It should also be possible to make use of this provision where the relationship between the relevant parties is based on a bailment on terms rather than contract.

2.327 A further exception from the primary rule in Article 4(1) should be noted. By Article 4(2), where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply. Consequently, but subject to the possible application of Article 4(3), where both the forwarder and the claimant have English or Welsh residence then English law applies. Finally, should there ever be a conflict between the law identified under the Regulation and a mandatory rule of the forum which applies an international carriage regime,[1348] there is little in the regulation to resolve it. Article 26 simply provides that the application of such a law may be refused if such application is manifestly incompatible with the public policy of the forum.[1349]

2.328 For the 1995 Act the general rule in respect of claims in tort[1350] was that the applicable law was the law of the country in which the events constituting the tort

1345. As in *Hedley Byrne & Co Ltd* v. *Heller & Partners Ltd* [1964] AC 465.

1346. Art. 4(1).

1347. Cheshire, North and Fawcett, p. 797.

1348. Normally expressed as a permission given to a person in a non-contractual relationship to the carrier to apply them, e.g. Art. 28 of the CMR Convention.

1349. *Cf* Art. 28(1) which gives preference to existing conventions laying down conflicts of law rules to which one or more Member States are parties.

1350. A claim for the loss of security involved in a delivery of goods without production of the bill of lading was characterised as tort in *Trafigura Beheer BV* v. *Kookmin Bank Co* [2006] EWHC 1450 (Comm), [2006] 2 Lloyd's Rep 455, see fn. 1341 and also the discussion at [63]–[75].

occurred.[1351] Where elements of those events occur in different countries, the applicable law under this general rule was taken as being, in the case of damage to property, the law of the country where the property was when it was damaged.[1352] In all other cases in such a case (other than personal injury) the relevant law was that of the country in which the most significant element or elements of those events occurred.[1353] As in respect of the Regulation where the claim involved damage to goods a search for the place where the damage occurred would similarly have been necessary which, as noted above, might well be impossible where the goods are carried in a container. A similar solution, as above, might be suggested that, in such a case it would be appropriate for a court to turn to the further rule[1354] which provided that if it appeared that it was substantially more appropriate[1355] for the applicable law for determining the case, or any of those issues, to be the law of another country that country's law was applicable.[1356] Finally, it should be noted that section 14(4) of the 1995 Act made clear that these rules were without prejudice to the operation of any rule of law which either has effect notwithstanding the rules of private international law applicable in the particular circumstances or modifies the rules of private international law that would otherwise be so applicable.

2C.25.4 Exclusive jurisdiction clauses

A provision in forwarders' conditions for the exclusive jurisdiction of the English court, as with BIFA and other conditions,[1357] will be of particular concern to a foreign customer of the forwarder or to a British customer who considers that it 2.329

1351. S. 11(1). See e.g. *Anton Durbeck GmbH* v. *Den Norske Bank ASA* [2005] EWHC 2497 (Comm), [2006] 1 Lloyd's Rep 93.

1352. S. 11(2)(b).

1353. S. 11(2)(c).

1354. In s. 12(1).

1355. From a comparison of the significance of the factors which connected a tort with the country whose law would be applicable under the general rule and the significance of any factors connecting the tort with another country. The difficulty here, however, is that if the country where the damage occurred cannot be determined there is no such country to form the basis for a comparison, in which case it might not be possible to apply this rule. However, if, as suggested by *Cheshire, North and Fawcett*, above, fn. 1347 the general rule in this circumstance could be applied to the place of discovery of the damage, this could be the starting point from which a departure could be made if thought to be more appropriate.

1356. The factors that could be taken into account for this purpose included factors relating to the parties, to any of the events which constitute the tort or any of the circumstances or consequences of those events, s. 12(2).

1357. E.g. Geologistics GTC, cl. 29. These clauses are clearly exclusive jurisdiction clauses. In some contracts their exclusivity is not so clearly expressed and must be drawn out as a matter of interpretation, see, e.g. *Bank of New York Mellon* v. *GV Films* [2009] EWHC 2338 (Comm), [2010] 1 Lloyd's Rep 365. Difficulties of interpretation are common also when dealing with contracts pointing to different jurisdictions depending upon the application of different regimes of liability as may be the case with bills of lading applying the Hague Rules or COGSA 1936 (US) depending on the circumstances, see e.g., *Sideridraulic Systems SPA* v. *BBC Chartering & Logistic GmbH & Co KG (The BBC Greenland)* [2011] EWHC 3106 (Comm), [2012] 1 Lloyd's Rep 230.

would be more convenient to sue in a foreign jurisdiction.[1358] Any questions concerning the effect of the clause is most likely to come into issue should the forwarder seek, by means of an injunction, to restrain proceedings taken elsewhere by the customer or to point to the jurisdiction clause when seeking to maintain a defence to enforcement of a foreign judgment. In respect of the latter section 32 of the Civil Jurisdiction and Judgments Act 1982 provides a defence to recognition or enforcement of the judgment of a court of an overseas country if the bringing of the proceedings was "contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country".[1359] It seems, however, that this defence does not operate in respect of other jurisdictions within the UK so that, for example, proceedings taken in Scotland would have to be appealed from there rather than raised as a defence in England.[1360] Nor does it apply to judgments of courts recognisable under the Brussels or Lugano Conventions,[1361] or Council Regulation 44/2001,[1362] so that a forwarder will need to be astute to challenge such foreign proceedings if there is a possibility that the court selected will ignore the jurisdiction clause.[1363]

2.330 A possibly less common occurrence will be where a foreign customer is faced with action by the forwarder and seeks to set aside service of a claim out of the jurisdiction or otherwise seeks to stay the English proceedings in favour of a foreign jurisdiction notwithstanding the existence of a clause providing for the exclusive jurisdiction of the English courts. These various possibilities can be placed into a consideration of the principles applicable to jurisdiction and the use of exclusive jurisdiction clauses as set out in the following paragraphs.

2.331 It would seem to be likely that the clause would be sufficient to impose a contractual obligation on both parties to litigate in England.[1364] The existence of the clause would be a strong reason[1365] for an English court not to exercise any

1358. For whether a forwarder who appears in the foreign jurisdiction without relying on the English jurisdiction runs the risk of being considered to have submitted to the foreign jurisdiction, see *Advent Capital plc* v. *Ellinas Imports-Exports Ltd* [2005] EWHC 1242 (Comm), [2005] 2 Lloyd's Rep 607 (rejected in that case in respect of insurers).

1359. See *Cheshire, North and Fawcett*, p. 569 and *Tracomin SA* v. *Sudan Oil Seeds Co Ltd (Nos 1 and 2)* [1983] 1 WLR 1026, [1983] 2 Lloyd's Rep 384.

1360. *Cheshire, North and Fawcett*, p. 571.

1361. See *Cheshire, North and Fawcett*, p. 571, fn. 446. See, however, in the context of arbitration clauses, *Phillip Alexander Securities and Futures Ltd* v. *Bamberger* [1997] IL Pr 73.

1362. See s. 32(4)(a) of the 1982 Act as amended, see also Cheshire, North and Fawcett, p. 629. See, however, *The Hari Bhum* [2004] 1 Lloyd's Rep 206, citing *Phillip Alexander Securities*, previous footnote.

1363. See 2.333.

1364. See *S. & W. Berisford plc and NGI International Precious Metals Inc* v. *New Hampshire Insurance Co* [1990] 2 QB 631, [1990] 1 Lloyd's Rep 454 and *Sophia Supply Co* v. *Gatoil USA Inc* [1989] 1 Lloyd's Rep 588. *Cf Continental Bank N.A.* v. *Aeakos Compania Naviera SA* [1994] 1 WLR 588, where the clause bound the defendants only (*cf. Middle Eastern Oil LLC* v. *National Bank of Adu Dhabi* [2008] EWHC 2895 (Comm), [2009] 1 Lloyd's Rep 251 where the clause bound the claimant only). Even in such a case the party bound by the clause will normally also have the right to sue in the jurisdiction indicated. Clear words are required to remove that right particularly when the clause is expressed as governing "any disputes", *Ocarina Marine Ltd* v. *Marcard Stein & Co* [1994] 2 Lloyd's Rep 524, *cf Sinochem International Oil (London) Co Ltd* v. *Mobil Sales and Supply Corp* [2000] 1 Lloyd's Rep 670.

1365. *Cheshire, North and Fawcett* indicate this in the context of leave under CPR 6.20 (now 6.36), see p. 402, but suggest that the position is less certain where a stay of English proceedings is in issue perceiving a lack of consistency of approach in the courts, see p. 431.

discretion it might have, subject to the special rules governing European defendants,[1366] to stay proceedings or refuse to serve a claim form out of the jurisdiction in accordance with the principles in respect of *forum non conveniens* and *forum conveniens* as laid down in *Spiliada Maritime Corp* v. *Consulex*[1367] and *The Abadin Daver*[1368] as stated in *Kuwait Oil Co (Ksc)* v. *Indemitsu Tankers KK*, *The Hida Maru*.[1369] In *Donohue* v. *Armco*,[1370] Lord Bingham stated that the general rule is that where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it.[1371] It is sometimes suggested that there is no discretion in the face of such a clause where the plaintiff is able to serve the defendant within the jurisdiction,[1372] although it might be possible to envisage circumstances where even

1366. See 2.335.

1367. [1987] AC 460, [1987] 1 Lloyd's Rep 1.

1368. [1984] AC 398.

1369. [1981] 2 Lloyd's Rep 510 at p. 514, see further, *Gulf Bank* v. *Mitsubishi* [1994] 1 Lloyd's Rep 323. See generally, *Cheshire, North and Fawcett*, pp. 399 *et seq*. and 426 *et seq*., and Briggs and Rees para. 4.37 *et seq*.

1370. [2001] UKHL 64, [2002] 1 Lloyd's Rep 425 at p. 433.

1371. Even where the clause is non-exclusive the general rule that strong reasons are required for departing from it was applied in *Import Export Metro Ltd* v. *Compania Sud Americana De Vapores* [2003] 1 Lloyd's Rep 405 (going beyond matters of foreseeable convenience and extending either to some matter of unforeseeable convenience or the interests of justice). See also *Bas Capital Funding Corp & Ors* v. *Medfinco Ltd & Ors* [2003] EWCH 1798 (Ch), [2004] 1 Lloyd's Rep 652. Contrast *BP plc* v. *AON Ltd* [2005] EWHC 2554 (Comm), [2006] 1 Lloyd's Rep 549; *Highland Crusader Offshore Partners LLP* v. *Deutsche Bank AG* [2009] EWCA Civ 725, [2009] 2 Lloyd's Rep 617.

1372. *S. & W. Berisford*, above, fn. 1364, at p. 638 and p. 458. See further *The Hida Maru*, above, and *Commercial Bank of the Near East plc* v. *A,B,C and D* [1989] 2 Lloyd's Rep 319 cited in Cheshire and North, p. 198, 12th edn, note 15. *Cf* in respect of a foreign jurisdiction clause *Mackender* v. *Feldia AG* [1967] 2 QB 590, [1966] 2 Lloyd's Rep 449; *Re Jogia* [1988] 1 WLR 484; *Purcell* v. *Khayat*, *The Times*, 23 November 1987. See further *Cheshire, North and Fawcett*, pp. 404–5 and 443 *et seq*. and *The Eleftheria* [1970] P. 94 at p. 110; *The El Amria* [1981] 2 Lloyd's Rep 119; *Trendtex Trading Corp* v. *Credit Suisse* [1980] QB 629 (affirmed [1982] AC 679); *The Sennar (No. 2)* [1985] 1 WLR 490, [1985] 1 Lloyd's Rep 521, at p. 500 and p. 527; *Standard Chartered Bank* v. *Pakistan National Shipping Corp* (1995) 415 LMLN 1; *The Havhelt* [1993] 1 Lloyd's Rep 523; *Citi-March Ltd* v. *Neptune Orient Lines* [1997] 1 Lloyd's Rep 72, [1996] 2 All ER 545 and *Mahavir Minerals Ltd* v. *Cho Yang Shipping Co Ltd (The MC Pearl)* [1997] 1 Lloyd's Rep 566. Note that the Court of Appeal in *Baghlaf Al Zafer Factory Co* v. *Pakistan National Shipping Co* [1998] 2 Lloyd's Rep 229, has reasserted that an English court ought to respect a foreign exclusive jurisdiction clause unless doing so risked an injustice, but that where a plaintiff has acted reasonably in commencing proceedings in England and in allowing time to expire in the agreed foreign jurisdiction, a stay of English proceedings should only be granted on terms that the defendant waived the time bar in the foreign jurisdiction. It also decided that the mere fact that defendants have instructed solicitors to accept service does not preclude them from raising an issue of *forum non conveniens* or the exclusive jurisdiction unless implicit in their agreement to accept service was an agreement that they waived their right to invoke the clause. See further generally, Peel ,"Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws" [1998] LMCLQ 182. In *Atlanska Plovidba* v. *Consignaciones Asturianas SA (The Lapad)* [2004] EWHC 1273 (Comm), [2004] 2 Lloyd's Rep 109, Moore-Bick J noted (at p. 115) that factors that might ordinarily influence the court when considering the question of *forum conveniens* were of little or no relevance where an exclusive jurisdiction clause was concerned, which point he proceeded to apply to an arbitration clause. See also *Konkola Copper Mines plc* v. *Coromin Ltd (No. 2)* [2006] EWHC 1093 (Comm), [2006] 2 Lloyd's Rep 446 where Colman J held that it was not open to a party seeking to justify service outside the jurisdiction in contravention of a foreign jurisdiction clause to rely as grounds for strong cause or reasons the risk of inconsistent decisions of different courts when he ought to have appreciated the existence of that risk at the time when he entered into the exclusive jurisdiction clause.

here a stay might be granted.[1373] The general rule is well reflected in cases concerning the issue of leave to serve a claim form out of the jurisdiction under CPR Rule 6.36.[1374] Where, however, a party seeks a negative declaration on the basis of an applicable head of jurisdiction, it has been said that this is regarded as an extraordinary form of relief which will only be considered if the applicant has good reason to seek it.[1375] The more modern approach is to consider the utility of the relief and to guard against inappropriate forum shopping and conflicting proceedings.[1376]

1373. *Cf Bouygues Offshore SA* v. *Caspian Shipping Co (Nos 1, 3, 4 and 5)* [1998] 2 Lloyd's Rep 461, where the Court of Appeal was concerned with multiple parties and the question of maintaining an injunction against proceedings contrary to the clause. In *Donohue* v. *Armco* (fn. 1382), Lord Bingham, at p. 433, citing this case among others noted that the English courts may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause were part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions. *Cf*, further, the complex case of *Astrazeneca UK Ltd* v. *Albemarle International Corp* [2010] EWHC 1028 (Comm), [2010] 2 Lloyd's Rep 61, where it was possible to separate out contract claims from claims for duress and conspiracy and make them subject to different exclusive jusrisdcition clauses, Hamblen J noting, at [119], that the court only grants stays on case management grounds in rare and compelling circumstances. *Cf Sebastian Holdings Inc* v. *Deutsche Bank AG* [2010] EWCA Civ 998, [2011] 1 Lloyd's Rep 106, in respect of where the same parties make several related contracts with jurisdiction clauses pointing to different countries.

1374. Under which is 6.BDP.3 (3.1(6)(d)) permitting service out of the jurisdiction where a contract contains a term granting jurisdiction to the court (formerly CPR 6.20(5)(d)). Many of the cases were decided under the earlier, Order 11(1)(d)(iv), see further *Cheshire, North and Fawcett*, pp. 382 and 402 *et seq*., and *Unterweser Reederei GmbH* v. *Zapata Off-Shore Co* (*The Chaparral)* [1968] 2 Lloyd's Rep 158, *The Vikfrost* [1980] 1 Lloyd's Rep 560, *Chevron International Oil Co Ltd* v. *A/S Sea Team (The T.S. Havprins)* [1983] 2 Lloyd's Rep 356, *British Aerospace plc* v. *Dee Howard Co* [1993] 1 Lloyd's Rep 368, *Gulf Bank K.S.C.* v. *Mitsubishi Heavy Industries Ltd* [1994] 1 Lloyd's Rep 323.

1375. See Cheshire & North, 13th edn, p. 339. In *Saipem SpA* v. *Dredging VO2 BV and Geosite Surveys Ltd (The Volvox Hollandia)* [1988] 2 Lloyd's Rep 361, an attempt to obtain negative declarations (unusually to assert the non-entitlement of the other party to limit their liability (commenced in the foreign court under limitation proceeding brought under international convention) rather than their own non-liability) by means of Order 11 was rejected and the fact that proceedings were pending in the foreign jurisdiction was emphasised, see Kerr LJ at p. 372 (note the absence of a claim for an anti-suit injunction, (see *per* Nicholls LJ at p. 378). In *OT Africa Line Ltd* v. *Magic Sportswear* [2005] EWCA Civ 710, [2005] 2 Lloyd's Rep 170 service out of the jurisdiction for negative declarations and anti-suit injunctions brought by a sea carrier against cargo claimants and their insurers were upheld (and a stay of the English proceedings refused) in the face of proceedings commenced by the claimants in Canada. The Court of Appeal emphasised the importance of party autonomy (applicable whether an English or Foreign Jurisdiction clause was in issue) which underlay the need for strong reasons to justify departure from the clause and which involved a narrower concept of comity that that underlying *forum non conveniens* and the need to avoid conflicting proceedings (in this case splitting those against the claimant and their subrogated insurers). The fact that Canadian legislation permitted claims in Canada notwithstanding contradictory contract clauses did not provide a sufficiently strong reason to override the English jurisdiction clause (for corresponding Canadian proceedings where the carriers were ultimately granted a stay notwithstanding the legislation see *OT Africa Line Ltd* v. *Magic Sportswear Corp* 2006 FCA 284, [2007] 1 Lloyd's Rep 85), see also *Horn Linie GmbH & Co* v. *Panamericana Formas e Impresos SA (The Hornbay)* [2006] EWHC 373 (Comm), [2006] 2 Lloyd's Rep 44. Note that the anti-suit injunction in this case was granted in favour of a shipowner in respect of suit brought against the shipowners' agents who faced personal liability under the foreign law.

1376. See now *Cheshire, North and Fawcett*, p. 498 and cases there cited including: *Messier-Dowty* v. *Sabena SA (No. 2)* [2000] 1 WLR 2040; *American Motorists Insurance Co* v. *Cellstar Corp* [2002] 2 Lloyd's Rep 216, affirmed [2003] EWCA Civ 206, [2003] IL Pr 379; *Travelers Casualty and Surety Co of Europe Ltd* v. *Sun Life Assurance Co of Canada (UK) Ltd* [2004] EWHC 1704 (Comm), [2004] IL Pr 50; *Bristow Helicopters Ltd* v. *Sikorsky Aircraft Corp* [2004] EWHC 401 (Comm), [2004] 2 Lloyd's Rep 150; *Ark* v. *True*

2.332 It can be noted further that a jurisdiction clause may provide that a party irrevocably submits to the jurisdiction of the English court and waives any objection to proceedings in such courts whether on grounds of venue or on the ground that proceedings have been brought in an inconvenient forum. Such a clause can be effective to prevent a claim that England is an inconvenient jurisdiction,[1377] unless the clause can be impeached for lack of consent or is displaced under a later agreement in the course of foreign proceedings.[1378]

2.333 An English court also has a discretion to restrain foreign proceedings by injunction where brought in breach of an exclusive jurisdiction clause[1379] or an exclusive arbitration clause.[1380] The burden of establishing a strong reason why the injunction should not be granted rests on the party which invoked the jurisdiction

North Capital [2005] EWHC 1585 (Comm), [2006] 1 All ER (Comm) 138. See also *Bhatia Shipping & Agencies PVT Ltd* v. *Alcobex Metals Ltd* [2004] EWHC 2323 (Comm), [2005] 2 Lloyd's Rep 336.

1377. *Credit Suisse First Boston (Europe) Ltd* v. *MLC (Bermuda) Ltd* [1999] 1 Lloyd's Rep 767, *cf Bank of New York Mellon* v. *GV Films* [2009] EWHC (2338) Comm, [2010] 1 Lloyd's Rep 365 (distinguishing *Shashoua* v. *Sharma* [2009] 2 Lloyd's Rep 376).

1378. See *Credit Suisse First Boston (Europe) Ltd* v. *Seagate Trading Co Ltd* [1999] 1 Lloyd's Rep 784.

1379. See generally, *Cheshire, North and Fawcett*, pp. 470–475. See also *Toepfer International GmbH* v. *Société Cargill France* [1997] 2 Lloyd's Rep 98 (affirmed [1998] 1 Lloyd's Rep 379 (CA)), *cf Shell International Petroleum Co Ltd* v. *Coral Oil Co Ltd* [1999] 1 Lloyd's Rep 72 and [1999] 2 Lloyd's Rep 606, *Bankers Trust Co* v. *P.T. Jakarta International Hotels and Development* [1999] 1 Lloyd's Rep 910), *XL Insurance Ltd* v. *Owens Corning* [2000] 2 Lloyd's Rep 500, *The Epsilon Rosa* [2003] 2 Lloyd's Rep 509, *American International Specialty Line Insurance Co* v. *Abbott Laboratories* [2003] 1 Lloyd's Rep 267, *Sabah Shipyard (Pakistan) Ltd* v. *Islamic Republic of Pakistan* [2002] EWCA Civ 1643, [2003] 2 Lloyd's Rep 571, *The Hari Bhum* [2004] 1 Lloyd's Rep 206, *Standard Bank plc* v. *Agrinvest International Inc* [2007] EWHC 2595 (Comm), [2008] 1 Lloyd's Rep 532, *Bank of New York Mellon* v. *GV Films* [2009] EWHC 2338 (Comm), [2010] 1 Lloyd's Rep 365, *Morgan Stanley* v. *China Haisheng Juice Holdings* [2009] EWHC 2409 (Comm), [2010] 1 Lloyd's Rep 265.

1380. *The Angelic Grace* [1995] 1 Lloyd's Rep 87 (see further, in respect of the possible use of an injunction to escape the effects of a time-bar, *The Bergen (No. 2)* [1997] 2 Lloyd's Rep 710, *Verity Shipping SA* v. *NV Norexa (The Skier Star)* [2008] EWHC 213 (Comm), [2008] 1 Lloyd's Rep 652). See also e.g. *Joint Stock Asset Management Co Ingosstrakh-Investments* v. *BNP Paribas SA* [2012] EWCA Civ 644, [2012] 1 Lloyd's Rep 649. Jurisdiction to grant a permanent anti-suit injunction in such cases derives from s. 37 Senior Courts (formerly known as the Supreme Court) Act 1981, *Welex AG* v. *Rosa Maritime Ltd (The Epsilon Rosa)* [2003] EWCA Civ 938, [2003] 2 Lloyd's Rep 509, [34]–[40], see also *Steamship Mutual Underwriting Association (Bermuda) Ltd* v. *Sulpicio Lines Inc* [2008] EWHC 914 (Comm), [2008] 2 Lloyd's Rep 269. This depends on whether it is just and convenient to do so which might not be the case, e.g. *Through Transport Mutual Assurance Association (Eurasia) Ltd* v. *New India Assurance Co Ltd* [2004] EWCA Civ 1598, [2005] 1 Lloyd's Rep 67. In *Kallang Shipping SA* v. *AXA Assurances Senegal (The Kallang)* [2006] EWHC 2825 (Comm), [2007] 1 Lloyd's Rep 160 an anti-suit injunction was allowed to prevent the use of arrest of the ship from frustrating the arbitration clause although usually it was legitimate for a party to use arrest to obtain security and that it was for the arresting court to determine the terms of the security (see also *The Kallang (No. 2)* [2008] EWHC 2761 (Comm), [2009] 1 Lloyd's Rep 124 and *Sotrade Denizcilik Sanayi Ve Ticaret SA* v. *Amadou Lo (The Duden)* [2008] EWHC 2762 (Comm), [2009] 1 Lloyd's Rep 145). Note further that the taking of *in rem* proceedings did not amount to waiver preventing reliance on an arbitration clause according to the Federal Court of Australia in *Comandate Marine Corp* v. *Pan Australia Shipping Pty (The Comandate)* [2006] FCAFC 192, [2008] 1 Lloyd's Rep 119, departing from views expressed in *Republic of India* v. *India Steamship Co (No. 2) (The Indian Grace)* [1998] 1 Lloyd's Rep 1). See further in respect of recognition of a foreign judgment taken in breach of an arbitration clause: *Aes Ust-Kamenogorsk Hydropower Plant LLP* v. *Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647, [2012] 1 WLR 920, [2011] 2 Lloyd's Rep 233.

of the foreign court in breach[1381] of the clause.[1382] The presence of even a non-exclusive jurisdiction clause might have the effect of lightening the burden of the applicant in establishing vexatious or oppressive conduct by the other party in pursuit of parallel proceedings where there was no contractual bar.[1383] Such discretion also exists where an attempt is made to establish jurisdiction in a non-natural forum and an injunction is necessary to prevent an injustice subject to principles of comity.[1384] This discretion may well be exercised sparingly however.[1385] An English court does not need to have regard to whether an exclusive jurisdiction clause in favour of the English courts is lawful under the foreign law, at least where the contract is governed by English law.[1386] It can also be noted that an

1381. The foreign proceedings must fall within the scope of the clause which was not the case in *AWB (Geneva) SA* v. *North America Steamships Ltd* [2007] EWCA Civ 739, [2007] 2 Lloyd's Rep 315 where the proceedings in Canada involved insolvency rather than obligations under the contract. An English jurisdiction clause in an escrow agreement enabling an arrested vessel to be released did not provide for the court to have jurisdiction over the underlying claim so that pursuit of the foreign proceedings was not a breach of the clause in *OceanConnect UK Ltd* v. *Angara Maritime Ltd (The Fesco Angara)* [2010] EWCA Civ 1050, [2011] 1 Lloyd's Rep 399. See further on the scope of jusrisdiction clauses: Briggs and Rees, 4.41. Note also that joining the shipper in a foreign action to ensure that the foreign court had appropriate access to information and documents was not a breach of a bill of lading arbitration clause in *Louis Dreyfus Commodities Ltd* v. *Bolster Shipping Co Ltd (The Giorgis Carras)* [2010] EWHC 1732 (Comm), [2011] 1 Lloyd's Rep 455.

1382. *The Kribi* [2001] 1 Lloyd's Rep 76, see also *Donohue* v. *Armco* [2001] UKHL 64, [2002] 1 Lloyd's Rep 425, at pp. 436 and 439.

1383. *Royal Bank of Canada* v. *Coöperatieve Centrale Raiffeisen-Boerenleenbank BA* [2004] EWCA Civ 7, [2004] 1 Lloyd's Rep 471, see p. 480. *Cf*, however, *Highland Crusader Offshore Partners LLP* v. *Deutsche Bank AG* [2009] EWCA Civ 725, [2009] 2 Lloyd's Rep 617.

1384. See *Airbus Industrie GIE* v. *Patel* [1999] AC 119, *Deaville* v. *Aeroflot* [1997] 2 Lloyd's Rep 67 and *The Irini A* [1999] 1 Lloyd's Rep 196. See further, Males "Comity and anti-suit injunctions," [1998] LMCLQ 543. The issue of whether the exercise of this discretion is consistent with the Brussels/Lugano system is considered below.

1385. See *Cheshire, North and Fawcett*, p. 456 and *Mike Trading and Transport Ltd* v. *R. Pagnan and Fratelli (The Lisboa)* [1980] 2 Lloyd's Rep 546, *British Airways Board* v. *Laker Airways Ltd* [1985] AC 58 at p. 81, *Ellerman Lines Ltd* v. *Read* [1928] 2 KB 144. See generally in respect of the exercise of the discretion, *Société Nationale Industrielle Aerospatiale* v. *Lee Kui Jak* [1987] AC 871, *Seismic Shipping Inc* v. *Total E&P UK plc (The Western Regent)* [2005] EWHC 460 (Admlty), [2005] 2 Lloyd's Rep 54 (*per* Flaux QC, the function of an anti-suit injunction is to prevent unconscionable conduct rather than ensure recognition of an English judgment in a friendly jurisdiction (although it may be necessary to preserve an English judgment, *Trafigura Beheer BV* v. *Kookmin Bank Co (No. 2)* [2006] EWHC 1921 (Comm), [2007] 1 Lloyd's Rep 669), *cf*, as to unconscionable conduct, *Cadre SA* v. *Astra Asigurari SA* [2005] EWHC 2626 (Comm), [2006] 1 Lloyd's Rep 560). Note, however, that the Court of Appeal has indicated caution as an anti-suit injunction involves interference with the process or potential process of a foreign court, *Highland Crusader Offshore Partners LLP* v. *Deutsche Bank* [2009] EWCA Civ 725, [2009] 2 Lloyd's Rep 617. See further *Star Reefers Pool Inc* v. *JFC Group Ltd* [2012] EWCA Civ 14, [2012] 1 Lloyd's Rep 376 where the conduct of the defendant in pursuing the foreign proceedings was not considered to be unconscionable. See also *A/S D/S Svendborg* v. *Wansa* [1996] 2 Lloyd's Rep 559, where although given the lapse of time and the submission to the foreign jurisdiction, the injunction could not normally be expected to be granted, special circumstances existed in the case which led to the conclusion that justice required that the allegations of fraud be heard in England. The inherent weakness of a claim, taken with other matters, could be an important factor in the consideration of whether foreign proceedings were vexatious or oppressive, *Elektrim SA* v. *Vivendi Holdings 1 Corp* [2008] EWCA Civ 1178, [2009] 1 Lloyd's Rep 59.

1386. *Youell* v. *Kara Mara Shipping Co Ltd* [2000] 2 Lloyd's Rep 102.

exceptional discretion to restrain arbitrations exists, even where the seat of the arbitration is in a foreign jurisdiction.[1387]

An alternative to the grant of an injunction is an award of damages for breach of the undertaking to sue in the exclusive jurisdiction.[1388] *2.334*

All the above considerations are subject to the application of the special rules governing defendants domiciled in Europe.[1389] Three similar regimes are currently in force but together they form the Brussels/Lugano system. The original scheme was created by the EC Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters as given the force of law by the Civil Jurisdiction and Judgments Act 1982. The Lugano Convention 1988 established similar rules for states members of EFTA and were given the force of law by the Civil Jurisdiction and Judgments Act 1991. From 1 March 2002 most Member States of the European Union became subject to new rules contained in Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (The Brussels 1 Regulation). This applies to all Member States except Denmark. At first the Brussels Convention continued to apply to Denmark but since 2007 a modified version of the Regulation has operated where the defendant is domiciled in Denmark or in certain other situations where jurisdiction is conferred on Denmark.[1390] The Brussels Convention continues to apply to the territories of some Contracting States excluded from the Regulation.[1391] The rules of the Lugano Convention[1392] apply to those Lugano states not also members of the EU. The first Lugano Convention of 1988 naturally and substantially followed the principles set out in the Brussels Convention. A new Lugano Convention was adopted in 2007 in order to bring this Convention into line with the Regulation. It came into force on *2.335*

1387. See e.g. *Excalibur Ventures LLC* v. *Texas Keystone Inc* [2011] EWHC 1624 (Comm), [2011] 2 Lloyd's Rep 289. See further, in respect of breach of a foreign jurisdiction clause: Briggs and Rees, 4.47.

1388. *Mike Trading and Transport Ltd* v. *R. Pagnan and Fratelli* (*The Lisboa*) [1980] 2 Lloyd's Rep 546 at p. 549, *Mantovani* v. *Carapelli SpA* [1980] 1 Lloyd's Rep 375 at p. 383 and *OT Africa Line Ltd* v. *Fayad Hijazy* 2001 WL 949819. *Cf Continental Bank N.A.* v. *Aeakos Compania Naviera SA* [1994] 1 WLR 588. A similar right is available for breach of an arbitration clause, see *CMA CGM SA* v. *Hyundai Mepo Dockyard Co Ltd* [2008] EWHC 2791 (Comm), [2009] 1 Lloyd's Rep 213. In respect of a non-exclusive jurisdiction clause see *BP plc* v. *AON Ltd* [2005] EWHC 2554 (Comm), [2006] 1 Lloyd's Rep 549, where, in the absence of proceedings in the indicated foreign jurisdiction there was no breach of contract in seeking permission to serve English proceedings.

1389. See also, for jurisdiction in respect of insolvency proceedings: Council Regulation (EC) 1346/2000. See further *Syska* v. *Vivendi Universal SA* [2008] EWHC 2155 (Comm), [2008] 2 Lloyd's Rep 636. Note also the existence of the Convention on Choice of Law Agreements 2005 adopted by the Hague Conference on Private International Law. This is not yet in force but will affect the English Rules concerning jurisdiction if it is ratified by the UK.

1390. EC/Denmark Agreement. OJ 2006 L 120/22 (consequential UK legislation: SI 2007/1655), applicable to legal proceedings occurring after 1 July 2007, see further *Cheshire, North and Fawcett*, pp. 204 and 341.

1391. E.g. French overseas territories such as New Caledonia, see further *Cheshire, North and Fawcett*, p. 342.

1392. Appended as a schedule to the 1982 Act.

1 January 2010.[1393] The rules in the Regulation are similar to those rules of the Brussels and former Lugano Conventions which are of special interest here. There are, however, some important changes which will be reflected in the discussion. References to the Convention will be, unless otherwise indicated, to the Brussels Convention which, in general terms, can be applied to situations falling within the former Lugano Convention. Where the wording of the Regulation is the same as that used in the Convention, it is likely that decisions based on the Convention will remain authoritative in respect of the Regulation.[1394] Whilst the main focus must now be on the Regulation the corresponding Convention article will be noted and the principal differences indicated.

2.336 It should be noted that once an English court is entitled to take jurisdiction under any of these regimes a claim form can be issued outside the jurisdiction without leave of the court under CPR 6.33.[1395] The application of these regimes is considered further below after specific treatment of exclusive jurisdiction clauses.[1396]

2.337 Of especial relevance to the use of exclusive jurisdiction clauses is Article 23 of the Regulation (Article 17 of the Convention) which provides that if the parties, one or more of whom is domiciled[1397] in a Member State,[1398] have agreed that a court or

1393. At least in respect of Norway. The 1988 Convention will continue to apply to Iceland and Switzerland until they have ratified the new convention, see SI 2009/3131.

1394. Forner, ICCLR 2002, 13(3), 131–137 at 132, in respect of rulings of the ECJ. See more recently the view expressed by the ECJ that in so far as Regulation 44/2001 replaces the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ([1978] OJ L304/36), as amended by the successive conventions relating to the accession of new Member States to that convention ("the Brussels Convention"), the interpretation provided by the court in respect of the provisions of the Brussels Convention is also valid for those of Regulation 44/2001 whenever the provisions of those instruments may be regarded as equivalent: *Ilsinger* v. *Dreschers* (C-180/06) [2009] ECR I-3961 at [41] and *Zuid-Chemie BV* v. *Philippo's Mineralenfabriek NV/SA* (C-189/08) [2009] ECR I-6917at [18].

1395. See also CPR 6.32 in respect of service of a claim form against a Scottish or Northern Irish defendant

1396. See below 2.352.

1397. See Art. 59 of the Regulation for the domicile of individuals (for the Convention, see s. 41 of the Act as amended by Schedule 1 (para. 9) of the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929. For the domicile of companies and other legal persons see Art. 60 of the Regulation. See further generally Briggs and Rees, para. 2.135 *et seq*. Note that in *British Sugar plc* v. *Babbini* [2004] EWHC 2560 (TCC) [2005] 1 Lloyd's Rep 332, a case where the jurisdiction clause was in a contract between parties both domiciled in the same Member State and granting exclusive jurisdiction to a court in that State, the court rejected the view that at the time the contract is concluded the clause must have been capable of being read as intended to cover proceedings where there is an international element which was argued not to be the case for the clause in question which referred simply to the competence of a court in the jurisdiction and not to the relevant country.

1398. For the Convention: Contracting State. Where the court of a non Member (Contracting) State is chosen the provision is not strictly applicable and may be determined by the national procedural law (including its conflicts rules) of the court seised of the case, see *Coreck Maritime GmbH* v. *Handelsveem BV* (Case C-387/98) (2000) ECR I-9337. This was applied by Colman J in *Konkola Copper Mines plc* v. *Coromin* [2005] EWHC 898 (Comm), [2005] 2 Lloyd's 555 (distinguishing *Owusu* v. *Jackson*, see fn. 1445) not on the basis of *forum conveniens* but rather on certainty and party autonomy). On appeal ([2006] EWCA Civ 5, [2006] 1 Lloyd's Rep 410) the Court of Appeal dealt with the issue of burden of proof where the incorporation of the clause was in issue in competition with an English jurisdiction clause and where the competence of the English court was clearly established under Art. 2 (on the applicant for the stay seeking to uphold the foreign jurisdiction clause). See also the further proceedings *Konkola Copper Mines plc* v. *Coromin (No. 2)* (2006) EWHC 1093 (Comm), [2006] 2 Lloyd's Rep 446).

the courts of a Member State are to have jurisdiction,[1399] that court or those courts shall have jurisdiction.[1400] The jurisdiction shall be exclusive unless the parties have agreed otherwise.[1401] It should be noted initially that the construction and effect of Article 17 of the Convention was considered in *AIG Europe SA* v. *QBE International Insurance Ltd*[1402] to be a matter to be determined by reference to principles of Community law rather than those of the proper law of the contract. The same would seem to be true of the Regulation.

Article 23 of the Regulation (Article 17 of the Convention) contains formal requirements governing the validity[1403] of clauses conferring jurisdiction which are designed to ensure that consensus between the parties can be established.[1404] These requirements must be strictly construed and considered first rather than engage in 2.338

1399. See fn. 1398.

1400. See generally Briggs and Rees paras 2.108 *et seq*., and note the summary of principles stated in *Knorr-Bremse Systems for Commercial Vehicles Ltd* v. *Haldex Brake Products GmbH* [2008] EWHC 156 (Pat), [2008] 2 All ER (Comm) 448 at [30]. Note further the discussion in Briggs and Rees at p. 166 of the need for the dispute to fall within the four corners of the agreement on jurisdiction. See further e.g. *Hewden Tower Cranes Ltd* v. *Wolffkran GmbH* [2007] EWHC 857 (TCC) [2007] 2 Lloyd's Rep 138, *ACP Capital Ltd* v. *IFR Capital plc* [2008] EWHC 1627 (Comm), [2008] 2 Lloyd's Rep 655. Claims for deceit may also be included where the court is satisfied that the parties could not have intended that different claims in contract and deceit were to be decided in different jurisdictions, *Maple Leaf Macro Volatility Master Fund* v. *Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep 475 [199] (drawing on dicta of Lord Hoffmann in *Fiona Trust & Holding Corp* v. *Privalov* [2007] UKHL 40, [2008] 1 Lloyd's Rep 254 at [7]) .

1401. See e.g., *Starlight Shipping Co* v. *Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2011] EWHC 3381 (Comm), [2012] 1 Lloyd's Rep 162. The agreement otherwise may be implied, *Evialis* v. *SIAT* [2003] 2 Lloyd's Rep 377 at p. 391.

1402. [2001] 2 Lloyd's Rep 268.

1403. For other challenges to the validity of clauses see Briggs and Rees, 2.128. Note, however that issues as to the identity of parties to the contract, including the jurisdiction clause, and any issue of succession to the contracts is a matter for national law whilst the issue of consensus is a matter for EU law: *Antonio Gramsci Shipping Corp* v. *Stepanovs* [2011] EWHC 333 (Comm), [2011] 1 Lloyd's Rep 647.

1404. Initially this was a very strict requirement gradually relaxed by decisions of the ECJ and amendments to the Convention. In *I.P. Metal* v. *Ruote* [1993] 2 Lloyd's Rep 60, Waller J accepted that Art. 17 envisaged a two-stage test, i.e. agreement or consensus and satisfaction of the formal requirements. The decision was confirmed in respect of the issue of sufficient consensus by the Court of Appeal, [1994] 2 Lloyd's Rep 560 where Saville LJ (at p. 566) considered that the question of consensus is simply a question as to whether or not the parties concerned truly consented or agreed to a special jurisdiction clause to govern any disputes between them. However, in *Mainschiffahrts-Genossenschaft eG (MSG)* v. *Les Gravières Rhénanes Sarl* (Case C-106/95) [1997] 3 WLR 179, the ECJ considered in respect of forms which accord with usage in international trade or commerce that whilst the relaxation in Art. 17 by the 1978 Accession Convention (i.e. Art. 17(c)) does not mean that there is not necessarily any need for consensus (since that is one of the aims of Art. 17, the weaker party should be protected by avoiding jurisdiction clauses incorporated by one party alone going unnoticed), to take the view that the only relaxation as to form is to eliminate the need for a written form of consent would be tantamount to disregarding the requirements of non-formalism, simplicity and speed in international trade. Consensus is therefore presumed to exist where commercial practices in the relevant branch of international trade or commerce exist of which the parties are or ought to be aware (see also *Trasporti Castelletti*, below fn. 1415, and *cf* Briggs and Rees, 2.117). Waller J, in *I.P. Metal*, (at p. 63) considered also that where the argument in relation to Art. 17 of the Convention is whether a consensus has been reached, that is likely to distinguish this situation from Art. 5 and that the Court will wish to be more certain that the party alleging the consensus is right (*cf* however, his comments in *Canada Trust* v. *Stolzenberg (No. 2)* [1998] 1 WLR 547 at p. 559 and the comment in *Lafarge* (below, fn. 1405, at p. 695) that these comments were made in the context of Arts 21 and 22 and that where these complexities do not arise establishing a "good arguable case" is the appropriate standard, see also Lord Steyn in *Canada Trust*, [2002] 1 AC 1 at 13 E-H, see also *Bols Distilleries* v. *Superior Yacht Services Ltd* [2006] UKPC 45, [2007] 1 WLR 12 at [28],

a consideration of whether there is an agreement applying principles of common law.[1405] The agreement conferring jurisdiction, for the purposes of Article 17 and Article 23, must either be in writing[1406] or evidenced in

Hewden Tower Cranes Ltd v. *Wolffkran GmbH* [2007] EWHC 857 (TCC), [2007] 2 Lloyd's Rep 138, *cf* Collins J in *Bank of Tokyo-Mitsubishi Ltd* v. *Baskan Gida Sanayi Ve Pazalarma AS* [2004] EWHC 945 (Ch), [2004] 2 Lloyd's Rep 394 at pp. 420–1 and 426–7). Note further that whilst it might be possible to establish acceptance of a jurisdiction clause by issuing the proceedings in the indicated jurisdiction a party cannot at one and the same time deny that they are a party to the contact as a whole and claim that the jurisdiction clause is applicable to the claim made against them, see *Andromeda Marine SA* v. *O W Bunker & Trading A/S (The Mana)* [2006] EWHC 777 (Comm), [2006] 2 Lloyd's Rep 319.

1405. *Lafarge Plasterboard Ltd* v. *Fritz Peters & Co KG* [2000] 2 Lloyd's Rep 689, distinguished in *SSQ Europe SA* v. *Johann & Backes OHG* [2002] 1 Lloyd's Rep 465, see below fn. 1408. It can be suggested that a clause which fails to be incorporated under the tests at Common law is unlikely to satisfy the Community rule. In *Siboti* v. *BP France SA* [2003] 2 Lloyd's Rep 364, Gross J (at [42]) thought that although the route might be different the objectives are the same so that it would be surprising if, at least in the generality of cases, the answer arrived at was not the same in English and Community law. No agreement as to jurisdiction could be found where the contract itself had not been finalised in *Bols Distilleries* v. *Superior Yacht Services Ltd* [2006] UKPC 45, [2007] 1 WLR 12. See also the approach to interpretation of Art. 23 in *British Sugar plc* v. *Babbini* [2004] EWHC 2560 (TCC), [2005] 1 Lloyd's Rep 332.

1406. Article 23(2) of the Regulation provides that any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing (this probably includes e-mail but probably not voicemail or text message, see Briggs and Rees, pp. 178–179). Agreement in writing includes a term incorporated by reference by reason of a party having signed a document containing the reference to a master agreement whether or not a copy of the terms of that agreement had been provided or were readily available to him: *Crédit Suisse Financial Products* v. *Société Générale d'Entreprises* [1996] 5 Bank LR 220. Clarke J in *Africa Express Line Ltd* v. *Socofi SA* [2009] EWHC 3223 (Comm), [2010] 2 Lloyd's Rep 181 at [24]–[29] noted that community law requires "real consent" to, or "actual acceptance" of, a jurisdiction clause, which must be "clearly and precisely demonstrated". He summarised the position where the term incorporated is that of one of the parties by noting that in *Salotti* v. *RÜWA Polstereimaschinen GmbH* (Case C-24/76) [1976] ECR 1831, [1977] 1 CMLR 345, the ECJ held, in respect of the analogous provisions of Art. 17 of the Brussels Convention, that the requirement of writing under the first paragraph of Art. 17 of the Convention is fulfilled: (a) where a clause conferring jurisdiction is included among the general conditions of one of the parties printed on the back of a contract, but *only* if the contract signed by both parties (although the agreement does not have to be signed *Powell Duffryn plc* v. *Wolfgang Petereit* (Case C-214/89) [1992] ECR I-1745, [1992] IL Pr 300) contains an express reference to those general conditions; or (b) where the contract refers to a prior written offer which refers to general conditions including a jurisdiction clause, only if the express reference can be checked by a party exercising reasonable care and the general conditions (including the jurisdiction clause) have been communicated to the other party with the prior offer. Where the contract refers expressly to one party's standard terms it is not necessary for there to have been a specific reference to the jurisdiction clause for the purposes of establishing the real consent required by Art. 23: *7E Communications Ltd* v. *Vertex Antennentechnik GmbH* [2007] 1 WLR 2175, 2185 at [32], *Credit Suisse Financial Products* v. *Société Générale d'Entreprises* [1997] CLC 168, 171 and 172, *Polskie Ratownictwo Okretowe* v. *Rallo Vito & C SNC* [2009] EWHC 2249 (Comm). In those circumstances it is irrelevant that the party against whom the jurisdiction clause is sought to be enforced does not have a copy of the terms and conditions. Further the parties' agreement may be contained in more than one document, e.g. by an exchange of correspondence: *7E Communications*, at [33]. So there will be a valid agreement in writing where a quotation is made on one party's own standard terms and is accepted, even though the acceptor did not have a copy of those terms. In *7E Communications* a German company faxed a quotation to an English company offering to sell certain satellite equipment on its general terms and conditions. These contained an exclusive German jurisdiction clause. No copy of those terms was sent to the claimant who faxed the defendant a purchase order for the goods in the quotation. It was held that there was an agreement in writing for the purpose of Art. 23(1). Note that there is no requirement for there to be a written record of the parties to the agreement, *Antonio Gramsci Shipping Corp* v. *Stepanovs,* fn. 1403, at [32]–[34]. In this case Burton J also considered (at [29]–[30]) that the doctrine of separability (see fn. 1438 below.) does not require an agreement specifically as to the jurisdiction clause as long as there is agreement to the terms which contain it.

writing;[1407] or in a form which accords with practices which the parties have established between themselves;[1408] or, in international trade or commerce, in a form which accords with a usage[1409] of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.[1410] The burden of proof is on the party seeking to rely on Article 23.[1411] The incorporation of terms from a document in one contract to a document in another is a matter of particular difficulty especially where the terms of a third party are sought to be incorporated.[1412]

1407. In *Partenreederei M.S. Tilly Russ* v. *Haven & Vervoebedrüf Nova NV* (Case 71/83) [1985] 1 QB 931 the ECJ held that if it was established that the jurisdiction clause contained in the conditions printed on a bill of lading was the subject of a prior oral agreement between the parties expressly relating to the jurisdiction clause and that the bill of lading, signed by the carrier, was regarded as the written confirmation of that oral agreement, such a clause would satisfy the conditions laid down in Art. 17 of the Convention, even if it was not signed by the shipper and therefore bore only the signature of the carrier. In fact, not only is the letter of Art. 17, which expressly provides for the possibility of an oral agreement evidenced in writing, thereby observed but in addition its function, which is to ensure that the agreement of the parties is clearly established is also fulfilled. Similarly in *Berghoefer GmbH and Co KG* v. *ASA SA* (Case 221/84) [1985] ECR 2699, the Court held that an agreement is evidenced in writing where an oral agreement expressly dealing with jurisdiction is confirmed in writing by one of the parties and the other raises no objection to it, it being a breach of good faith to then subsequently contest the application of the oral agreement. *Cf Ocarina Marine Ltd* v. *Marcard Stein & Co* [1994] 1 Lloyd's Rep 524 where there was no confirmation in writing.

1408. In *Lafarge Plasterboard Ltd* v. *Fritz Peters & Co KG*, above, fn. 1405, goods were ordered on the basis of a printed form which contained a jurisdiction clause on the back but to which no reference was made on the front. For judge Bowsher QC this did not satisfy Art. 17 of the Convention, there having been no prior oral agreement and no continuing trading relationship based on the conditions where one party (on its evidence) had sent one set of conditions (on which it was relying) and the other had sent conflicting conditions. In *SSQ Europe* (above, fn. 1405) where Judge Havelock-Allen QC held Art. 17(b) to be satisfied where there had been a series of transactions over some years between the parties, based firstly on a price list sent by the claimant which referred generally to its conditions, orders placed by fax and then invoices sent by the claimants which printed the claimant's terms in full on the back. The evidence confirmed that the defendant was aware from the price list that the orders were only accepted on the claimant's terms and although the defendant asserted that no jurisdiction clause would have been agreed to, this was never indicated to the claimant. It was therefore arguable that it would be contrary to the legitimate expectation of the claimant and/or contrary to good faith for the defendant to deny the terms. Note that the judge also said, at p. 480, of Judge Bowsher's decision in *Lafarge* (above, fn. 1405) that: "If and insofar as the learned judge purported to hold that Article 17(b) has brought about no relaxation in the formalities of proof of consensus in cases where there is a continuous trading relationship between the parties based on the general conditions of business of one of them, save where there has been a prior oral agreement later confirmed in writing . . . I would respectfully disagree."

1409. The wording of Art. 17 is: "in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware".

1410. See below, fn. 1415.

1411. *Hewden Tower Cranes Ltd* v. *Wolffkran GmbH* [2007] EWHC 857 (TCC), [2007] 2 Lloyd's Rep 138 at [46]. Having reviewed the authorities Jackson J derived two propositions: First, where one party relies upon Art. 23 in order to oust the jurisdiction of the courts which would otherwise deal with their dispute, the burden is upon that party to prove an agreement satisfying the requirements of Art. 23. Secondly, since jurisdictional questions are resolved at an interlocutory stage upon written evidence, the standard of proof required must be moderated. The party invoking Art. 23 must show that it has much the better of the argument.

1412. See e.g in the context of incorporation of terms of an underlying insurance contract into a reinsurance contract, *AIG Europe SA* v. *QBE International Insurance Ltd* [2001] 2 Lloyd's Rep 268, and *AIG Europe (UK) Ltd* v. *The Ethniki* [2000] 2 All ER 566 (*cf* in a non-regulation context: *Dornoch Ltd* v. *Mauritius Union Assurance Co Ltd* [2006] 2 Lloyd's Rep 475). See also *Africa Express Line Ltd* v. *Socofi SA* [2009] EWHC 3223 (Comm), [2010] 2 Lloyd's Rep 181, where, in the context of whether a jurisdiction clause in terms agreed between parties to a slot charter could be incorporated by a general reference to

2.339 The printed clause here might not, in the circumstances, amount to an agreement in writing or evidenced in writing,[1413] or be in a form which accords with practices which the parties have established between themselves. Presumably, however, international freight forwarding could be considered to fall within the purview of international commerce so that the clause could be counted as a form according with usage,[1414] especially given the importance of the conditions in the industry.[1415]

2.340 Furthermore, given that a jurisdiction clause in the terms of clause 28 of BIFA 2005A relates to any dispute arising out of any act or contract[1416] to which the conditions apply, should a clause in the same terms of clause 4 of BIFA 1989 be applicable,[1417] since it purports to extend the application of the conditions to persons other than the customer, it may be that it would be wide enough to cover

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those terms in a maritime transport agreement made by one of them with a different party, Clarke J held that since the jurisdiction clause was ancillary to the main purpose of the second agreement (incorporation of conditions by general wording being usually inapt to incorporate an ancillary arbitration or jurisdiction clause) he could not be confident that the parties intended to incorporate the jurisdiction clause. See fn. 1406 above for Clarke J's summary of the position in respect of incorporation of one of the parties own terms.

1413. See fnn 1406 and 1407 above. In *Middle East Tankers & Freighters Bunker Services SA* v. *Abu Dhabi Container Lines P.J.S.C.* [2002] EWHC 957 (Comm), [2002] 2 Lloyd's Rep 643, Judge Dean QC did not read *Tilly Russ*, above fn. 1407, as requiring an oral agreement as a pre-condition. He considered there is sufficient evidence of an agreement to satisfy Art. 17(a) where a party who is willing to supply goods presents a document which contains either on its face or by reference to documents which the other party has, offering to supply goods on particular terms, including a jurisdiction clause, and the party to whom that document is proffered orders the goods and takes delivery of the goods on that basis. *Cf I.P. Metal*, above fn. 1404, which was not a case where there was an express oral agreement as to the jurisdiction clause but one where terms were agreed orally and a telex confirmed it by setting out the terms which one party was saying had been orally agreed. In the context of the particular trade it was common form for terms to be negotiated on the telephone and that not every term would be orally agreed since some would go without saying but be followed by telex confirmation. The only legitimate expectation on making the order was for the indicated forum and required an objection to be made to it. For Waller J on the evidence the agreement was either evidenced in writing or was in a form which accords with the parties' practice or usage of the trade. It can be noted that the orders by telephone were made after offers had been sent by fax which indicated the competent forum.

1414. *Cf The Rewia* [1991] 1 Lloyd's Rep 69 in respect of a jurisdiction clause in a bill of lading (reversed on different grounds, [1991] 1 Lloyd's Rep 325 but *cf* Dillon LJ at p. 336).

1415. In *Mainschiffahrts-Genossenschaft eG (MSG)* v. *Les Gravières Rhénanes Sarl* (Case C–106/95) [1997] 3 WLR 179, the ECJ held, in a case where no objection was raised to a letter of confirmation which contained a jurisdiction clause, that such circumstances involved a valid agreement within Art. 17 provided that this conduct was consistent with a practice in force in the field of international trade or commerce in which the parties operated and the parties were or ought to have been aware of that practice. Actual or presumptive awareness of the practice was made out in particular where the parties had previously had trade or commercial relations between themselves or with other parties operating in the branch of trade or commerce in question or where, in that branch, a particular course of conduct was generally and regularly followed when a certain type of contract was concluded, with the result that it could be regarded as a consolidated practice. In *Trasporti Castelletti Spedizioni Internationali SpA* v. *Hugo Trumpy SpA* (Case C-159/97) (1999) 34 ETL 617, [1999] 7 Euro CL 14, the court held that a usage is established where a particular course of conduct is generally and regularly followed by operators in the relevant branch of trade or commerce. See also *The Kribi* [2001] 1 Lloyd's Rep 76.

1416. A wider form of expression than e.g. "arising under" which potentially leads to differences in scope. Although recently, fine distinctions in this regard have been frowned upon as uncommercial, see the comments of Lord Hoffmann in *Fiona Trust & Holding* v. *Privalov* [2007] UKHL 40, [2008] 1 Lloyd's Rep 254, at [11]–[12], *cf* Lord Hope at [25]–[31] who distinguishes between clauses likely to be precise and those, such as jurisdiction and arbitration clauses where the purpose is likely to be clear and the parties are unlikely to linger over the words used to express it.

1417. See 2.33.

non-contracting parties provided that they are otherwise bound by it.[1418] In *Dresser UK Ltd and others* v. *Falcongate Freight Management Ltd and others*,[1419] however, the expanded definition of "merchant" in the bill of lading was not sufficient to expand the application of the jurisdiction clause to non-contracting parties. Clause 28 should therefore be more clearly expressed so as to cover any claim regardless of who brought it. Also it should be noted that in *Dresser*,[1420] it was stated that the mere fact that a bailment is a bailment on terms (including the terms as to jurisdiction) will not amount to an "agreement" between the bailor and the bailee in the absence of privity of contract for the purpose of Article 17 of the Convention. The doctrine of bailment on terms, while depending upon the bailor's express or implied consent to the bailee's subcontract, was said to have evolved because the bailor cannot sue the sub-bailee in contract, whereas a contract is what the first sentence of Article 17 (and now Article 23(1) of the Regulation) demands.[1421]

Should this view be sustained for the Convention and for Article 23 of the Regulation, it contrasts with the effect of an exclusive jurisdiction clause whenever these provisions are not involved given the decision of the Privy Council in *The Pioneer Container*.[1422] In this case shipowners were held able to rely on the jurisdiction clause in their feeder bill of lading as against the owners of goods shipped under bills of lading issued by the contracting operators but which authorised subcontracting on any terms. The decision contrasts with that of Sheen J in *The Forum Craftsman*,[1423] where shipowners sought to rely on the jurisdiction clause in the bill of lading issued by charterers to the owners of the goods. Sheen J held that the shipowners were unable to rely on this clause largely on the basis[1424] that sub-bailees could not be bound by such a clause in the charterers' bill of lading. This was because the agreement was not one which they had negotiated or in which they had acquiesced.[1425] This case is distinguishable from *The Pioneer Container* where the shipowners were seeking to rely on their own bill.[1426] The narrow view taken of *Morris* v. *Martin*[1427] by Sheen J[1428] must be contrasted with the view of the

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1418. In *Hewden Tower Cranes Ltd* v. *Wolffkran GmbH* [2007] EWHC 857 (TCC), [2007] 2 Lloyd's Rep 138, at [60], however, a transferee of a hire business was unable to rely on the jurisdiction clause in the transferor's contract with the lessee since the transfer had not been notified to the lessee nor had the lessee consented to the substitution of the defendant as lessor.

1419. [1991] 2 Lloyd's Rep 557.

1420. Previous footnote, at p. 562.

1421. *Cf* the view taken in the Court of Appeal in *Sandeman Coprimar SA* v. *Transitos y Transportes Integrales SI* [2003] EWCA Civ 113, [2003] 1 All ER (Comm) 504, that a bailment on terms can be analysed as involving a collateral contract between the bailor and the sub-bailee. In so far as an exclusive jurisdiction clause is relied on by virtue of a Himalaya clause (see 2.245) it might be that since objections to the absence of privity can be overcome by virtue of the effect of the Contracts (Rights of Third Parties) Act 1999, the fact that such a clause is contained in an agreement made with the party against whom the clause is most likely to be relied upon should be sufficient to overcome the objection made in *Dresser*.

1422. [1994] 2 All ER 250.

1423. [1984] 2 Lloyd's Rep 102.

1424. See p. 107.

1425. The decision was upheld on appeal [1985] 1 Lloyd's Rep 191, although not specifically on this basis. See further Palmer, p. 1288, 23–038.

1426. And was distinguished, see *per* Lord Goff at p. 266, although the distinction appears to proceed on a misunderstanding of the facts.

1427. [1966] 1 QB 716.

1428. At p. 107.

Privy Council[1429] that there need be no limit to the terms consented to. Furthermore, the approach to construction of the relevant clause in *The Forum Craftsman*[1430] and by the Court of Appeal in *Dresser*[1431] can be contrasted with the criticism made in *The Pioneer Container*[1432] of the extreme technicality of the point raised in that case on the construction of the jurisdiction clause. It was considered difficult to accept that a clause in a bill of lading providing for the governing law and for exclusive jurisdiction over claims could not cover claims by cargo owners against shipowners framed in bailment rather than contract simply because the clause refers to claims under the bill of lading contract as opposed to claims under the bill of lading.

2.342 Where, however, a shipowner sought to rely on a Himalaya clause which stated that subcontractors were to have the benefit of "all exceptions, limitations, provisions, conditions and liberties herein benefitting the carrier . . . ", it was held in *The Mahkutai*[1433] that this did not enable the shipowner to rely on an exclusive jurisdiction clause. Such a clause embodies a mutual agreement and cannot be described as an exception etc.

2.343 The situation which occurred in *Dresser* must, however, be distinguished from where a bill of lading has been transferred so as to transfer the contract of carriage by virtue of the Carriage of Goods by Sea Act 1992. So long as the conditions in Article 23 of the Regulation (Article 17 of the Convention) have been satisfied as between the shipper and the carrier[1434] then the jurisdiction clause will be effective in respect of the transferee where the operation of national law effects the transfer of the contract of carriage.[1435]

2.344 Thus, in the context of an English exclusive jurisdiction clause as in BIFA 2005A, on the assumption that either the forwarder or customer is domiciled in

1429. See *per* Lord Goff, at pp. 265–266.

1430. At first instance at p. 107.

1431. At p. 561.

1432. At p. 263.

1433. [1996] AC 650, [1996] 2 Lloyd's Rep 1. A potentially effective alternative is to contract for a promise not to sue enforced by the contracting carrier, see e.g. *Whitesea Shipping and Trading Corp* v. *El Paso Rio Clara Ltda (The Marielle Bolten)* [2009] EWHC 2552 (Comm), [2010] 1 Lloyd's Rep 648.

1434. In answer to the question whether a jurisdiction clause must be formulated in such a way that its wording alone makes it clear, or at least easy to ascertain (even) for persons other than the parties and the court concerned which court is to have jurisdiction, the ECJ in *Coreck Maritime GmbH* v. *Handelsveem BV* (Case C-387/98) (2000) ECR I-9337 held that whilst it is not necessary for the jurisdiction clause to be formulated in such a way that the competent court can be determined on its wording alone, the clause must state the objective factors on the basis of which the parties have agreed to choose a court or courts to which they wish to submit disputes. Those factors, which must be sufficiently precise to enable the court seised to ascertain whether it has jurisdiction, may, where appropriate, be determined by the particular circumstances of the case. This was said in the context of an identity of carrier clause where the jurisdiction clause referred to the country where the carrier had his principal place of business.

1435. *Partenreederei M.S. Tilly Russ* v. *Haven & Vervoebedriif Nova NV* (Case 71/83) [1985] 1 QB 931 and *Trasporti Castelletti Spedizioni Internationali SpA* v. *Hugo Trumpy SpA* (Case C-159/97) (1999) 34 ETL 617, [1999] 7 Euro CL 14. See also *Coreck Maritime GmbH* v. *Handelsveem BV* (Case C-387/98) (2000) ECR I-9337 (which appears to answer the difficulty, noted in the opinion of Advocate-General Sir Gordon Slynn in *Tilly Russ,* of where the transferee is a domiciliary of a non-contracting Member State. The conditions of application of the Article must be assessed by reference to the relationship between the parties to the original contract). It would seem to be likely that a similar result obtains when a third party seeks enforcement of a contract by virtue of the Contracts (Rights of Third Parties) Act 1999, see further Briggs and Rees, 4.43. Contrast *Hewden Tower Cranes Ltd* v. *Wolffkran GmbH* [2007]

England and bound by the conditions, then Article 23 (and Article 17 of the Convention) will confirm the exclusive jurisdiction[1436] of the English courts.[1437] Even a claim that the contract is void and should be set aside will not deprive it of effect.[1438] The question may still arise whether *forum non conveniens* can

EWHC 857 (TCC), [2007] 2 Lloyd's Rep 138 where, in the absence of a novation, a transferee of the original party's business was unable to rely on an exclusive jurisdiction clause in the original contract made by the transferor.

1436. A difficulty arising under the Convention is the effect of a non-exclusive jurisdiction clause. Hoffmann J in *Kurz* v. *Stella Musical Veranstaltungs GmbH* [1992] 1 All ER 630 held such a clause to be within Art. 17. Cheshire and North (13th edn) at p. 239 suggested that Art. 17 concerns itself only with exclusive jurisdiction clauses and that the Convention needs to deal separately with non-exclusive clauses (*cf* p. 289 of the 14th edn). The change of wording in the Regulation (by adding the words "unless the parties have agreed otherwise") is said both to confirm that the jurisdiction conferred by a choice of forum is exclusive whilst nevertheless enabling parties to agree that it is not exclusive (see the Commission Report accompanying the Draft Regulation (Com/99/0348)). The change may well confirm the approach taken by Hoffmann J in *Kurz* to the effect that depending on the wording a jurisdiction clause can have effect to the exclusion of the jurisdictions which would otherwise be imposed (*cf Hough* v. *P&O Containers Ltd* [1998] 2 Lloyd's Rep 318, [1998] 3 WLR 851) or confer jurisdiction in addition to the jurisdictions which would apply in the absence of the clause (see p. 637f–h and p. 638h–j, *cf The Kherson* [1992] 2 Lloyd's Rep 261 and see *Insured Financial Structures Ltd* v. *Elektrocieplownia Tychy SA* [2003] EWCA Civ 110, [2003] 2 WLR 656 which adopts the same interpretation as Hoffmann J). Once a court has been seised in accordance with a non-exclusive jurisdiction clause the effect of Art. 27 of the Regulation will mean that its jurisdiction becomes exclusive, Briggs and Rees, p. 192.

1437. Unless the claimant seeks to sue in some other part of the UK in which case Rule 11 in Chapter II of the Regulation as modified may be applicable, see s. 16 of the Civil Jurisdiction and Judgments Act 1982 as amended by The Civil Jurisdiction and Judgments Order 2001 (SI 2001 No. 3929). See also fn. 1439 below.

1438. *Benincasa* v. *Dentalkit Srl* (Case C-269/95, ECJ) [1998] All ER (EC) 135. The concept of separability applies both to arbitration and jurisdiction clauses, *Deutsche Bank AG* v. *Asia Pacific Communications Inc* [2008] EWCA Civ 1094, [2008] 2 Lloyd's Rep 619 at [24]–[25] (although in the context of arbitration this is reinforced by s. 7 Arbitration Act 1996). This is different from where no agreement has been concluded (including the jurisdiction clause) because the parties are still in negotiation as in *Bols Distilleries* v. *Superior Yacht Services Ltd* [2006] UKPC 45, [2007] 1 WLR 12. However, even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration, see Lord Hoffmann in *Fiona Trust & Holding* v. *Privalov* [2007] UKHL 40, [2008] 1 Lloyd's Rep 254, [16]–[19] especially at [18], *cf* Lord Hope at [34]–[35]. In essence the question will be whether or not the attack on the main contract includes an attack on the arbitration or jurisdiction clause and if not, whether the arbitration or jurisdiction clause can be attacked separately from the main contract. A jurisdiction clause in a bill of lading can continue to apply to the parties to it notwithstanding that it is surrendered and replaced by a fresh bill of lading, *AP Moller-Maersk A/S* v. *Sonaec Villas Cen Sad Fadoul* [2010] EWHC 355 (Comm), [2011] 1 Lloyd's Rep 1. Where different jurisdiction clauses appear in different documents in a complex derivatives transaction it is the jurisdiction clauses in the agreements which are at the commercial centre of the transaction which the parties must have intended to apply rather than "boiler plate" clauses in other documents primarily intended to deal with technical banking disputes, Lord Collins of Mapesbury in *UBS AG* v. *HSH Nordbank* [2009] EWCA Civ 585, [2009] 2 Lloyd's Rep 272 at [95]. In *ACP Capital Ltd* v. *IFR Capital plc* [2008] EWHC 1627 (Comm), [2008] 2 Lloyd's Rep 655 a jurisdiction clause in a financial advisory agreement was not abrogated by a differing jurisdiction clause in later loan agreements. The issue was not the construing of the ambit of a single clause (distinguishing *Fiona Trust* (above) which concerned the same arbitration clause in eight charterparties between eight companies), it was the effect of a number of clauses in a series of contracts carefully drafted with the assistance of lawyers. These cases suggest also that clauses referring to disputes arising under a contract or arising out of or in connection with a contract are likely to include disputes concerning claims of breach of fiduciary duty or misrepresentation at least where they could affect the validity of the contract.

be applied.[1439] Early decisions of the High Court indicated that there is no scope for applying the principles of *forum non conveniens*, where to do so would be inconsistent with the Convention and so contrary to section 49 of the Act.[1440] However, the Court of Appeal in *Re Harrods (Buenos Aires) Ltd*,[1441] took the view that whilst *forum non conveniens* is not a recognised basis of stay under the Convention where the contest is between the jurisdiction of Contracting States, this is not the case where the only competing foreign jurisdiction is that of a non-Contracting State.[1442] Consequently application of the principle was not seen as inconsistent with the Convention and was not precluded by Article 2 which was also applicable and required a person to be sued in a Contracting State if domiciled there. Further, in *Ultisol Transport Contractors Ltd* v. *Bouygues Offshore SA*, Clarke J considered that Article 17 of the Convention was similarly not intended to exclude the jurisdiction of a non-Contracting State in any circumstances, and did not exclude the jurisdiction of a non-Contracting State even where one of the parties proceeded in the courts of such a State in breach of an exclusive jurisdiction agreement providing for the exclusive jurisdiction of the courts of a Contracting State. There was nothing in Article 17 to exclude the court's discretion whether to grant an injunction in such circumstances.[1443]

2.345 The correctness of the decision in *Re Harrods*[1444] was referred to the ECJ in *Owusu* v. *Jackson*.[1445] The court held that Article 2 was mandatory and that no exception on the ground *of forum non conveniens*, which is not expressly provided for in the Convention, could be applied.[1446] This clearly prevents the use of such a principle wherever a basis of jurisdiction is regarded as mandatory which would

1439. There is no difficulty about applying *forum non conveniens* where the conflict is within the UK, see *Sunderland Marine Mutual Insurance Co Ltd* v. *Wiseman (The Seaward Quest)* [2007] EWHC 1460 (Comm), [2007] 2 Lloyd's Rep 308 and s. 49 of the 1982 Act.

1440. See *S. & W. Berisford*, above, and *Arkwright Mutual Insurance Co* v. *Bryanston Insurance Co Ltd and Others* [1990] 2 QB 649, [1990] 2 Lloyd's Rep 70. Note that no amendment has been made to s. 49 of the Act to take account of the Council Regulation. This is unlikely to have any effect as, ultimately, the question of whether *forum non conveniens* can still be applied in this context depends upon the correct interpretation of the Regulation.

1441. [1992] Ch. 72, see especially *per* Dillon LJ at pp. 97–98, *cf Hamed El Chiaty & Co* v. *The Thomas Cook Group Ltd, (The Nile Rhapsody)* [1994] 1 Lloyd's Rep 382). See also *The Po* [1991] 2 Lloyd's Rep 206, see further, P Kaye, "The EEC Judgments Convention and the Outer World: Goodbye to Forum Non Conveniens ?" [1992] JBL 47. See further *Sarrio SA* v. *Kuwait Investment Authority* [1997] 1 Lloyd's Rep 113 (CA), reversed on different grounds [1999] AC 30, [1998] 1 Lloyd's Rep 129, *Haji-Ioannou* v. *Frangos* [1999] 2 Lloyd's Rep 337, *Ace Insurance SA* v. *Zurich Insurance Co* [2000] 2 Lloyd's Rep 423, *Lubbe* v. *Cape* [2000] 2 Lloyd's Rep 383.

1442. [1996] 2 Lloyd's Rep 140.

1443. The injunction granted by Clarke J was lifted by the Court of Appeal in light of subsequent circumstances concerning other parties involved in the litigation, see *Bouygues Offshore SA* v. *Caspian Shipping Co (Nos 1, 3, 4 and 5)* [1998] 2 Lloyd's Rep 461.

1444. Above fn. 1441.

1445. [2002] EWCA Civ 877 (2002 WL 1039653). See also *American Motorists Insurance Co* v. *Cellstar Corp* [2003] EWCA Civ 206, [2003] All ER (D) 26.

1446. [2005] QB 801 (Case C-281/02). See further for comments on the controversy, *UBS AG* v. *HSH Nordbank AG* [2009] EWCA Civ 585, [2009] 2 Lloyd's Rep 272 at [103] citing the views of Dicey, Morris & Collins, 14th edn (2006) at paras 11–023, 12–020 & 12–124 and Briggs & Rees, 2008, para. 7.02.

apply to Article 23 (Article 17 of the Convention).[1447] It seems that this should apply also to the situation where an exclusive jurisdiction clause directs jurisdiction to the court of a non-Contracting State where the defendant is domiciled in a Contracting State so that Article 2 applies.[1448] There may, however, be the possibility of reflexive effect[1449] in this situation so that an implied authority can be derived from the Regulation itself for a court in a Member State to decline jurisdiction in favour of a court in a non-Member Sate in certain circumstances including where there is an exclusive jurisdiction clause in favour of the courts of the non-Member State.[1450] A further possibility is the use of an anti-suit injunction where this was ancillary or incidental to earlier substantive English proceedings.[1451]

2.346 If, however, neither party were to be domiciled in England or other Member (Contracting) State, Article 23 (Article 17 of the Convention) provides that the courts of other Contracting States shall have no jurisdiction over their disputes unless the courts chosen have declined jurisdiction. In this case the English courts might have discretion in respect of the jurisdiction and so could decline jurisdiction on the basis of *forum non conveniens*.[1452] It would seem likely, however, that this could be the case only where the exercise of the discretion is consistent with other provisions of the Regulation.[1453]

2.347 Further issues arise in relation to Article 23 of the Regulation (Article 17 of the Convention). In respect of the Brussels Convention, English courts have taken the position that the fact that proceedings have been commenced in the courts of another Contracting State does not prevent an English court from considering the validity of a jurisdiction clause and, on deciding that it is valid, allowing claims on

1447. See the discussion in *Cheshire, North and Fawcett*, pp. 320–329, especially at p. 326. *Cf Mazur Media Ltd* v. *Mazur Media GmbH* [2004] EWHC 1566 (Ch), [2005] 1 Lloyd's Rep 41 at [69]–[70]. See further, *Equitas Ltd* v. *Allstate Insurance Co* [2009] Lloyd's Rep IR 227 at [64].

1448. Presumably also where some other mandatory basis of jurisdiction is applicable, see *Cheshire, North and Fawcett*, p. 328.

1449. See *Cheshire, North and Fawcett*, p. 333.

1450. Conversely, the court would have a discretion not to enforce the non European Exclusive jurisdiction clause. In *Konkola Copper Mines plc* v. *Coromin Ltd* [2006] EWCA Civ 5 [2006] 1 Lloyd's Rep 410, the Court of Appeal refused to interfere with the judge's exercise of his discretion to refuse a stay of English proceedings based on case management grounds. It also considered the issue of the burden of proof when a challenge to an established Regulation jurisdiction is challenged on the basis of Art. 23—*per* Rix LJ at [95] "It seems to me to be counterintuitive to think that, where a statutory jurisdiction has been established but an exceptional jurisdiction elsewhere is put forward based on a contract which must be clearly shown to have the assent of both parties, it remains the burden of the claimant to prove a negative rather than that of the applicant who challenges the established jurisdiction to prove that he is entitled to rely on the clause in question." In *ACP Capital Ltd* v. *IFR Capital plc* [2008] EWHC 1627 (Comm), [2008] 2 Lloyd's Rep 655 Beatson J felt able to assess issues of *forum non conveniens* where an exclusive jurisdiction clause in favour of Jersey was applicable and the domicile of the defendant was Jersey.

1451. See *Masri* v. *Consolidated Contractors International Co* [2008] EWCA Civ 624, [2008] 2 Lloyd's Rep 301 and *Masri* v. *Consolidated Contractors International Co* [2008] EWCA Civ 876, [2009] 1 Lloyd's Rep 42. See also, in the context of Art. 22, *Ferrexpo AG* v. *Gilson Investments Ltd* [2012] EWHC 721 (Comm), [2012] 1 Lloyd's Rep 588.

1452. *S. & W. Berisford plc and NGI International Precious Metals Inc* v. *New Hampshire Insurance Co* [1990] 2 QB 631, [1990] 1 Lloyd's Rep 454 at p. 642 and p. 461 and based on the Schlosser report, OJ 1979, C59/97 at [176].

1453. *Cf*, in respect of the Convention in the light of s. 49 of the 1982 Act. See *Cheshire, North and Fawcett*, p. 345.

it to continue.[1454] In Regulation terms Article 23 of the Regulation (Article 17 of the Convention) would therefore be considered to have priority over Article 27 of the Regulation (Article 21 of the Convention)[1455] which provides that where proceedings involving the same cause of action[1456] and between the same parties are brought in the courts of different Member States, any court other than the court first seized[1457] shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. Furthermore, in *Continental Bank N.A.* v. *Aeakos Compania Naviera SA*[1458] the Court of Appeal considered that there is nothing in the Convention which is inconsistent with a power vesting in the English court to grant an injunction the objective of which is to secure enforcement of an exclusive jurisdiction clause. However, in *Erich Gasser GmbH* v. *MISAT srl* the European Court of Justice ruled that, in respect of the Convention, notwithstanding that jurisdiction was claimed, by virtue of Article 17 of the Convention, before a court second seized[1459] that court had to give way to the court first seized and stay the action.[1460] It was for the court first seized to decide on the applicability of the jurisdiction clause and accept or decline jurisdiction as appropriate. In response to a further issue as to whether there was an exception to Article 21 of the Convention where there was a danger of protracted proceedings in the court first seized, the court emphasised that the Convention was necessarily based on the trust which the Contracting States accorded to each other's legal systems and judicial institutions. It was that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention were required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism. This would seem equally referable to the issue of whether the court second seized should trust the court first seized to consider the

1454. *Kloeckner & Co AG* v. *Gatoil Overseas Inc* [1990] 1 Lloyd's Rep 177 at p. 196, *I.P. Metal* v. *Ruote* [1993] 2 Lloyd's Rep 10 (and see [1994] 2 Lloyd's Rep 560), *Mark Edmund Denby* v. *The Hellenic Mediterranean Lines Co Ltd* [1994] 1 Lloyd's Rep 320). The approach was confirmed in *Continental Bank N.A.* v. *Aeakos Compania Naviera SA* [1994] 1 WLR 588. See also *Lexmar Corp and Steamship Mutual Underwriting Association (Bermuda) Ltd* v. *Nordisk Skibsreder Forening and Northern Tankers (Cyprus) Ltd* [1997] 1 Lloyd's Rep 717 and *Glencore International Inc* v. *Metro Trading International Inc* [1999] 2 Lloyd's Rep 632 (*cf*. *Lafi Office and International Business S.L.* v. *Meriden Animal Health Ltd* [2000] 2 Lloyd's Rep 51).

1455. See also Art. 29 of the Regulation (Art. 23 of the Convention). Article 28 of the Regulation (Art. 22 of the Convention), provides that in respect of related actions a court, other than that first seized may stay its proceedings thus giving a discretion to the court second seized. For factors involved in the exercise of this discretion, see e.g. *Bank of Tokyo-Mitsubishi Ltd* v. *Baskan Gida Sanayi Vè Pazalarma AS* [2004] EWHC 945 (Ch), [2004] 2 Lloyd's Rep 394, at p. 426.

1456. See *JP Morgan Europe Ltd* v. *Primacom AG* [2005] EWHC 508 (Comm), [2005] 2 Lloyd's Rep 665.

1457. See e.g. *WPP Holdings Italy SRL* v. *Benatti* [2996] EWHC 1641 (Comm), [2006] 2 Lloyd's Rep 610.

1458. [1994] 1 WLR 588 at p. 597.

1459. In this case involving an English exclusive jurisdiction clause, see *Cheshire, North and Fawcett* p. 335.

1460. Case C-116/02. [2004] 1 Lloyd's Rep 222. See Baatz [2004] LMCLQ 25 and Wall, (2004) 4(1) S&TL 1. See its application in *JP Morgan Europe Ltd* v. *Primacom AG* [2005] EWHC 508 (Comm), [2005] 2 Lloyd's Rep 665.

issue appropriately.[1461] Consequently, although the issue of whether an anti-suit injunction to restrain the continuation of proceedings before the court first seized in breach of a jurisdiction clause was not directly answered by *Gasser*, the decision in *Continental Bank* can be regarded as contrary to its spirit. This question merges with the wider question of whether such a remedy is compatible with the Brussels regime in so far as it is designed to prevent the courts of a Member/Contracting State from exercising jurisdiction under the regime.

On a reference made by the House of Lords in the case of *Turner* v. *Grovit*[1462] the ECJ answered that question in the negative.[1463] Furthermore, the ECJ in *Allianz SpA and others* v. *West Tankers Inc (The Front Comor)*,[1464] on reference by the House of Lords has since determined that the use of an anti-suit injunction to support a London arbitration clause is incompatible with the Regulation at least where the subject matter of the dispute falls within the Regulation,[1465] a preliminary issue concerning the applicability of an arbitration clause, including in particular its validity, also coming within this scope.[1466] As the principle underlying these decisions is the respect and trust due to the courts of other Member States and the right of a court seized to determine its jurisdiction under the Regulation, no objection can be made to use by the court of a Member State of an anti-suit injunction against courts of a non-Member State in order to preserve its jurisdiction as designated by the Regulation,[1467] nor to restrain the commencement of the arbitration proceedings themselves independently of any court proceedings.[1468] An 2.348

1461. In *Gasser* the court rejected argument that the court chosen under the clause was best placed to consider the effect of the agreement, *cf* the observations of Steyn LJ in *Continental Bank* at p. 511. The court also rejected the prospect of action before the first court as a delaying tactic as a reason for the second court refusing to stay its proceedings.

1462. [2001] UKHL 65, [2002] 1 WLR 107. (The Opinion of Advocate General Ruiz-Jarabo Colomer is clearly against. See also Baatz and Wall (fn. 1460). The view of the Advocate General, at [37], suggests that such injunctions could not fall within protective measures envisaged by Art. 24 of the Convention and Art. 31 of the Regulation).

1463. Case C-159/02 [2005] 1 AC 101, see *Cheshire, North and Fawcett*, pp. 335–6 and references cited at p. 335, n. 1135.

1464. Case-185/07 [2009] 1 AC 1138, [2009] 1 Lloyd's Rep 413. See further, *DHL GBS (UK) Ltd* v. *Fallimento Finmatica SPA* [2009] EWHC 291 (Comm), [2009] 1 Lloyd's Rep 430.

1465. See similarly *Youell* v. *La Reunion Aerienne* [2009] EWCA Civ 175, [2009] 1 Lloyd's Rep 586, in respect of application for an order that the court has no jurisdiction.

1466. It seems likely that, by implication, the ability of a court second seized to consider the validity or the applicability of an arbitration clause without waiting for any decision of the court first seized to determine the issue of validity is equally restricted (possibly affecting therefore the approach of the English courts in *Through Transport Mutual Insurance Association (Eurasia) Ltd* v. *New India Assurance Co Ltd* [2004] EWCA Civ 1598, [2005] 1 Lloyd's Rep 67 and *Through Transport Mutual Insurance Association (Eurasia) Ltd* v. *New India Assurance Co Ltd (No. 2)* [2005] EWHC 455 (Comm), [2005] 2 Lloyd's Rep 378.

1467. See *Cheshire, North and Fawcett*, p. 339 and *Advent Capital plc* v. *Ellinas Imports-Exports Ltd* [2005] EWHC 1242 (Comm) at [100], [2005] 2 Lloyd's Rep 607 (EJC), *Samengo-Turner* v. *J & H Marsh & McLennan (Services) Ltd* [2007] EWCA 723, [2007] IL Pr 52 (s. 5, Brussels Regulation). See further, *Shashoua* v. *Sharma* [2009] EWHC 957 (Comm), [2009] 2 Lloyd's Rep 376, where an attempt to apply the reasoning of *The Front Comor* (see fn. 1464) to the New York Convention in order to restrain the use of an anti-suit injunction against proceedings in the courts of a non-Member State was rejected. See further *Midgulf International Ltd* v. *Groupe Chimique Tunisien* [2010] EWCA Civ 66, [2010] 2 Lloyd's Rep 543.

1468. See *Claxton Engineering Services Ltd* v. *TXM Olaj-és Gázkutató KFT* [2011] EWHC 345 (Comm), [2011] 1 Lloyd's Rep 510.

arbitration tribunal is not bound to give effect to the principle of effective judicial protection and is not deprived, by reason of European law, of the jurisdiction to award equitable damages for breach of the obligation to arbitrate.[1469]

2.349 It can be noted that in *Continental Bank* it was the breach of contract in pursuing the action in breach of the jurisdiction clause which was emphasised as oppressive. The same can be said of the action of a party in seeking a stay of the proceedings before the English court, yet such action, equally in breach of contract, must now be permissible after *Gasser*.[1470]

2.350 Article 27 of the Regulation (Article 21 of the Convention) will anyhow take priority in other cases even if the jurisdiction of the court first seized is challenged in the second court.[1471] It should also be noted that if one of the parties chooses to sue in another Member State, and the court of that State chooses to ignore the jurisdiction clause, it will not be possible to challenge the enforcement of the decision on this jurisdictional ground in the English courts.[1472] The exceptions to this rule in the cases where exclusive jurisdiction is expressly granted in sections 3, 4 and 6 of Chapter II of the Regulation[1473] are unlikely to apply to a forwarder unless he also acts as an insurer. It will therefore be extremely important for a forwarder to contest strongly in the foreign court itself any attempt by the customer to sue in that court in breach of the jurisdiction clause. Alternatively an anti-suit injunction might be sought although the prospects of obtaining one are somewhat doubtful.[1474]

2C.25.5 Where there is no exclusive jurisdiction clause

2.351 Where a clause such as BIFA clause 28 cannot be applied because, for example the trading conditions have not been incorporated into the contract,[1475] then the jurisdiction of the English court will need to be founded on some other principle. Where the Brussels Regulation or Convention does not apply, jurisdiction may be

1469. *West Tankers Inc* v. *Allianz SpA (The Front Comor)*, [2012] EWHC 854 (Comm), [2012] 2 Lloyd's Rep 103.

1470. Damages may be available for the breach involved, see Merrett (2006) 55 ICLQ 315. Seeking a declaration of non-liability in a different court might not amount to a breach, *cf Evialis* v. *SIAT* [2003] 2 Lloyd's Rep 377, 391. Note also the need for privity of contract which might not exist where the defendant is pursuing a claim against a defendant's insurer under statutory rights notwithstanding the existence of an arbitration clause in the contract between the defendant and the insurer, see *Through Transport Mutual Insurance Association (Eurasia) Ltd* v. *New India Assurance Co Ltd* [2004] EWCA Civ 1598, [2005] 1 Lloyd's Rep 67 at [52], nevertheless pursuing such a claim might result in the party being bound by the arbitration clause, see the further proceedings in *Through Transport Mutual Insurance Association (Eurasia) Ltd* v. *New India Assurance Co Ltd (No. 2)* [2005] EWHC 455 (Comm), [2005] 2 Lloyd's Rep 378. In *CMA CGM SA* v. *Hyundai Mepo Dockyard Co Ltd* [2008] EWHC 2791 (Comm), [2009] 1 Lloyd's Rep 213, the court upheld the award by arbitrators of damages for proceedings taken in breach of the arbitration agreement, not being bound by the French judgment under the regulation.

1471. *Overseas Union Insurance Ltd and Others* v. *New Hampshire Insurance Co* [1992] 1 Lloyd's Rep 204. This is regardless of the domicile of the parties.

1472. Article 35(3). See further *Cheshire, North and Fawcett*, p. 629. *Cf* Art. 28(3) of the Convention which is in similar terms with respect to a court of a Contracting State.

1473. Ss. 3, 4 and 5 of Title II of the Convention.

1474. In the light of *Erich Gasser*, see above fn. 1460.

1475. See e.g. *Siboti K/S* v. *BP France SA* [2003] 2 Lloyd's Rep 364.

taken under traditional English rules[1476] based on service of a claim form on a defendant who is present within the jurisdiction[1477] or submits to the jurisdiction or by virtue of obtaining leave to serve a claim form out of the jurisdiction under CPR 6.36 where the situation falls within para. 3.1 of Practice Direction 6B (6BPD).[1478] In respect of forwarding and carriage operations of special concern[1479] are those cases concerning claims in contract and tort and where further defendants or third parties need to be joined in the proceedings.[1480] Under 6BPD para. 3.1(6) leave can be sought for a claim in respect of a contract[1481] where the contract (a) was made

1476. See generally *The White Book*, 2010, *Cheshire, North and Fawcett*, ch. 12, Briggs and Rees, ch. 4. See also CPR 6.12 for service on an agent of an overseas principal where a contract is entered into within the jurisdiction with or through the defendant's agent. Claims in rem within the Admiralty jurisdiction under ss. 20–21 of the Senior Courts Act 1981, may be commenced by service on a ship unless service of the in rem claim form is accepted or acknowledged voluntarily (see Briggs and Rees, para. 2.273 and generally CPR Part 61 and Practice Direction 61). Arrest of the ship may follow and provide the basis for security for the claim usually by the provision of alternative security. The court may proceed to exercise its discretion to stay the claim in which case it may require retention of the security or make the stay conditional on the provision of equivalent security (s. 26 CJJA, s. 11 Arbitration Act 1996). The power of the Admiralty Court to take jurisdiction is subject to the Brussels/Lugano Conventions and the Council Regulation (see in particular Art. 5(7) of these instruments) but these in turn are subject to other conventions which provide for jurisdiction based on the arrest of the ship, see fn. 1573 below.

1477. See, however, *Kamali* v. *City & Country Properties* [2006] EWCA Civ 1879, [2007] 1 WLR 1219, where the Court of Appeal held that service can be effected by a method authorised by Part 6 of the CPR notwithstanding the temporary absence of the defendant at the time of service, see *Cheshire, North and Fawcett*, pp. 355–6. For the presence of a company see the Companies Act 2006, Parts 34 & 37.

1478. Formerly Order 11, r. 1 and CPR 6.20. See also CPR 6.37 (formerly 6.21). For 6BPD, para. 3.1 the applicant has the burden to establish a good arguable case that the claim falls within a relevant sub-paragraph, see *Petroleo Brasil SA* v. *Mellitus Shipping (The Baltic Flame)* [2001] EWCA Civ 418, [2001] 2 Lloyd's Rep 203, *Canada Trust Co* v. *Stolzenberg (No. 2)* [2002] 1 AC 1, 13, *Carvill America Inc* v. *Camperdown UK Ltd* [2005] EWCA Civ 645, [2005] 2 Lloyd's Rep 457. It was considered in *Bas Capital Funding Corp* & *Ors* v. *Medfinco Ltd & Ors* [2003] EWCH 1798 (Ch), [2004] 1 Lloyd's Rep 652. that there was no reason to believe that the standard introduced by CPR 6.21(b) of "reasonable prospect of success" (see now CPR 6.37(1)(b)) differs from the "serious issue to be tried" test (see now CPR 6.37(2) & 6BPD para. 3.1(3)(a)). In *MRG (Japan) Ltd* v. *Engelhard Metals Japan Ltd* [2004] 1 Lloyd's Rep 731, Toulson J, at pp. 732–3, set out the requirements for service out of the jurisdiction under r. 6.21: (1) in respect of each claim the applicant must show a good arguable case that it falls within a relevant sub-paragraph of r. 6.20—this is less stringent than a balance of probabilities; (2) that there is a serious issue to be tried in respect of each claim; and (3) that England is the appropriate forum. The material facts to be disclosed were those sufficient to enable the court to determine whether to grant the application and not necessarily all facts relevant to the merits of the claim.

1479. There is also the possibility of leave being obtained where a remedy is sought in respect of a person domiciled within the jurisdiction, see 6BPD para. 3.1(1) domicile being determined by ss. 41–46 of CJJA 1982 (CPR 6.31(j)). This will be of limited use to forwarders or carriers since normally claims by them against a person domiciled in the UK or against them where they are domiciled in the UK will normally fall within the scope of the Brussels 1 Regulation or Convention.

1480. On the last see 6BPD para. 3.1(3) and (4). In respect of para 3.1(3) see e,g., *Joint Stock Asset Management Co Ingosstrakh-Investments* v. *BNP Paribas SA* [2012] EWCA Civ 644, [2012] 1 Lloyd's Rep 649. In respect of freezing orders (formerly *Mareva* injunctions), see 6BPD para. 3.1(5).

1481. For the width of this wording see *Cheshire, North and Fawcett* p. 379. *Albon* v. *Naza Motor Trading* [2007] EWHC 9 (Ch), [2007] 1 Lloyd's Rep 297 confirmed its application to restitutionary claims related to a contract (in that case overpayments made under it) overlapping with 6BPD para. 3.1(16) in respect of claims made for restitution where the defendant's alleged liability arises out of acts committed within the jurisdiction. See further *Nabb Brothers Ltd* v. *Lloyds International (Guernsey) Ltd* [2005] EWHC 405 (Ch), [2005] IL Pr 37, *The White Book*, Commentary, 6.37.35 and *Greene Wood & McLean* v. *Templeton Insurance Ltd* [2009] EWCA Civ 65, [2009] 1 WLR 2013, *cf Cecil* v. *Bayat* [2010] EWHC 641 (Comm), March 29, 2010, unreported.

in the jurisdiction;[1482] (b) was made by or through an agent trading or residing within the jurisdiction; (c) is governed by English law[1483] or (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract.[1484] Leave can also be given where a claim is made in respect of a breach of contract committed within the jurisdiction,[1485] or a claim is made for a declaration that no claim exists where, if the contract was found to exist, it would comply with the conditions in 6BPD para. 3.1(6).[1486] By 6BPD para. 3.1(9) leave can be sought for a claim in tort[1487] where (a) the damage was sustained within the jurisdiction[1488] or (b) the damage sustained resulted from an act committed within the jurisdiction.[1489] 6BPD para. 3.1(11) deals with claims about property within the jurisdiction where leave can be granted where the whole subject matter of a claim relates to property located within the jurisdiction. This includes personal property and has been applied to intellectual property where a claim for breach of confidence was made in respect of information in digital form on a server within the jurisdiction.[1490] 6PBD para. 3.1(19) deals with Admiralty claims. Both in respect of exercise of the discretion regarding leave and generally in respect of proceedings

1482. See e.g. *Sharab* v. *Al Saud* [2009] EWCA (Civ) 353, [2009] 2 Lloyd's Rep 160.

1483. See e.g. *Novus Aviation Ltd* v. *Onur Air Tasimacilik AS* [2009] EWCA Civ 122, [2009] 1 Lloyd's Rep 576. Contrast *Galaxy Special Maritime Enterprise* v. *Prima Ceylon Ltd (The Olympic Galaxy)* [2006] EWCA Civ 528, [2006] 2 Lloyd's Rep 27.

1484. See e.g. *Trafigura PTE Ltd* v. *Emirates General Petroleum Ltd* [2009] EWHC 1613 (Comm), WL 1894655.

1485. 6BPD para. 3.1(7), e.g. *Sharab* v. *Al Saud* [2009] EWCA Civ 353, [2009] 2 Lloyd's Rep 160. The original version of the CPR in 1998 reproduced the former RSC Order 11, r. 1. Under para. (e) leave could be sought if the claim was brought in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction, and irrespective of the fact, if such was the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction. The expanded wording of this rule was designed to reverse the result in *Johnson* v. *Taylor Bros and Co Ltd* [1920] AC 144 where a substantial breach occurring out of the jurisdiction (failure to ship goods under a CIF contract) led to an incidental breach within the jurisdiction (failure to tender shipping documents) with the result that the court declined jurisdiction (see *Cheshire, North and Fawcett*, p. 383). It is unclear if the simplification of the wording in the current rule is designed to effect a further change.

1486. 6BPD para. 3.1(8).

1487. Formerly: "the claim is founded on a tort". See also, in respect of claims based on fraudulent misrepresentation and conspiracy to defraud in the context of RSC. Order 11, r. 1(1)(f), *ABCI* v. *Banque Franco-Tunisienne* [2003] EWCA Civ 205, [2003] 2 Lloyd's Rep 146. It was noted in *Newsat Holdings Ltd* v. *Zani* [2006] EWHC 342 (Comm), [2006] 1 Lloyd's Rep 707 at [31] that in 1987 the rules as to claims in tort were changed to reflect the Brussels Convention and ECJ decisions. See Art. 5(3) of the Convention and Regulation below, 2.355.

1488. Including financial detriment sustained in England, *Booth* v. *Phillips* [2004] EWHC 1437 (Comm) [2004] 2 Lloyd's Rep 457 (under CPR 6.20(8)). Compare, however, *Newsat Holdings Ltd* v. *Zani* [2006] EWHC 342 (Comm), [2006] 1 Lloyd's Rep 707. Note also CPR Part 2.3 which defines jurisdiction as: "unless the context requires otherwise, England and Wales and any part of the territorial waters of the United Kingdom adjoining England and Wales". This was not displaced by the law of the flag where the tort was committed on board a foreign vessel whcilst in the territorial waters: *Saldanha* v. *Fulton Navigation Inc (The Omega King)* [2011] EWHC 1118 (Admlty), [2011] 2 Lloyd's Rep 206.

1489. For an example of damage caused by hacking into a computer system see *Ashton Investments Ltd* v. *Rusal* [2006] EWHC 2545 (Comm), [2007] 1 Lloyd's Rep 311. As with Art. 5(3) of the Brussels Convention and Regulation, where the claim is for misrepresentation, the place of the relevant act is the place where the misrepresentation is made rather than where it was received, *Newsat Holdings Ltd* v. *Zani* [2006] EWHC 342 (Comm), [2006] 1 Lloyd's Rep 707.

1490. *Ashton Investments Ltd* v. *Rusal* [2006] EWHC 2545 (Comm), [2007] 1 Lloyd's Rep 311.

questioning or seeking to support the exercise of English jurisdiction there is no restraint on application of principles of *forum conveniens*,[1491] as might operate where the Brussels regimes apply.

2.352 Given the importance of the European context to forwarders and customers operating within the UK slightly more attention can be given to the rules governing defendants domiciled in the UK and other States subject to the Brussels 1 Regulation or Convention. These regimes apply in civil and commercial matters whatever the nature of the court or tribunal but not to revenues, customs and administrative matters,[1492] thus excluding public law matters.[1493] Of some importance also is the exclusion of arbitration.[1494] Thus matters concerning the appointment of arbitrators, the place or arbitration or time limit fall outside these regimes although provisional measures such as a freezing order, in support of arbitration proceedings, fall within Article 31 of the Regulation (Article 24 of the Convention). The approach of the English courts to regard proceedings concerned directly with the enforcement of an arbitration clause, for example. by means of an anti-suit injunction as excluded,[1495] has been rejected by the ECJ.[1496]

2.353 The general rule under Article 2 of the Regulation or Convention is that persons domiciled[1497] in a Member (Contracting) State shall, whatever their nationality, be sued in the courts of that State. Generally the claimant's domicile is not relevant.[1498] Derogation from the general rule is permitted in certain cases.[1499] The position in respect of jurisdiction clauses has already been noted above. Provision is also made

1491. See generally, *Cheshire, North and Fawcett*, chs 12 and 13. In *Sharab* v. *Al Saud* [2009] EWCA Civ 353, [2009] 2 Lloyd's Rep 160 it was pointed out that the solution of disputes about the relative merits of trial in England and trial abroad was pre-eminently a matter for the trial judge.

1492. Art. 1(1) of the Regulation, Art. 1 of the Convention.

1493. See *Cheshire, North and Fawcett*, pp. 215–222. See also *Grovit* v. *De Nederlandsche Bank NV* [2007] EWCA Civ 953, [2008] 1 WLR 51, where a claim against a bank exercising sovereign authority in supervising money transaction offices was held to be an action against a public law body and therefore not a civil or commercial matter.

1494. Article 1(2)(d) of the Regulation, Art. 1(4) of the Convention. Also excluded are: the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; Social Security.

1495. See *Through Transport Mutual Assurance Association (Eurasia) Ltd* v. *New India Assurance Co Ltd*, above fn. 1380, *West Tankers Inc* v. *RAS Riunione Adriatica di Sicurta SpA (The Front Comor)* [2007] UKHL 4, [2007] 1 Lloyd's Rep 391.

1496. *West Tankers Inc* v. *Allianz SpA* (Case C-185/07) [2009] 1 AC 1138.

1497. See Arts 59–60 of the Regulation, Arts 52–53 of the Convention, paras 9 and 10 of Sch. 1 of the Civil Jurisdiction and Judgments Order 2001/3929 (Regulation), ss. 41–46 CJJA 1982 (Convention) as amended by the Civil Jurisdiction and Judgments Regulation 2009/3131, Regulations 18 and 20 (Lugano Convention 2007) and generally, Briggs and Rees, paras 2.134 *et seq*.

1498. *Société Group Josi Reinsurance Co SA* v. *Universal General Insurance Co*, (ECJ Case C–412/98), [2000] All ER (EC) 653.

1499. See generally, Briggs and Rees, para. 2.144 *et seq*. As derogations from the basic rule they are to be interpreted strictly, *Kalfelis* v. *Bankhaus Schröder, Münchmeyer, Hengst & Co,* (ECJ Case C-189/87) [1988] ECR 5565. The requirement of a restrictive or strict interpretation was acknowledged in the context of Art. 5(1) of the Lugano Convention by Lord Woolf in *Agnew* v. *Lansförsäkringsbølagens AB* [2000] 1 All ER (Comm) 321 at p. 330, but he continued: "But the adoption of that approach does not require the ordinary meaning of the language to be artificially confined so as to give the language used an unnatural meaning". Note that a defendant might be able to resist jurisdiction in a place other than its domicile where it is able to convince the non-domicile court that there is no real issue to be tried on the basis of the claims made, see *Andrew Weir Shipping Ltd* v. *Wartsila UK Ltd* [2004] EWHC 1284 (Comm), [2004] 2 Lloyd's Rep 377.

for submission to jurisdiction,[1500] claims in contract and tort and multiple defendants and third party proceedings.[1501]

2.354 Under Article 5 a party domiciled in a Member (Contracting) State may be sued in the courts of another Member (Contracting) State where the connecting factors in either Article 5(1) or Article 5(3) are satisfied.[1502] In matters relating to a contract, Article 5(1)(a) of the Regulation (Article 5(1) of the Convention) provides that such a person can be sued in the courts for the place of performance of the obligation in question.[1503] Article 5(1)(b) of the Regulation, however, goes further than the Convention by adding provisions which will be of relevance to carriage and forwarding contracts, as indeed most contracts. Since these provisions in the Regulation need to be considered in the light of the previous position under the Convention they will be discussed further in paragraph 2.360 below after a more detailed consideration of the former Convention rule.

1500. Article 24 of the Regulation, Art. 18 of the Convention. See *Maple Leaf Macro Volatility Master Fund* v. *Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep 475.

1501. On this last aspect Art. 6(1) of the Convention provided that a person domiciled in a Contracting State could also be sued where he is one of a number of defendants, in the courts for the place where any one of them is domiciled; Art. 6(2) as a third party in an action on a warranty or guarantee or in any other third party proceedings in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case. Further provision in Art. 6 was made in respect of counterclaims and claims combined with actions concerned with rights in rem in immovable property. Article 6 of the Regulation is in similar terms except that in Art. 6(1) the further requirement has been added that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. This expressly reproduces the decision on Art. 6(1) of the Convention in *Kalfelis* (see fn. 1499, and see Dicey, Morris and Collins, 11–328). It will not quell the criticism made of the limitations in Art. 6(1), see e.g. Briggs, "Claims against sea carriers and the Brussels Convention" [1999] LMCLQ 333 at pp. 335–336 in the context of *Réunion Européenne* v. *Spliethoff's Bevrachtingskantoor* (ECJ Third Chamber (Case C-51/97) [1999] IL Pr 205, [1999] 34 ETL 187). The court held that Art. 6.1 of the Convention must be interpreted as meaning that a defendant domiciled in a Contracting State cannot be sued in another Contracting State before a court seized of the action against a co-defendant not domiciled in a Contracting State on the ground that the dispute is "indivisible" rather than merely displaying a connection. Consequently a Dutch defendant could not be sued in a French court which had taken jurisdiction over an Australian co-defendant. A further difficulty is the statement made in para. 50 of the decision that claims for compensation directed against different defendants but based in the one case in contract and the other in tort are insufficiently connected for this purpose. In *Watson* v. *First Choice Holidays and Flights* [2001] EWCA Civ 972, [2001] 2 Lloyd's Rep 339 where there was a substantial connection in both fact and law in respect of a contractual claim against a tour operator based on the negligence of the resort complex separately sued in tort, the Court of Appeal felt unable to understand this distinction in the context of Art. 6(1) (as opposed to Art. 5, see below) and referred the matter to the ECJ. The reference was, however, withdrawn when the case was settled (Dicey, Morris and Collins, 11.329). See further, however, *Bank of Tokyo-Mitsubishi Ltd* v. *Baskan Gida Sanayi Ve Pazarlama AS* [2004] EWHC 945 (Ch), [2004] 2 Lloyd's Rep 394, 423 reinforcing the idea that independent claims in contract and tort, even with common background and facts, can involve suit in different jurisdictions and that they were not related for the purposes of Art. 28. The claims in tort against various parties were, however, sufficiently related for the purposes of Art. 6(1). See also *Andrew Weir Shipping Ltd* v. *Wartsila UK Ltd* [2004] EWHC 1284 (Comm), [2004] 2 Lloyd's Rep 377. *Cf* in respect of actions brought separately against different defendants related by their connection to the same cause of action, *Masri* v. *Consolidated Contractors Group SAL (Holding Company)* [2005] EWCA Civ 1436, [2006] 1 Lloyd's Rep 391.

1502. The wording suggests that if the relevant connecting factor points to a non-contracting or Member State then Art. 5 has no application, *cf* Takahashi, [2002] ELR 530, 540.

1503. Which may be an implied obligation, *Raiffeisen Zentralbank Österreich AG* v. *National Bank of Greece SA* [1999] 1 Lloyd's Rep 408.

2.355 At this point the further derogation in matters relating to tort, delict or quasi-delict can be noted. Article 5(3) of the Regulation and Convention provides that, in respect of these matters, a person may sue in the courts for the place where the harmful event occurred *or may occur.*[1504] These derogations are made available "because of the existence, in certain clearly defined situations, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it".[1505] The concepts contained in these derogations are to be determined by *autonomous* interpretation and not by reference to national law.[1506] However, under the Convention, references to national law, determined through conflicts rules of the court seized, to establish the place of performance for the obligation in question in contract were considered necessary by the Court of Justice in the absence of a Convention definition.[1507] It seems that the introduction of the specific indicators introduced in Article 5(1)(b) of the Regulation, considered below at 2.360, are intended as a response to criticism of the Court's approach.[1508]

2.356 The precise relationship between the contract and tort rules is a matter of some difficulty. The view taken so far in England based upon *Kalfelis,*[1509] in respect of the Convention is that Articles 5(1) and 5(3) are mutually exclusive so that a claim must be classified under one head or the other.[1510] Consequently in *Source Ltd* v. *T.U.V. Rheinland Holding AG*[1511] the Court of Appeal held that a claim, which in English law might be brought either under a contract or independently of a contract on the same facts, save that the contract does not need to be established, is a "matter relating to a contract" within Article 5(1) and cannot be brought within Article 5(3).[1512]

2.357 It has been said that whether a matter relates to a contract will not usually give rise to difficulty.[1513] Nevertheless it has not proved easy to give a clear definition of this concept. It does not depend upon any national view as to the existence of a cause

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1504. My emphasis, these words being added by the Regulation.

1505. *De Bloos* v. *Bouyer* (Case 14/76) [1976] ECR 1497, 1508, para. 1. See also Recital 12 of the Regulation.

1506. *Cheshire, North and Fawcett*, pp. 207 & 247, and see *Kalfelis* v. *Schroder*, above fn .

1507. *Cheshire, North and Fawcett*, p. 237, Dicey, Morris and Collins, 11–293. See *GIE Groupe Concorde* v. *The Master of the Vessel "Suhadiwarno Panjan"* (Case C-440/97 [1999] ECR I-6307) reaffirming the position taken in *Industrie Tessili Italiana Como* v. *Dunlop AG* (Case 12/76) [1976] ECR 1473. See also *Commercial Marine & Piling Ltd* v. *Pierse Contracting Ltd* [2009] EWHC 2241 (TCC), [2009] 2 Lloyd's Rep 659 (in the context of a guarantee the court applied the Rome Convention to determine the relevant law and then, having determined English law to be applicable used it to determine the place of the performance of the obligation in question).

1508. *Cheshire, North and Fawcett*, p. 237.

1509. See above fn. 1499.

1510. E.g. see Lord Woolf in *Agnew* v. *Lansförsäkringsbølagens AB* [2000] 1 All ER (Comm) 321 at 334. There is an argument that the relevant passage in *Kalfelis* (para. 19) which forms the basis of this view, simply meant that a court with jurisdiction over a claim in tort does not thereby have jurisdiction over a contractual claim, *Cheshire, North and Fawcett*, p. 251, citing Peel, [1998] LMCLQ 22, 26, and Briggs and Rees (4th edn, 2005), para 2.138.

1511. [1997] 3 WLR 365, [1998] QB 54. The claim was for breach of contract and for breach of a duty of care by the defendants in respect of reports about the quality of goods based on inspection of them which the plaintiffs relied on before authorising payment to the suppliers of the goods.

1512. See also *Mazur Media Ltd* v. *Mazur Media GmbH* [2004] EWHC 1566 (Ch), [2005] 1 Lloyd's Rep 41 at [30].

1513. Dicey, Morris and Collins, 11–284.

of action. Thus in *Soc. Handte et Cie GmbH* v. *TMCS*[1514] the fact that under French law a buyer could pursue a contractual claim against a manufacturer based upon transmission of the right by the intermediate buyer did not bring a case within Article 5(1) of the Convention since this only applies where there is an agreement freely entered into between the parties.[1515] This reasoning formed the basis also for the decision in *Réunion* that a claim against a performing sea carrier by the consignee under a bill of lading issued by a different company was not within Article 5(1) again because the sea carrier had not freely assumed a contractual obligation to the plaintiff.[1516] The issue in that case was regarded as one of tort under Article 5(3) and not contract under Article 5(1).

In *Agnew* v. *Lansförsäkringsbølagens AB*,[1517] Lord Woolf MR thought that although there are two parts to Article 5(1) the language of the whole can assist in the interpretation of the two parts. If no obligation could be identified or if there was no place of performance that would be a strong indicator that no part of Article 5(1) has any application although what is in issue is literally a matter relating to a contract. In this case a majority of the House of Lords held that Article 5(1) of the Lugano Convention could be applied to a claim to avoid a reinsurance contract for non disclosure. For Lord Woolf a central factor seems to have been that in the case of non-disclosure there is a place which can be identified where the disclosure should have taken place.[1518] The decision contrasts with an earlier decision of the

1514. (Case C-51/97) [1992] ECR I-3967. *Cf Atlas Shipping Agency (UK) Ltd* v. *Suisse Atlantique Société d'Armement Maritime SA (The Gulf Grain and El Amaan)* [1995] 2 Lloyd's Rep 188, where enforcement of a broker's commission by way of a trust was held to involve the enforcement of a contractual obligation and so to be within Art. 5(1) of the Lugano Convention. It seems therefore that the enforcement by a third party of a promise made in his favour by the contracting parties is contractual. The rights granted by the Contracts (Rights of Third Parties) Act 1999 can be so regarded. Further, it can be argued that *Handte* does not prevent the right of an assignee to enforce the rights assigned as contractual, see Briggs and Rees, para. 2.150. The case for the same position where the contract is transferred by the effect of legislation such as the Carriage of Goods by Sea Act 1992 seems equally strong.

1515. From this it is arguable that claims based on a direct assumption of responsibility as in *Henderson* v. *Merrett Syndicates Ltd* [1995] 2 AC 145 and *Hedley Byrne & Co* v. *Heller and Partners* [1964] AC 465 can be regarded as contractual notwithstanding any lack of consideration provided that there is privity, see Briggs and Rees, para. 2.153.

1516. It has been argued that in this type of case the correct approach is to have regard to the legal basis in which the claimant has chosen to base the claim, Takahashi [2001] LMCLQ 107, 110.

1517. [2000] 1 All ER (Comm) 321 at p. 330.

1518. At p. 331. This compares with an obligation not to be guilty of duress or undue influence or to induce a contract by mistake. *Cf Besix*, fn. 1529 below. Mance J at first instance saw the duty in a positive sense as one to make a fair presentation of the risk (see [1996] 4 All ER 978, 981, cited at p. 336 by Lord Cooke). For the majority the fact that the duty arose by operation of the general law did not prevent the obligation from being a contractual one for the purpose of Art. 5(1) (see Lord Woolf, p. 330; Lord Cooke, p. 336). This rejects the approach taken by Rix J in the earlier decision of *Trade Indemnity plc* v. *Försäkringsaktiebolaget Njord (in liq.)* [1995] 1 All ER 796, who had come to the opposite conclusion, in part based on the view that the obligation arose in equity rather than contract and because it gave no right to contractual performance or damages in lieu and so was more likely to point to the place of contracting (and possible forum of the plaintiff) than the place of performance (see the criticism of this in Gaskell *et al*., para. 20.88). The view of Lord Woolf extended to any contract entered into in circumstances where one or other party is under an obligation of good faith (p. 331). This contrasts with the decision of the European Court in *Fonderie Officine Meccaniche SpA* v. *HWS GmbH* (Case C-334/00, 17 September 2002, Dicey, Morris and Collins, 11–287) that an action in Italy based on breach of the obligation to act in good faith in negotiations was a matter relating to tort etc., and not contract. Article 5(1) depends on an obligation freely assumed and an obligation to make good damage caused by breaking off negotiations

House in respect of the Modified Convention in *Kleinwort Benson Ltd* v. *Glasgow City Council*[1519] in which, by a majority the court held that a claim for restitution,[1520] based on unjust enrichment, of money paid under a contract accepted to be void *ab initio* did not fall within Article 5(1).[1521] However, the mere fact that a defence is put forward which goes to the existence of the contract does not, at least initially, prevent a case falling within Article 5(1),[1522] provided that there is a good arguable case that a contract exists.[1523] Furthermore, it is not necessary for the contract to be fully concluded provided that its main elements have been agreed.[1524]

2.358 More specifically in respect of the obligation in question the essential search under the Convention is for the contractual obligation forming the basis of the proceedings,[1525] i.e. the principal ground for the complaint rather than, except in cases concerning employment, the obligation which may be said to be characteristic of the contract. Where a contractual performance can be analysed as involving different obligations the court must seek the principal obligation forming the basis of the claim.[1526] This will be easier to find where there is a sequential link between

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could derive only from breach of rules of law, in particular the requirement to act in good faith in negotiations surrounding the formation of the contract. The distinction perhaps lies in the difference between a claim which depends upon a finding that an obligation forms an express or implied term of a contract (whatever the source of the implication) and one which does not.

1519. [1999] 1 AC 153.

1520. In *Trade Indemnity plc* v. *Försäkringsaktiebolaget Njord (in liq.)* [1995] 1 All ER 796, Rix J considered that a claim for restitution arising out of the avoidance of a contract as being a claim in matters relating to a contract but the whole claim fell in the light of his conclusion that there was no relevant obligation in question.

1521. For Lord Clyde (at p. 181) there must be an obligation to be performed and the obligation must be in dispute, *cf* Lord Hutton (p. 189) who made reference to seeking to enforce the performance of an obligation. The reconciliation that may be said to lie at the basis of Lord Woolf's view is that in *Agnew* the dispute could still be seen as being about the performance of a contractual obligation (and involved assertion of a remedy linked to it) albeit that it was a performance that arose by reason of the general law. In *Kleinwort* one of the dissenting judges (Lord Nicholls at p. 172) noted that the view of the majority meant that a claim for damages for non-performance, to which the existence of the contract is raised as a defence comes within Art. 5(1) but not a claim for restitutionary relief where such a defence is successful, see also *Cheshire, North and Fawcett*, p. 231 n. 232.

1522. *Cheshire, North and Fawcett*, p. 234, citing *Effer* v. *Kantner* (Case 38/81) [1982] ECR 825. *Cf* Dicey, Morris and Collins, 11–288. *Cf* further Briggs and Rees, para. 2.152; for quasi-contractual or restitutionary claims see the views expressed at para. 2 154.

1523. In *Boss Group Ltd* v. *Boss France SA* [1996] IL Pr 544, a plaintiff seeking a negative declaration in order to deny the existence of a contract had a "good arguable case" that there was a matter relating to a contract by relying on the fact that this was what the defendants were contending against them. See also *Youell* v. *La Reunion Aerienne* [2009] EWCA Civ 175, [2009] 1 Lloyd's Rep 586.

1524. *Fonderie Officine Meccaniche Tacconi SpA* v. *Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)* (Case C-334/00) [2002] ECR I-7357, see *Cheshire, North and Fawcett*, p. 230.

1525. *De Bloos Sprl* v. *Bouyer SA* (Case 14/76) [1976] ECR 1497.

1526. See *Union Transport plc* v. *Continental Lines SA and Conti Lines SA* [1992] 1 WLR 15 (HL). See also *Medway Packaging* v. *Meurer Maschinen GmbH & Co KG* [1990] 2 Lloyd's Rep 112. In *AIG Group (UK) Ltd* v. *The Ethniki* [2000] IL Pr 426 the principal obligation was breach of the claims control clause in a reinsurance contract. This was a condition precedent to the reinsurer's liability and as such was the basis for the primary relief claimed i.e. non-liability, notwithstanding the existence of a further claim in respect of failure to investigate the claim and for which damages were claimed. At first instance ([1998] 4 All ER 301, 303) it was suggested that on seeking a negative declaration that there was no liability to perform the contract because of breach of the other party of a term the claimant could refer to the place of performance of the other party's performance of that term rather than the place relevant to their own performance. *Cf Boss Group Ltd* v. *Boss France SA* [1997] 1 WLR 351.

the obligations so that where the non-performance of one obligation may be said to follow from the failure to perform another, the latter can be regarded as the principal obligation and the matter must be directed to courts at the place for performance of that obligation.[1527] However, it may not always be possible to find a single obligation and in *Leathertex Divisione Sintetici SpA* v. *Bodetex BVBA*[1528] the ECJ decided, in respect of the Convention, that where two obligations were to be performed in different States and were of equal rank, each must be pursued in its respective place of performance (unless, of course, the claimant chooses to sue in the defendants domicile). In *Besix SA* v. *Wasserreinigunsbau Alfred Kretzschmar GmbH & Co KG*,[1529] the ECJ held that since an undertaking not to do something which consists in an undertaking to act exclusively with a contracting partner is applicable without any geographical limit and must therefore be honoured throughout the world and, in particular, in each of the Contracting States, it could not be brought within Article 5(1).[1530] Such an undertaking to refrain from doing something in any place whatsoever is not linked to any particular court which would be particularly suited to hear and determine the dispute relating to that obligation.

2.359 Whilst therefore the ideal, under Article 5(1) of the Convention is to find a single jurisdiction which most appropriately can deal with claims made in respect of a contract, application of the rule can produce some fragmentation of jurisdiction. This is also true of Article 5(1)(a) of the Regulation in those cases where it continues to apply apart from the circumstances falling within Article 5(1)(b).[1531] An instructive case especially in the context of forwarding and shipping operations is the decision of Rix J in *The Sea Maas*[1532] in respect of the application of the rule in the context of the Hague Rules. In his view[1533] it is an error to characterise a damage to cargo claim under a bill of lading incorporating the Hague or the Hague-Visby Rules as one based on an obligation to discharge goods in the same order and condition as when loaded. The fundamental obligation under such a contract of carriage is to exercise due diligence. Everything depends on the nature of the bill of lading holder's claim. If it is for misdelivery, then the place of performance of the obligation in question might well be the port of discharge. If the vessel was

1527. As in *Union Transport*, above fn. 1526. In cases where Art. 5(1)(b) does not apply the traditional approach taken in *Tessili* (above) continues to apply so that the place of performance of the obligation in question has to be determined in accordance with the law governing the obligation in accordance with the conflict rules of the State where the case is being heard, *Gie Groupe Concorde* v. *Master of the Vessel "Suhadiwarno Panjan"* (Case C-440/97) [1999] Euro CL 10, [2000] All ER (EC) 865. However, in *Mainschiffahrts-Genossenschaft eG (MSG)* v. *Les Gravières Rhénanes Sarl* [1997] 3 WLR 179 (Case C–106/95), it was held that the parties to a contract are not entitled to state a place for performance solely in order to confer jurisdiction on the courts of that place. Such a statement is really an attempted jurisdiction clause and as such is subject to the requirements of Art. 23 of the Regulation or Art. 17 of the Convention, see *Cheshire, North and Fawcett*, p. 244.

1528. (Case C-420/97) [1999] ECR I-6747.

1529. [2003] IL Pr 8.

1530. An obligation to pay which could be performed in more than one country similarly cannot be brought within Art. 5.1 (a) of the Regulation, *Mora Shipping Inc* v. *Axa Corporate Solutions Assurance SA* [2005] EWCA Civ 1069, [2005] 2 Lloyd's Rep 769.

1531. See below, 2.360.

1532. [1999] 2 Lloyd's Rep 281.

1533. See p. 284.

seaworthy but the alleged failure of due diligence was some lack of care during the voyage, then the place of performance of the obligation in question might well have occurred on the high seas, in which case there would be no special jurisdiction within Article 5(1). If, however, the fundamental matter of complaint was that the shipowner never provided a seaworthy vessel then the place of performance of the obligation in question would be at the port of loading.[1534] A similar decision was made in *Royal & Sun Alliance Insurance plc* v. *MK Digital FZE (Cyprus) Ltd.*[1535] An attempt to establish jurisdiction in England for a declaration of non-liability arising out of theft of goods in France in the course of a carriage of goods by road from France to England failed. The obligation in question, which in the context of a claim for non-liability is the obligation being used as the basis for the assertion of liability, was not the failure ultimately to deliver the goods but for the loss during the carriage. This took place in France in breach of the claimant's obligation to ensure transportation over French territory to the country of destination.

The formulation in *The Sea Maas* will require reconsideration under the Regulation. Article 5(1)(a) of the Regulation is in the same terms as the Convention. However, Article 5(1)(b) provides that, unless otherwise agreed,[1536] the place of performance of the obligation in question, in the case of provision of services,[1537] shall be the place in a Member State where, under the contract, the services were provided or should have been provided.[1538] This autonomous rule should reduce *2.360*

1534. *Cf*, however, in respect of Art. 5(3) the *Réunion* case below.

1535. [2006] EWCA Civ 629, [2006] 2 Lloyd's Rep 110.

1536. Strictly speaking, such agreement simply excludes the application of (b) but without disturbing the general rule, Forner, ICCLR 2002, 13(3), 131–137 at p. 136. See further Kennett, (2000) 49 ICLQ 502–507 and (2001) 50 ICLQ 725–737. Takahashi ([2002] ELR 530 at p. 537) notes that the Commission's Explanatory Memorandum appears to suggest that the expression "unless otherwise agreed" should be interpreted as meaning "unless the place of performance of the obligation forming the basis of the claim is agreed". On this interpretation, in the case of a claim for the price for goods or services, the courts for the place of payment would have jurisdiction if there is an agreement on the place of payment. He argues, however, that it is unlikely that this effect is intended by the parties who make such an agreement and, therefore, this interpretation has little to commend it. The words should instead be interpreted as meaning "unless the parties have agreed that subparagraph (b) will not apply to their contract". Since such agreement will not in practice be made unless the parties are sufficiently attuned to the intricacies of Art. 5(1), the merit of subparagraph (b) will not be thwarted unless the parties are clearly conscious of it. Briggs and Rees, at para. 2.123, regard the words as unintelligible.

1537. In the case of a sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered. The special provisions in s. 3 of the Regulation rather than Art. 5(1)(b) will apply to insurance services.

1538. According to the Commission Report (fn. 1539) where the effect of the autonomous definition is to designate a court in a non-Member country, subparagraph (a) will apply rather than subparagraph (b). Takahashi ([2002] ELR 530 at p. 540) argues that, to avoid the result that it might thereby be possible to bring a claim for payment in the place of payment, if the service is to be provided in a non-Member State, Art. 5(1) simply does not apply at all. For Forner, (see fn. 1394 at p. 136) were it to become necessary to ascertain the place of performance where this is not indicated "under the contract", subparagraph (b) would not be applicable and subparagraph (c) then remands to subparagraph (a). This reflects a view that "under the contract" refers to the place of performance stated in the contract itself and not in the applicable law. This contrasts with the view of Takahashi, above, at pp. 536–537 that, whilst acknowledging that the policy of the change is to adopt an autonomous rule without the need to refer to choice of law rules, the determination of the place of performance depends upon the terms of the contract and the circumstances of the case. Some consideration of choice of law rules would be necessary if a contractual indication of the place of performance were claimed to be invalid. Arguably, if no particular place for the provision of a service can be identified then neither can an obligation in question so that jurisdiction is determined by Art. 2 rather than Art. 5(1)(a).

the potential for fragmentation of jurisdiction. The Commission Report accompanying the draft Regulation[1539] notes that the pragmatic determination of the place of enforcement in the new rule applies regardless of the obligation in question, even where this obligation is the payment of the financial consideration for the contract. It also applies where the claim relates to several obligations. Under Article 5(1)(b) the focus is on services rather than obligations which might point to different connecting points than that suggested in *The Sea Maas*. Arguably a provision of services suggests a delivery of them in the same sense as a delivery of goods as in the other part of Article 5(1)(b) dealing with sales of goods, so that a carriage of goods might be regarded as the service of delivering them at a certain place. Alternatively it might be regarded as the collection of services involved in loading, carrying and delivering which may be thought to occur in different places or in one place if the rule is interpreted as requiring a search for a principal service.[1540] It might not now be possible to take the approach in *The Sea Maas* regarding the obligation to exercise due diligence to make a ship seaworthy since this can arguably be regarded as an obligation preliminary to the performance of the service itself.

2.361 Some guidance might be extracted from the decision of the ECJ in *Wood Floor Solutions Andreas Domberger GmbH* v. *Silva Trade SA*[1541] although this was concerned with services provided at locations in different Member States rather than, as in the *Sea Maas*, a series of services designed to produce a single final result. In the context of a distribution agency contract performed in several Member States the court held that the court having jurisdiction to hear and determine all the claims based on the contract is the court within whose jurisdiction the place of the main provision of services is situated. For a commercial agency contract, that place is the place of the main provision of services by the agent, as it appears from the provisions of the contract or, in the absence of such provisions, the actual performance of that contract or, where it cannot be determined on that basis, the place where the agent is domiciled. This case might well have particular relevance to freight forwarding and related contracts which clearly involve the provision of services and therefore will tend to fall naturally within Article 5(1)(b) and which might well involve the provision of services across several Member States. Article 5(1)(b), however, might not be applicable where the service is to be provided in a non-Member State. Furthermore not all provisions in such contract are necessarily directed to the provision of a service.[1542] These should not alter the overall characterisation of the contract but could raise the question of whether Article 5(1)(b) can be displaced in respect of these types of obligation. Article 5(1)(b) applies "unless otherwise agreed". An express agreement will achieve this. More difficult is perhaps the suggestion that it can be implied.[1543]

1539. COM(1999)348.

1540. *Cf* the alternatives suggested by Takahashi [2002] ELR 530 at pp. 538–539.

1541. (Case C-19/09) [2010] 2 Lloyd's Rep 114.

1542. Quite apart from provisions as to payment there may well be clauses dealing with the transfer or sharing of staff or equipment or the safeguarding or transfer of rights of intellectual property particularly in the context of logistics outsourcing.

1543. *Cheshire, North and Fawcett*, p. 243.

2.362 As noted above, in matters relating to tort, delict or quasi-delict, Article 5(3) of the Regulation and Convention provides that a person may sue in the courts for the place where the harmful event occurred. In *Kalfelis*[1544] it was made clear that the rule must be given an autonomous meaning but some of the passages in the judgment by the ECJ in that case have led to some confusion. On the one hand a wide interpretation was suggested by its statement that all actions which seek to establish the liability of a defendant and which are not related to a contract fall within this rule.[1545] On the other hand a further statement[1546] made by the court could be taken as support for a narrower view so as to exclude claims based on unjust enrichment. In *Kleinwort Benson* v. *Glasgow City Council*,[1547] the House of Lords took the narrower view in the context of the Modified Convention and held that a bank's claim for restitution of monies paid under an *ultra vires* contract did not fall within Article 5(3). In particular, the court noted that a claim based on unjust enrichment does not presuppose a harmful event.[1548] A wider view seems to have informed the view of the ECJ in *Réunion Européenne* v. *Spliethoffs Bevrachtingskantoor BV*[1549] holding that since the actual carrier's liability did not fall within Article 5(1) it thereby fell within Article 5(3).[1550] At least the damage in that case, the damage by over-ripening of pears carried in containers during a voyage due to a breakdown in the cooling system, could be said to constitute a claim based on harm to the goods.[1551] More recently in *Alfred Dunhill Ltd* v. *Diffusion Internationale de Maroquinerie de Prestige Sarl*[1552] on finding that a claim for damages based on misrepresentation by a third party which induced the making of a contract was not a matter related to contract held that it fell squarely within Article 5(3). Certainly the harm envisaged by Article 5(3) is not confined to physical harm but includes recoverable economic loss such as that produced by reliance on a misrepresentation. In such cases the focus shifts rather to the difficulty of determining the place where action in respect of such loss can be brought.

2.363 Article 5(3) is unclear as to whether the place where the harmful event occurred refers to the place where the event producing the damage occurred or where the

1544. See fn. 1499.

1545. In *Hewden Tower Cranes Ltd* v. *Wolffkran GmbH* [2007] EWHC 857 (TCC), [2007] 2 Lloyd's Rep 138, a claim for contribution for a liability caused by the tortious acts of the defendant was held to fall within Art. 5(3).

1546. That a court having jurisdiction in tort does not also have jurisdiction over related claims. Since the context of the case was that one of those alternative claims was a claim for unjust enrichment this implies that such a claim does not otherwise fall within Art. 5(3), see Peel [1998] LMCLQ 22. For a full explanation of this area of difficulty, see *Cheshire, North and Fawcett*, pp. 247–249. *Cf* Briggs and Rees, para. 2.189.

1547. Above, fn. 1519.

1548. *Cheshire, North and Fawcett* at pp. 249 and 250 regard the court as separating the issues of meaning of delict etc and harmful event but arguably the meaning of harmful event informed the view the court took of the meaning of tort, delict etc.

1549. [1999] IL Pr 205, [1999] 34 ETL 187 (ECJ Third Chamber).

1550. See also *Fonderie Officine Meccaniche Tacconi SpA* v. *Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)* (Case C-334/00) [2002] ECR I-7357.

1551. See also cases on breach of fiduciary duty cited in *Cheshire, North and Fawcett* p. 250 n. 407: *Casio Computer Co Ltd* v. *Sayo* [2001] Il Pr 164; *Dexter Ltd (In Administrative Receivership)* v. *Harley* (2001) *The Times*, 2 April; *Benatti* v. *WPP Holdings Italy srl* [2007] EWCA Cive 263, [2007] 1 WLR 2175.

1552. [2002] 1 All ER (Comm) 950.

damage occurred.[1553] In *Bier* v. *Mines de Potasse d'Alsace*[1554] the ECJ confirmed the requirement of an autonomous interpretation of the rule and held that this interpretation required that the plaintiff has an option to sue in the place where the damage occurred or the place of the event giving rise to it,[1555] thus producing two limbs to the rule. It must be kept in mind that a place where adverse economic consequences of a harmful event are suffered is not necessarily within the rule. The search under the first limb is rather for the place where the event giving rise to the damage directly produced its harmful effects.[1556] In *Minster Investments* v. *Hyundai Precision & Industry Co Ltd*,[1557] a French classification society was sued for providing to the plaintiffs in England inspection certificates which negligently described containers as being fit. Steyn J adopted a test which considered where, in substance, the cause of action in tort has arisen and what place the tort was most closely connected and concluded that the event which caused harm to the plaintiff was the receipt in England of the certificates which were there relied upon. This loses sight somewhat of the two limbs identified in *Bier* and in *Domicrest Ltd* v. *Swiss Bank Corp*[1558] Rix J felt constrained by the European decisions to take a more structured approach.[1559] In this case an English company claimed against a Swiss bank for misrepresenting the effect of a payment order so that goods stored in Switzerland and Italy were released without payment. The plaintiff sought jurisdiction in England on the basis that the misrepresentations were made in the course of a telephone conversation from a bank employee in Switzerland to the plaintiff company in England. Rix J held that the place where the harmful event giving rise to the damage in such a case is the place where the misstatement originates (i.e. Switzerland). He considered that in a case of misstatement it is quite likely that the place at which the damage occurs will be where the misstatement is received and relied upon.[1560] Nevertheless he concluded that the damage occurred in Switzer-

1553. *Cheshire, North and Fawcett*, p. 253 and see The Jenard Report p. 26.

1554. (Case 21/76) [1976] ECR 1735, [1978] QB 708. See Dicey, Morris and Collins, para. S11–352. See also *Marinari* v. *Lloyds Bank plc* [1996] 2 WLR 159.

1555. Note the difficulty where either of these elements cannot be located within a Member State, discussed by Briggs and Rees, para. 2.183.

1556. *Dumez France and Tracoba* v. *Hessische Landesbank* (Case C-364/93) [1990] ECR I-2719, *Kronhofer* v. *Maier* (Case C-168/02) [2005] 1 Lloyd's Rep 284. See, *Mazur Media Ltd* v. *Mazur Media GmbH* [2004] EWHC 1566 (Ch), [2005] 1 Lloyd's Rep 41, in the context of a claim in conversion, at [26] and [49]–[52].

1557. [1988] 2 Lloyd's Rep 621.

1558. [1999] 1 Lloyd's Rep 80, [1998] 3 All ER 577.

1559. See the review of the case by the judge (Rokison QC) in *Alfred Dunhill*, above.

1560. *Cf Sunderland Marine Mutual Insurance Co Ltd* v. *Wiseman (The Seaward Quest)* [2007] EWHC 1460 (Comm), [2007] 2 Lloyd's Rep 308 where Langley J rejected the place from which payment was made in respect of a false insurance claim as falling within "the place where the harmful event occurred". *Cf* further *Bank of Tokyo-Mitsubishi Ltd* v. *Baskan Gida Sanayi Ve Pazarlama AS* [2004] EWHC 945 (Ch), [2004] 2 Lloyd's Rep 394, 425 (see this case also in respect of claims for conspiracy and conversion and knowing receipt/constructive trust, pp. 424–425), *Maple Leaf Macro Volatility Master Fund* v. *Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep 475.

land and Italy[1561] where the goods were released on payment.[1562] Similarly, in *Alfred Dunhill*,[1563] where misrepresentations were alleged to have been received in England it was held that the damage occurred in the place where the goods were to be manufactured which was where the misrepresentations became apparent and had to be dealt with. Consistently with the general approach outlined here the ECJ held in *Réunion Européenne* v. *Spliethoffs Bevrachtingskantoor BV*[1564] that the place where the harmful event occurred,[1565] in respect of goods damaged at sea, was held to be the point at which the carrier was to deliver the goods and not at some further point to which the goods were on-carried.[1566] What constitutes a harmful event and the extent of the harm is to be determined by the national court applying its own substantive law i.e. the Convention is not to be construed as altering the substantive law of Contracting States. Applying this, the House of Lords in *Shevill* v. *Presse Alliance SA*[1567] held that, where English law presumes that the publication of a defamatory statement causes damage without proof of it, then that is sufficient for the application of Article 5(3).[1568]

Apart from the Brussels Convention and Regulation it must be remembered that *2.364* where a forwarder's contract is governed by an international carriage convention which contains jurisdictional rules, these rules may well take precedence. The Brussels Convention Article 57(1) (and section 9(1) of the 1982 Act) provides that the Convention shall not affect conventions to which Contracting States are or will be parties in relation to jurisdiction or the recognition or enforcement of judg-

1561. Application of the first limb can therefore lead to a further fragmentation of jurisdiction. In *Shevill* v. *Press Alliance* (Case C-68/93) [1995] ECR I-415, [1995] 2 AC 18 (see Dicey, Morris and Collins, 11–302) the ECJ held that the victim of libel in a newspaper may sue in the court of the Contracting State of the place where the publisher is established for all the damage (i.e. the place where the event giving rise to the damage occurred, see further Briggs and Rees, para. 2.187), or in the courts of the Contracting States where the publication is distributed for the harm caused in the State of the court seized.

1562. Rix J accepted the decision in *Minster Investments* since the place where the damage occurred appeared in any event to be in England from where the price of the containers was released and where at the time the loss was felt. Rokison QC in *Alfred Dunhill* found the two decisions hard to reconcile since in each case the misstatements had been received in England and the decision taken in England in reliance on them, which was implemented by release of, in the one case, goods and in the other, a payment in another country. One possible difference was that in *Minster Investments* the plaintiffs had completed their actions in reliance by giving instructions to someone else in Korea whereas in *Domicrest* the release of the goods was by employees of the plaintiffs in the respective countries, but he thought this was speculative and too narrow a distinction.

1563. Fn. 1552.

1564. Fn. 1549.

1565. In the sense of it being difficult, in this type of case, to determine the place where the event causing the damage occurred.

1566. See Briggs, "Claims against Sea Carriers and The Brussels Convention" [1999] LMCLQ 333.

1567. [1996] AC 959, in proceedings subsequent to the earlier ruling of the ECJ, see fn. 1561. A further example of the application of Art. 5(3) includes *Dolphin Maritime and Aviation Services Ltd* v. *Sveriges Angfartygs Assurans Forening* [2009] EWHC 716 (Comm), [2009] 2 Lloyd's Rep 123.

1568. See Dicey, Morris and Collins, 11–302.

ments.[1569] Article 71 of the Regulation provides similarly[1570] but makes no reference to conventions to which Member States will be parties so that only those ratified by Member States at the time the Regulation came into force are automatically covered by the Rules. It seems that future recognition of conventions containing these types of rule will depend upon ratification of them by the Community rather than by individual Member States since these matters now fall within exclusive competence of the Community.[1571] Furthermore Article 71 of the Regulation must be read in the light of its context and the objectives of the Regulation so that the rules governing jurisdiction set out in specialised conventions referred to in Article 71 of the Regulation can be applied in the European Union only to the extent that, as is called for by Recitals 11, 12 and 15 in the preamble to the Regulation, they are highly predictable, facilitate the sound administration of justice and enable the risk of concurrent proceedings to be minimised.[1572]

2.365 Of special relevance to freight forwarding will be situations where the CMR Convention or the Warsaw or Montreal Convention applies compulsorily to the contract.[1573] Thus, e.g. Article 31 of the CMR Convention provides that the plaintiff may bring an action in any court or tribunal of a contracting country

1569. Article 57(2)(a) of the Convention makes reference to Art. 20 of the Convention which provides that where a defendant is domiciled in one Contracting State but is sued in another and fails to enter an appearance, the court in the latter country shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from provisions of the Convention. The ECJ in *Nurnberger Allgemeine Vershicherungs AG* v. *Portbridge Transport International BV* (Case C-148/03) [2005] 1 Lloyd's Rep 592 confirmed that jurisdiction derived from a convention within Art. 57(1) was still derived from the Brussels Convention. Article 71 and 26 of the Regulation are in similar terms.

1570. Note also the possibility that the Regulation (and Convention) may also be read subject to fundamental principles of international law. See in respect of sovereign immunity *Grovit* v. *De Nederlandsche Bank NV* [2005] EWHC 2944 (QB), [2006] 1 Lloyd's Rep 636 (not considered on appeal: [2007] EWCA Civ 953, [2008] 1 WLR 51).

1571. See Takahashi, (2003) 52 ICLQ 529. This will be facilitated where a Convention provides for ratification by a regional organisation, see e.g. Art. 53(2) of the Montreal Convention 1999. Otherwise a Council decision authorising ratification may be sought.

1572. See *TNT Express Nederland BV* v. *AXA Versicherung AG* (Case C-533/08) at [53], [2010] IL Pr 35, in the context of the *lis pendens* rules in the CMR Convention in contrast to similar rules in the Regulation. The ECJ confirmed that it had no jurisdiction to interpret the CMR Convention.

1573. In respect of the Warsaw Convention see Art. 28 (Art. 33 of the Montreal Convention). See further *Deaville* v. *Aeroflot Russian International Airlines* [1997] 2 Lloyd's Rep 67. In respect of the Arrest Convention 1952 see Art. 7. In *The Tatry,* Case C-406/92 [1994] ECR I-5439, the ECJ considered that conventions on particular matters prevail over the Brussels Convention only to the extent that there is a conflict and that the Arrest Convention did not override the application of Arts 21 and 22 (see now Arts 27 and 28 of the Regulation), see further Dicey, Morris and Collins, 13–029 and Briggs and Rees, para. 2.48. This case was distinguished in *The Bergen,* [1997] 1 Lloyd's Rep 380, where Clarke J held the Arrest Convention overrode Art. 17 (Art. 23 of the Regulation) since the effect of applying Art. 17 would be to deprive the court of jurisdiction altogether which would thus be inconsistent with the Arrest Convention (see, however, *Cheshire, North and Fawcett*, p. 419). In respect of limitation proceedings see *Maersk Olie & Gas A/S* v. *Firma M De Haan* (Case C-39/02) [2005] 1 Lloyd's Rep 210. Gaskell *et al.*, (para. 20.74) consider that it is arguable that English courts could no longer apply the decision in *The Morviken* [1983] 1 AC 565, to negate a jurisdiction clause in a bill of lading choosing the court of another Contracting State on the ground that it is null and void under Art. III, r. 8 of the Hague-Visby Rules. These Rules contain no express provision as to jurisdiction (*cf* Art. 21 of the Hamburg Rules and Arts 66–74 of the Rotterdam Rules (as to which see further Baatz, ch. 11 in Thomas, ch. 16 in Thomas RR and ch.14 in RRAPA). Nevertheless it must equally be arguable that the Rules on a particular matter "govern" jurisdiction.

designated by agreement between the parties[1574] and, in addition, in the courts or tribunals of a country within whose territory: (a) the defendant[1575] is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made; or (b) the place where the goods were taken over by the carrier or the place designated for delivery is situated, and in no other courts or tribunals.[1576] These rules are a "self-contained code within which a plaintiff must found his assertion of jurisdiction".[1577] However, not all issues concerning jurisdiction are necessarily dealt with by the "code" so that a court may need to refer back to the Regulation to fill the gap.[1578]

The type of clause illustrated by Clause 28 of BIFA 2005A is in danger of being struck down as null and void by Article 41 whenever CMR applies to the contract, since the attempt to grant exclusive jurisdiction to the English courts would be in derogation from the apparent freedom given to the plaintiff by Article 3.[1579] Consequently it may not operate at all as a designation of the English courts, notwithstanding the freedom, in any event, for the plaintiff to sue in another state if within the terms of Article 31. Furthermore, even as a designation, it may need to be shown to be binding on a third party such as a consignee or successive carrier. In the case of the consignee, he will be bound by a designation agreed by the sender where the sender acts as his agent or, in circumstances where the sender does not act as his agent, where he has actual or constructive notice.[1580] In the case of a successive carrier it is submitted that he cannot be bound by a designation unless it is contained in the CMR consignment note since Article 34 provides that the successive carrier becomes a party to the contract of carriage "under the terms of the consignment note".[1581] This may well be of importance to a forwarder who may wish his customer to be encouraged to sue a successive carrier in England under

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1574. If contained in a framework agreement between the sender and the carrier it does not necessarily apply to successive carriers, *BAT Switzerland SA* v. *Exel Europe Ltd* [2012] EWHC 694 (Comm), [2012] 2 Lloyd's Rep 1.

1575. The term defendant does not include an assignee of a party to the contract of carriage, *Hatzl* v. *XL Insurance Co Ltd* [2009] EWCA Civ 223, [2010] 1 WLR 470, [2009] 1 Lloyd's Rep 555.

1576. *Cf* Art. 28(1) of the Warsaw Convention. See *Royal & Sun Alliance* v. *MK Digital (Cyprus) Ltd* [2006] EWCA Civ 629, [2006] 2 Lloyd's Rep 110, where the Convention was applied rather than CMR since the claimant seeking a declaration of non-liability was not a CMR carrier. The arguments proceeded in the case on the basis of a distinction between a CMR carrier and a French Commissionaire de Transport. Arguably, this failed sufficiently to treat the concept of a CMR carrier as an autonomous concept especially as there could be argument that the French law concept draws too fine a distinction for the purposes of CMR, see K.F. Haak, *The Liability of the Carrier under the CMR Convention* (1986) p. 62.

1577. Hobhouse J in *Arctic Electronics Co (UK)* v. *McGregor Sea and Air Services* [1985] 2 Lloyd's Rep 510 at pp. 513–514, citing Roskill LJ in *Rothmans of Pall Mall (Overseas)* v. *Saudi Arabian Airlines Corp* [1981] QB 368 at p. 385. See further Clarke, para. 46a.

1578. As in *Sony Computer Entertainment Ltd* v. *RH Freight Services Ltd* [2007] EWHC 302 (Comm), [2007] 2 Lloyd's Rep 463 where, in respect of competing jurisdictions, the court was unable to apply Art. 31(2) of CMR since the competing actions were not brought by the same parties but was able to apply Art. 28 of the Regulation since they were sufficiently related. *Cf*, however, *BAT Switzerland SA* v. *Exel Europe Ltd* [2012] EWHC 694 (Comm), [2012] 2 Lloyd's Rep 1.

1579. See further Clarke, para. 46. Similarly and more clearly the Warsaw Convention (above fn. 1573, and below fn. 1583).

1580. See Clarke, para. 46c.

1581. See further Palmer (2nd edn), p. 1136, *cf* Clarke, para. 50b.

such a designation, in view of the difficulty that otherwise the forwarder might be constrained to rely on a recourse action within the limitations of Article 39.[1582]

2.367 It seems unlikely that principles of *forum non conveniens* could have any general application to the CMR Convention since it is essentially a civil law Convention and civil law has no tradition of applying such a principle.[1583] It should be noted that where the issue of a writ out of the jurisdiction in respect of a claim governed by the rules of these Conventions is involved the position is determined by CPR Rule 6.19(2) whereby the writ may be issued without the leave of the court so that no issue in respect of the discretion of the court can arise.

1582. See further Clarke, para. 53 and *Harrison and Sons Ltd* v. *R.T. Stewart Transport Ltd* (1993) 28 ETL 747.

1583. Clarke, para. 46a and compare, as cited therein, in respect of the Warsaw Convention, the US decision of *Smith* v. *Canadian Pacific Airlines Inc* (1972) 452 F.2d 798 (2d Cir. 1971). See now *Milor Srl* v. *British Airways plc* [1996] QB 702 and *Royal & Sun Alliance* v. *MK Digital (Cyprus) Ltd* [2005] 2 Lloyd's Rep 679 [72] (at first instance, reversed on different grounds).

CHAPTER THREE

MULTIMODAL TRANSPORT

3A INTRODUCTION

3.1 In this chapter contract forms and provisions which are concerned mainly with the management of liability by operators moving goods across modes are considered. In Chapter 4 the focus will be on contracts or terms specifically linked to the use of particular types of transport technique designed to operate across modes. As noted in Chapter 1 it is possible to see the development of contract forms in this area in terms of stages of development. In this chapter the material will be presented consistently with these stages so that the discussion will proceed in apparently historical terms. It must be kept in mind that some contract forms identified as belonging to an earlier stage may well still be of relevance today quite apart from the fact that issues of relevance to them can still be relevant in the context of some features of more modern forms. Similarly, whilst the opportunity is taken to group legal issues of distinctive relevance in respect of a particular stage these can be of relevance in respect of other stages.

3.2 Following the historical approach just noted, an outline of types of through bill will be given along with material on the legal issues of relevance to them, moving on to the development of combined transport documents and leading to the developments in multimodal transport. Each part of the discussion will revolve around different types of illustrative text. First, clause 6 of the BIMCO Conlinebill is chosen as illustrative of one type of through transport provision in common use in bills of lading. The ICC Uniform Rules for a Combined Transport Document are then chosen as the main vehicle for a discussion of the development of modern contract forms since these rules were of major influence in this development. Contract terms derived from these Rules are still in use to a substantial degree. A detailed review of the Multimodal Transport Convention 1980 and the UNCTAD/ICC Rules is then provided. The chapter concludes with a review of aspects of the Rotterdam Rules which in providing rules governing door-to-door transport in the context of carriage by sea and in respect of the types and use of documents in sea carriage is likely to have considerable impact on the law governing a major part of multimodal transport if it comes into force.

3.3 One issue which cuts across all types of document issued in the context of through transit is their ability to satisfy the requirements of mandatory rules applicable to the modes of transport which may be covered by them. A particular difficulty should be noted in respect of the application of the Hague Rules to sections of sea transport

in a through movement. Unlike most international regimes of liability these rules require the transit to be "covered" by a bill of lading[1] raising questions as to what counts as a bill of lading and whether and when a transit is so covered. Similar questions can arise also in the context of through bills of lading used in a movement involving only sea transport. It is convenient to consider this aspect after some familiarity has been gained of the types of through bill in operation.

3B THROUGH BILLS AND LIABILITY

3.4 **Conlinebill, clause 6**[2]

6. Whether expressly arranged beforehand or otherwise, the Carrier shall be at liberty to carry the goods to their port of destination by the said or other vessel or vessels either belonging to the Carrier or others, or by other means of transport, proceeding either directly or indirectly to such port and to carry the goods or part of them beyond their port of destination, and to tranship, land and store the goods either on shore or afloat and reship and forward the same at Carrier's expense but at Merchant's risk. When the ultimate destination at which the Carrier may have engaged to deliver the goods is other than the vessel's port of discharge, the Carrier acts as Forwarding Agent only.

The responsibility of the Carrier shall be limited to the part of the transport performed by him on vessels under his management and no claim will be acknowledged by the Carrier for damage or loss arising during any other part of the transport even though the freight for the whole transport has been collected by him.

3B.1 INTRODUCTION

3.5 As noted in Chapter 1, the early course of the development of combined transport documentation took the form of adaptation of through transport documents. Where carriage by sea was likely to be involved as a major stage of the transit the tendency was to adapt forms of through bill of lading commonly in use. Given the dominant position of sea carriage in many through transits consideration will be given mainly to shipping documents although some points may be relevant to through documents used where carriage by sea is not a major element. This is especially the case in respect of through documents issued by carriers by air. Consideration of through bills will be used to illustrate some of the problems for which combined transport bills provide a solution and to identify some conflicting approaches taken by the courts in respect of the application of the Hague Rules in particular which can also be related to the difficulty of applying mandatory rules in respect of combined transport bills.[3] Through bills of lading developed in pure sea transport to cover service beyond that provided by the principal carrier, especially where a feeder was

1. Article 1(b).
2. As will be explained at 3.11 below, the clause reproduced is from the 1978 amendment of Conlinebill. The latest version is Conlinebill 2000.
3. See generally, *Scrutton*, A180, pp. 332 *et seq.*; Carver, paras 418 *et seq.*, Tetley, ch. 44, Gaskell *et al.*, para. 9c, De Wit, paras 6.14 *et seq*.

required to link into an ocean carrier's main service, or to extend carriage beyond his normal port of discharge. They could quite easily be adapted to cover supplemental non-sea service. All types of through bill are considered here whether confined purely to sea transport or extending to other modes.

3B.2 TYPES OF THROUGH BILL

3.6 The fact of through carriage (whether by sea or other modes) may be known to or agreed with the customer and is commonly reflected by indications made on the document. This contrasts with where an option to tranship is granted in a standard bill of lading and exercised by the carrier in accordance with whatever discretion is granted by the option. The former anticipates a movement which is outside the carrier's normal operation, whereas the latter anticipates carriage within it but grants a liberty to get the goods to the anticipated destination by unexpected means.[4] Modern bills of lading provide a joint form with boxes on the face of the bill to indicate periods of pre-carriage or on-carriage.[5] This commonly ties in with the existence of a Substitution of Vessel clause which commonly deals both with the possibility of optional transhipment and with prearranged transhipment as with clause 6 of Conlinebill reproduced above.[6] The distinction between a through and transhipment bill therefore is a difference between contemplated and non contemplated transhipment commonly reflected on the face of the document. Unlike a combined or multimodal transport document a through bill form will indicate the contemplated points of transhipment. It may, however, be necessary to make further distinctions reflecting the extent of the liability accepted by the issuing carrier and the nature of the delivery obligations.

3B.3 THROUGH LIABILITY BILLS

3.7 A through bill may involve the contracting carrier undertaking a through liability as with a modern combined or multimodal transport bill.[7] In such a case the expectation will be that the ultimate destination and the point of delivery will be the same. Further, if a bill or other document in negotiable form is issued, the expectation might be that delivery will be taken on its presentation. Where the same type of transport was involved early forms of through contracts would frequently engage the responsibility of the carrier for the whole carriage.[8] It is not completely

4. See further Selvig, p. 376, Tetley, pp. 2283–4, De Wit, para. 6.15.

5. See further Mitchelhill, p. 30.

6. See also the form of the bill of lading described in *J.I. Macwilliam Co Inc* v. *Mediterranean Shipping Co SA (The Rafaela S)* [2003] EWCA Civ 556, [2003] 2 Lloyd's Rep 113, and the Substitution of vessel, through transport, transhipment and forwarding clause reproduced at para. 17 of the report.

7. For De Wit, this is a "pure" through bill, para. 6.15.

8. The English courts at times would apply a presumption to this effect. See generally *Scrutton*, A180, and see *Bristol & Exeter Ry* v. *Collins* (1859) 7 HLC 196, *Fowles* v. *G.W. Ry*, 7 Ex. 699 (carriage by rail), *Aberdeen Grit* v. *Ellerman's Wilson Line* 1933 SC 9, *Greeves* v. *West India and Pacific S.S.* (1870) 22 LT 615 (carriage by sea). *Cf* the US position, *Myrick* v. *Michigan Central Ry* 107 U.S. 102; see also *Louis Dreyfus* v. *Paterson S.S.* [1930] AMC 1555. Such through liability is said to be rare (Tetley, p. 2259) and largely confined to cabotage.

unknown, however, even in modern combined container carriage, for a through liability to be taken on a "through bill" form, though often on terms of liability commonly adopted in combined transport bills.[9] Furthermore, in North Atlantic trades it has been common to provide that the carrier agrees to procure carriers authorised by competent authority to engage in transportation and also to guarantee fulfilment of their obligations.[10] This reflects the desire to market a combined transport service which nevertheless satisfies any regulatory requirement involving separate tariffs.[11] In recent years these regulatory requirements have undergone a process of relaxation.[12] Nevertheless, the need to accommodate them for some years has been reflected in this kind of through bill of lading. An example has been a bill of lading used by Sea-Land which was the subject of litigation in *Toshiba International Corp* v. *M/V Sea-Land Express*.[13] In this case the package limitation clause[14] in the bill was held to protect Sea-Land when the goods passed out of its custody into the hands of a rail carrier. Such bills of lading make reference to such other carriers as "participating carriers". In *Transatlantic Marine Claims Agency Inc* v. *M/V OOCL Inspiration*[15] it was held that a carrier could not be both a participating carrier and a carrier within the definition of carrier clause in the bill of lading. This clause provided that: " 'Carrier' shall include the party on whose behalf this Bill of Lading has been signed, the Vessel, her owner(s), operator(s), demise, time, slot and space charterers or any person or entity to the extent bound by this Bill of Lading". A participating carrier was defined as: "any other water, land or air carrier whose services are procured by the carrier . . . " Both OOCL which was named in an identity of carrier clause, and Sea-Land whose ship was employed under a space charter were within the definition of carrier. Consequently Sea-Land could not also be a participating carrier. This meant that both OOCL and Sea-Land's liability for damage which occurred at sea was governed by OOCL's tariff

9. *Cf The Holstencruiser* [1992] 2 Lloyd's Rep 378. See also *Marley Co* v. *Cast North America (1983) Inc (The Cast Husky)* (1995) 405 LMLN 3 (Federal Court of Canada, 31 March 1995. See also *Fruit of the Loom* v. *Arawak* [2000] AMC 387, 391 (SD Fla 1998), for recognition of a basic distinction between through bills of lading involving a through liability and through bills involving separate contracts with each carrier.

10. See e.g., *Quebec Liquor Corp* v. *The Owners and Charterers of the Vessel Dart Europe* [1979] AMC 2382, (1980) 15 ETL 145 (Fed Ct Canada, 1979). Alternatively some operators agree to be responsible for filing claims to conclusion against other carriers involved in the movement. Some bills of lading take a contrasting approach by providing in a US COGSA clause in respect of port to port shipment that the carrier acts as agent only to procure carriage subject to the inland carriers contract and tariff and that if the carrier is denied the right to act as agent it seeks to revert to the general provisions governing liability for combined or multimodal transport, see DAMCO Bill of Lading, cl. 6(1)(c), TT CLUB 100, cl. 6(1)(c).

11. *Cf* the DAMCO Bill of Lading and TT CLUB 100 clauses noted in the previous footnote which, as indicated, seek to provide a safety-net whereby, if the carrier is denied the right to act as agent liability is to be determined in accordance with the combined or multimodal transport provisions. *Cf* Maersk Line Terms and Conditions, cl. 5.3, applicable where the shipment is port to port.

12. For the beginning of the major changes made in the US, see Basedow, "Common Carriers Continuity and Disintegration in US Transportation Law" (1983) 18 ETL 251 and M.E. DeOrchis, "Maritime Insurance and the Multimodal Muddle" (1982) 17 ETL 691. See also Wood, "Multimodal Transportation. An American Perspective on Carrier Liability and Bill of Lading" in Kiantou-Pampouki, pp. 235–268.

13. [1994] AMC 995 (SDNY 1994).

14. 4G.3.7.1.

15. [1998] AMC 1327 (2d Cir.).

and not that of Sea-Land. In the circumstances this proved to be a disadvantage for the plaintiff, since Sea-Land's tariff applied the more favourable Hague-Visby Rules limit than OOCL's tariff, which applied the US COGSA limit. In *Hartford Fire Insurance* v. *OOCL Bravery*[16] the bill of lading indicated the agreement to procure overland transportation and that the care, custody and carriage of the goods during which the participating carrier is in possession of the goods will be the sole responsibility of the participating carrier and not the carrier. The court rejected the argument that this involved an agency on the part of the party issuing the bill of lading who remained liable as a carrier throughout. The carrier had failed to exclude both his responsibility and liability.[17] A more straightforward form of through bill of lading appeared in *Fruit of the Loom* v. *Arawak*[18] where the carrier took responsibility for the whole transit and the road carrier performing the last stage of the carriage who was described as a connecting carrier was protected by means of a "Himalaya" clause. Consequently the road carrier could rely on the exception in the bill of lading for acts of "assailing thieves" where trailers of clothing were hijacked during the land stage of a Jamaica to Kentucky intermodal shipment.[19]

3.8 If the issuing carrier is not a sea carrier the difficulty will arise as to whether the through bill can operate as a document of title or be capable of transferring contractual rights under the Carriage of Goods By Sea Act 1992 or enable the contract to be "covered" by a bill of lading for the purpose of the Hague Rules. This difficulty is considered generally in the context of forwarding contracts and the reader is referred to that discussion.[20] A number of points on this relevant specifically to the other forms of through bill will be made below.

3B.4 SEGMENTED LIABILITY BILLS

3.9 More usually a through bill provides for segmented responsibility, each carrier being responsible solely for his own section. This forms the chief contrast with combined transport bills which normally involve a through liability.[21] Within this category there are several possibilities:

(a) Joint arrangements

Carriers engaged in a joint operation might restrict their liability to their own period of performance but the document will continue to carry an undertaking to deliver

16. [2000] 1 Lloyd's Rep 394, [2000] AMC 1305 (SDNY 1999).
17. This view of the District Court appears to have been rejected by the Court of Appeals [2001] AMC 25, 36, which reversed the decision. *Cf P.T. Indonesia* v. *Orient* [2002] AMC 2209 (SD Fla (Miami Div)).
18. [2000] AMC 387 (SD Fla 1998).
19. Contrast *Vistar SA* v. *M/V Sea Land Express*, 774 F. 2d (5th Cir. 1985), Sorkin, para. 14.14(3) n. 42, where the defence of error in navigation could not be applied to a motor carrier since it was not a ship.
20. See 2C.4.4.
21. Mitchelhill, p. 36.

to the holder as with a traditional bill of lading. Each carrier will become party to that undertaking through the agency of the carrier issuing the bill and applicable once they take possession of the goods.[22] This type of arrangement was common in the past where movements by rail from inland points in the US and thence by sea to an English port could be made under cover of a through bill issued by the rail carrier.[23] They were adapted to modern container carriage but are probably rare today. The bill itself controls the whole movement, although each carrier is made responsible only for his own section under a several but not joint liability. The terms governing each stage may be set out or incorporated by reference.[24] A complex array of terms would provide for the adjustment of claims via the intermediary of the last carrier and for collection of freight and the exercise of a lien.[25] As noted above if the bill is issued by a non-sea operator the question will arise as to its status as a document of title etc. At least with this form of contract a direct tie to the sea carrier is made by the terms of the through bill,[26] so that once this carrier takes possession it may be possible to see the through bill as capable as being regarded in the same way as a normal bill.[27]

(b) Forwarder bills

A bill of lading might not involve a through liability to the ultimate destination, but involve a duty to deliver at one place coupled with a duty to forward the goods to a further point. This might be termed a "through" bill but it is only through in the sense that the final destination is indicated on the document. In *Cliffe* v. *Hull & Netherlands S.S. Co Ltd,*[28] a period of land carriage followed a period of carriage by sea, and the shipowner acted as forwarding agent in respect of the land stage. The bill of lading was considered to evince an intention to deliver at the discharge port coupled with an obligation to forward the goods to the final destination. The bill of lading could not therefore be considered a through bill to that destination. On completion of the carriage by sea, the liability of the carrier by sea as a carrier had ceased so that difficulties encountered in despatching the goods by rail so as to prevent delay in reaching the destination were not its responsibility. Since the goods were forwarded to the plaintiff by rail it seems likely that by that stage the bill of lading had ceased to play any further role in respect of the delivery of the goods. This clearly distinguishes the case from the joint arrangements described above where the bill of lading still plays a role in the delivery of the goods, at least where the goods are being delivered from a ship.

22. See *The Pioneer Land* [1957] AMC 50 (SDNY 1956).
23. See e.g. the form of contract in *Burstall & Co* v. *Grimsdale and Sons* (1906) 11 Com Cas 280.
24. See *E. Clemens Horst* v. *Norfolk & North American S.S. Co* (1906) 11 Com Cas 141.
25. See further: *The Hibernian* [1907] P. 277, *Kitts* v. *Atlantic Transport* (1902) 7 Com Cas 227 and *Greeves* v. *West India and Pacific S.S.* (1870) 22 LT 615.
26. See however the difficulty noted below at fn. 27. Much depends on whether the sea carrier is ascertained at the time the through bill is issued.
27. The bill will not, however, be a shipped bill, unless issued by the sea carrier on shipment, and for this reason might fall outside the custom of merchants as expressed in *Lickbarrow* v. *Mason* (1787) 2 TR 63, see, however, 2.90.
28. (1921) 6 Ll L Rep 136. See p. 137.

A further possibility, however, has some importance in a modern context. Even when no joint operation is involved a common arrangement in carriage by sea has been for a through or transhipment bill to be used to obtain delivery from an on-carrier whose own bill of lading may have been issued to the pre-carrier as a service bill. The "through" bill expresses the responsibility of the issuing carrier to be that of a forwarding agent only in respect of the on-carriage. In *Plaimar Ltd* v. *Waters Trading Co Ltd,* it was said to be the practice for the consignee to secure delivery of the goods on production of the through bill and to obtain the on-carrying bill, or a copy of it, only if needed in connection with a claim for loss or damage.[29] Since the through bill will be on terms of agency in respect of the on-shipment, although it may, in a practical sense, be a means by which delivery of the goods is accomplished at the destination, the document might well have ceased to carry any undertaking to deliver to the holder. This will be relevant to whether the document can function as a document of title and in other respects in the same way as a standard bill of lading. This is considered further in the specific context of the application of the Hague Rules.[30] For the moment it can be noted that, even as an agent, there may be a duty on the issuing carrier to secure delivery in accordance with the terms of the bill.[31] So far as the on-carrier is concerned, the indication in *Plaimar*, that it is a matter of practice to secure delivery from the on-carrier via the through bill, suggests the absence of any direct undertaking to deliver to a holder by the on-carrier. In some cases, however, it may be that the on-carrier's bill is linked to the through bill in such a way as to ensure an obligation on the on-carrier to deliver against the through bill although on the terms as to liability contained in the on-carrier's bill.[32] *3.10*

3B.5 UNCLEAR AGENCY CLAUSES

Clauses in bills of lading may make it clear that the carrier acts as agent both in respect of supplementary carriage and in respect of terminal operations.[33] They may indicate this whether transhipment is prearranged or occurs under the liberty granted by the transhipment clause.[34] Clause 6 of Conlinebill makes this clear where carriage is arranged beyond the vessel's port of discharge. Sometimes, however, a clause may not make it clear that the issuing carrier is agreeing to act as agent but may simply confine his liability to the period of carriage he performs. This often couples with a standard type of clause which denies liability for pre-loading and post-discharge damage without making it clear on what basis pre-loading or post-discharge operations are being made. Typical is clause 6 of the version of the *3.11*

29. (1945) 72 CLR 304 at p. 315 (Australia High Ct). See also Mitchelhill, p. 31. For the similar position under a transhipment bill see *Holland Columbo Trading Society* v. *Segu Mohamed Khaja Alawdeen* [1954] 2 Lloyd's Rep 45.

30. See below, 3.37, and see generally, 2C.4.4.

31. See, fn. 192.

32. See the form of through bill discussed by Carver in "Defects in the Bills of Lading Act 1855" (1890) 6 LQR 289, at p. 300, and see the discussion, below, at text to fn. 192.

33. Joint operation bills might also deal with the terminal operations on that basis.

34. See e.g., cl. 15 of the bill of lading terms reproduced in Mitchelhill, App.G.

Conlinebill reproduced above. This indicates that the carrier acts as forwarding agent in respect of subsequent carriage but also gives a wide liberty to the carrier to tranship the goods and forward them by the same or other means of transport to the port of destination without making clear the status of the carrier in respect of such on-carriage and seemingly denying liability for any part of the transport not performed in vessels under its management. Arguably the part of the clause which provides for this exclusion might perhaps be construed as applying only to prearranged forwarding.[35] A similar problem arose in the past with joint service agreements where the engagement was with a shipping line which might engage a ship belonging to a different line for the carriage by sea,[36] although in modern times the contractual link would probably be provided by a demise or identity of carrier clause. It would seem unlikely that the exclusion would be restricted in the way suggested. Nevertheless, as worded, it will not protect the carrier from misdelivery of the goods, whether by itself or a subcontractor without production of the bill of lading.[37]

3.12 Where an operator makes clear that he is acting as an agent this can be expected normally to take effect and create privity of contract between the customer and the underlying carrier or terminal operator.[38] Where the clause is not clear the court might be able to imply agency although it may not necessarily do so. This problem arose with early types of forwarder bills of lading, which denied liability for any damage occurring outside the forwarder's custody but were unclear as to the status of the forwarder in organising the through carriage. The courts were quite prepared to accept the underlying operators as subcontractors of the forwarder as in *Troy* v. *Eastern Co of Warehouses.*[39] Even though the courts may not be able to imply a full agency in the sense of establishing privity of contract between the shipper and the on-carrier, it seems likely that the courts will imply a similar duty of care to that of an agent at least in respect of obligations arising out of the procuring of an on-carrier.[40] Furthermore the absence of a full agency will not necessarily prevent the on-carrier from relying on the terms of his contract with the operator on the basis of a bailment on terms.[41] Authority to subcontract[42] can carry with it implied authority to contract on the known and contemplated terms.[43] The absence of a

35. The clause reproduced is from the former Conlinebill last amended in 1978. Conlinebill 2000, in cl. 8, makes the position clear by confining the exclusion of liability to pre-carriage and on-carriage in respect of which the carrier acts as an agent.

36. See Carver (1890) 6 LQR 289.

37. See *M.B. Pyramid Sound N.V.* v. *Briese Schiffahrts GmbH & Co (The Ines)* [1995] 2 Lloyd's Rep 144. See also *Kanematsu (Hong Kong) Ltd* v. *Eurasia Express Line* [1997] CLY No. 4494 and [1998] CLY No. 472 (CA).

38. See *Victoria Fur Traders Ltd* v. *Roadline (UK) Ltd* [1981] 1 Lloyd's Rep 570. It is interesting to compare the US decision in *Sabah* v. *Harbel Tapper* [2000] AMC 163 (5th Cir. 1999) in which, whilst not concerned with privity of contract, the court took the view that a clause in a bill of lading indicating that the carrier acts as forwarding agent only after discharge, did not prevent the defendant from being regarded as a carrier and taking the benefit of the COGSA limit. A further clause had extended COGSA to post-discharge operations. Compare further *Center Optical (Hong Kong) Ltd* v. *Jardine Transport Services (China) Ltd* [2001] 2 Lloyd's Rep 678 (HK HC).

39. (1921) 8 Ll L Rep 17.

40. See above, 2.60 and 2.113, and below, 3.33.

41. *Cf* where there is such an agency, see above, 2.113 and below, 3.33.

42. As e.g. granted by Conlinebill, cl. 6.

43. *Morris* v. *Martin* [1966] 1 QB 716, [1965] 2 Lloyd's Rep 63.

wider authority as granted by the bill of lading in *The Pioneer Container*[44] may place the operator in breach if he subcontracts on terms which are particularly unfavourable to the customer.

A case which contrasts with the position taken in *Troy* is *Raymond Burke Motors Ltd* v. *Mersey Docks and Harbour Co*,[45] where a container load of motor- cycles were damaged whilst being stored in a container park at the loading terminal due to the negligence of the servants of the terminal operator in unloading a ship other than the one on which the container was to be loaded. The terminal operator was held unable to rely on a Himalaya clause in the shipowner's bill of lading, which was never issued, since the act was not referable to the contract of carriage.[46] This was because the shipowner was held to be the agent of the shipper in making the terminal arrangements, notwithstanding the fact that the goods were received by the terminal under a terminal agreement which was applicable "at any time for the reception, accommodation and delivery of goods".[47] It was not clear what kind of bill would have been issued, whether a through bill or a shipped or received for shipment bill, but the bill of lading clauses referred to by the court were open as to the precise status of the shipowner in respect of terminal operations and excluded the liability of the shipowner prior to loading on board.[48] The decision contrasts with *Port Jackson Stevedoring Pty Ltd* v. *Salmon and Spraggon (Australia) Pty Ltd* (*The New York Star*),[49] where the shipowner's acceptance of a bailment responsibility after discharge from the ship enabled the Privy Council to see the act of the stevedore as referable to the contract of carriage.[50] Further comparison can be made with *The Rigoletto*,[51] where, despite the existence of an agreement between the shipowners and a stevedoring company for receipt and cargo handling, the bill of lading was considered not to embrace pre-loading storage. This was either because the form of the bill of lading, which was neither a through nor a combined transport bill, had not been adapted to take account of the special arrangements made regarding the pre-loading period, or because it was always intended that these arrangements would stand on their own feet in accordance with other terms variously applicable under the shipping note issued by the stevedores, the agreement between the stevedores and the shipowners and the operators' licence granted by the owners and operators of the port.

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44. [1994] 2 All ER 250.

45. [1986] 1 Lloyd's Rep 155.

46. *Cf Davinder Singh* v. *M/V Saudi Dirayah* [1993] AMC 2636 (SD Tex 1991) and *M.C. Watkins* v. *M/V London Senator* [2000] AMC 2740 (E.D. Virginia), see below 3.15.

47. *Cf John Rigby (Haulage) Ltd* v. *Reliance Marine Insurance Co Ltd* [1956] 2 Lloyd's Rep 10. *Cf* also *Freight Systems Ltd* v. *Korea Shipping Corp (The Korea Wonis-Sun)* 1990, Hong Kong, LMLN 290 and *Center Optical (Hong Kong) Ltd* v. *Jardine Transport Services (China) Ltd* [2001] 2 Lloyd's Rep 678 (HK HC). *Cf*, further, *Rafisani* v. *Coastal Cargo Co* 2012 WL 1032908 (ED La).

48. The judge appears to have accepted that despatch of the straddle carrier to collect the container would have been part of the process of loading since that would have been referable to the contract of carriage, see p. 161.

49. [1980] 2 Lloyd's Rep 317, [1981] 1 WLR 138.

50. See Lord Wilberforce at pp. 322 and 145. Contrast further *I.T.O. Ltd* v. *Miida Electronics Inc* [1986] AMC 2580 (Sup Ct Canada, 1986) and *Parker Hannif in Corp* v. *Ceres Marine Terminals* [1996] AMC 1573 (D Maryland).

51. [2000] 2 Lloyd's Rep 532.

3B.6 SCOPE OF CARRIAGE AND HIMALAYA CLAUSES

3.14 As appears from the cases just discussed the precise scope of the contract of carriage can be of considerable importance in determining the application of such a Himalaya clause[52] since it must be referable to the period of carriage contracted for by the carrier.[53] Thus in the US case of *Komori America Corp* v. *Howland Hook Container Terminal*[54] it was considered that the terms CFS and Pier to Pier, whilst indicating that the sea carrier stuffs or strips the container, do not necessarily indicate that he has undertaken to load the stripped goods on to the consignee's truck, so that when this task is performed by the terminal operator it may not be referable to the bill of lading, especially where the terminal operator charges the consignee for this task.[55] Clearly the extent of the carriage agreed naturally arises for all types of carriage contract, and in this context, whether for through or combined transport.[56] Furthermore, where a combined transport or through bill is issued by a forwarder as a principal, the actual carriers and other performing operators, such as terminal operators, may well have an interest in relying on a Himalaya clause etc., in the forwarder's bill.[57] Similar issues will arise in respect of other protective clauses as well as Himalaya clauses.[58]

3.15 It may be more difficult to determine the extent of Himalaya protection where the contractor simply excludes liability outside certain points.[59] In trades connected with the US the effect of compulsory legislation may have the effect, not only of prohibiting such exclusion but also, in effect, of extending the scope of the carriage

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52. See 2.245.

53. See generally Tetley, ch. 36 and by the same author "The Himalaya Clause—Revisited" [2003] 9 JIML 1, 40, especially at p. 54, and Sorkin, para. 14.15. See also Harrington, "Liability for pre-Loading and after Discharge Losses in Quebec" [1977] ETL 483, and *Robert Simpson Montreal Ltd* v. *Canadian Overseas Shipping Ltd (The Prins Willem III)* [1973] 2 Lloyd's Rep 124; *Halm Industries* v. *Timur Star* [1985] AMC 391 (SDNY); *I.T.O.* v. *Miida Electronics* [1986] AMC 2580, (Sup Ct Canada, 1986), *Tokio Marine & Fire Insurance Co Ltd* v. *Hyundai Merchant Marine Co Ltd (The Packing)* (ND Ill 1989), LMLN 263; *Caterpillar Overseas SA* v. *Marine Transport Inc* [1991] AMC 75 (4th Cir. 1990) LMLN 292; *Taisho Marine and Fire Insurance Co* v. *The Vessel "Gladiolus"* [1987] AMC 2047 (9th Cir. 1985); *Taisho Marine and Fire Insurance Co* v. *Maersk Line Inc* [1993] AMC 705 (ND Ill 1992); *Hiram Walker & Sons Inc* v. *Kirk Line* [1993] AMC 965 and [1995] AMC 879 (11th Cir. 1992 and 1994); *Sony Chemicals Europe BV* v. *M/V Ingrita* [1997] AMC 755 (D Maryland 1996); *Akiyama* v. *M.V. Hanjin Marseilles* [1999] AMC 650 (9th Cir. 1998). See further J. Zawitoski, Limitation of Liability of Stevedores and Terminal Operators under the Carrier's Bill of Lading and COGSA, (1985) 16 JMLC 337.

54. [1998] AMC 2894 (SDNY).

55. *Cf INA* v. *Savannah* [1998] AMC 1029 (SDNY 1997); *Celthene Pty Ltd* v. *W.J.K. Hauliers Pty Ltd* [1981] 1 NSWLR 606; *Rockwell Graphic Systems Ltd* v. *Freemantle Terminals* (1991) 106 FLR 294 (Sup Ct Western Australia); *Glebe Island Terminals Pty Ltd* v. *Continental Seagram Pty Ltd (The Antwerpen)* [1994] 1 Lloyd's Rep 213; (CA NSW).

56. See e.g. the difficulty that arose in *P&O Nedlloyd BV* v. *Arab Metals Co (The UB Tiger)* [2006] EWCA Civ 1300, [2007] 2 Lloyd's Rep 148.

57. The former P&O Containers bill of lading, in cl. 28(3) as part of the USA paramount clause contained a warranty where the bill of lading was accepted by a groupage agent acting as an NVOCC that the terms of the bill would be incorporated into the NVOCC's own contract of carriage.

58. E.g. indemnity clauses. See e.g. *Neptune Orient Lines Ltd* v. *J.V.C. (UK) Ltd* (*The Chevalier Roze*) [1983] 2 Lloyd's Rep 438, *cf The Antwerpen* [1994] 1 Lloyd's Rep 413 and *Sonicare International Ltd* v. *East Anglia Freight Terminal Ltd* [1997] 2 Lloyd's Rep 48, at p. 57.

59. E.g. pre-loading and after discharge in the context of the application of the Hague Rules in carriage by sea, see *The New York Star*, fn. 49 above.

for the purpose of the Himalaya clause. Where a movement involves carriage by sea to or from the US the Harter Act applies to periods prior to loading or after discharge while goods are in a port area and prevents the carrier from excluding liability until "proper delivery".[60] Consequently the carrier's responsibility for the goods is extended to these periods and is brought to an end only in accordance with the courts' interpretation of its scope. The carrier can, however, limit liability during the extended period and a common method is by extending the application of COGSA.[61] This then links with the use of a Himalaya clause to enable terminal operators and stevedores to take advantage of the COGSA limits. In *M.C. Watkins* v. *M/V London Senator*[62] the bill of lading was held to be port to port and excluded liability after discharge under a clause which constituted the carrier as the merchant's agent. Since, however, the Harter Act rendered the exclusion null and void the carrier's liability extended until "proper delivery". As this meant that the transfer from ship to shed was still within the scope of the carriage, the stevedore performing this transfer could take the benefit of the Himalaya clause.[63] Similarly in *Standard Multiwall Bag Manufacturing Co* v. *Marine Terminals Corp*,[64] Harter Act liability, and consequently the Himalaya protection attached to the extended COGSA limit, continued until proper delivery which would occur only when the consignee's trucker signed the Equipment Interchange Receipt acknowledging delivery.[65] This meant that the port and stevedores responsible for damaging the equipment whilst attempting to move it to the gate area could take the benefit of a Himalaya clause which extended protection to "all other independent contractors whatsoever".[66]

Apart from issues arising from the overall scope of the carriage, US authorities 3.16
can assist in introducing further issues of relevance to the application of protective clauses which can be especially pertinent to through and combined carriage. The issues have wider significance than their original domestic context. The first arises from a requirement in earlier decisions that the carriage document be clear as to the

60. See further Tetley, p. 1889 and [2003] 9 JIML 1, 40, 57; *Allstate Ins. Co* v. *International Shipping Corp*, 703 F. 2d 497, [1985] AMC 760 (11th Cir. 1983) and C.W. O'Hare, "The Duration of the Sea Carriers Liability" (1978) 6 ABLR 65.

61. Similarly also to periods of temporary unloading, *Schramm Inc* v. *Shipco Transport Inc, In Personam* [2004] AMC 961 (4th cir), *cf Mayhew Foods* v. *Overseas Containers* [1984] 1 Lloyd's Rep 317, below 3.87).

62. [2000] AMC 2740 (ED Va).

63. The bill of lading recognised that the effect of the Harter Act might be to render the exclusion of liability invalid and, if this should be the case went on to apply COGSA.

64. [1997] AMC 891 (D Ore 1996).

65. Note the court applied *Jagenberg*, below fn. 106, but might have distinguished it as applicable to intermodal contracts and applied the alternative of constructive delivery.

66. See further below, 3.17. In *Nipponkoa Insurance Co Ltd* v. *Wallenius Wilhelmsen Lines* [2003] AMC 1907 (SDNY 2003) a bill of lading extended COGSA ashore but provided that delivery occurs upon delivery to an entity to whom custody and control is customarily relinquished at the port of discharge. The court held that this did not mean that delivery occurs when cargo is taken into the hands of the carrier's own stevedore. The clause is a reflection of the custom of the port exception to the delivery requirements in the Harter Act and did not prevent reliance on the COGSA extension, otherwise the reference to stevedores in the Himalaya clause would be meaningless.

intended beneficiaries of the protective clauses.[67] This will become a more prominent issue in English law in the context of the Contracts (Rights of Third Parties) Act 1999[68] since it will be sufficient for a beneficiary to be identified as a member of a class or as answering a particular description.[69] Naturally the court will be concerned to determine the intention behind the words used and any perceived ambiguity might be construed against the person claiming the benefit. In theory a search for the necessary authority[70] stemming from this person to the contracting carrier is no longer necessary. Were it to be, it could well produce difficulty where, typically in combined transport, there is a chain of carriers, stevedores and other subcontractors, not all of whom would have been appointed by the original carrier. The search for authority remains a problem in some jurisdictions,[71] and might continue to cause problems if the references to agency commonly made in Himalaya clauses are treated by the courts as continuing to require a finding of agency as a condition for the application of the clause.

3.17 The US courts initially required Himalaya clauses to be strictly construed and limited to intended beneficiaries.[72] It was said that controversy surrounded the extent to which the beneficiary had to be described, i.e. whether it is necessary to specify the type of beneficiary e.g. stevedore, or whether it was sufficient to describe the beneficiary in broad terms such as "agents" or "independent contractor".[73] Several circuits accepted that it was sufficient to express a clear intent to extend

67. For a recent English example, however, see *Whitesea Shipping and Trading Corp* v. *El PasoRio Clara Ltda (The Marielle Bolten)* [2009] EWHC 2552 (Comm), [2010] 1 Lloyd's Rep 648 where it was held that the claimants were entitled to rely upon the wide definition of "Subcontractor" to which the Himalaya clause referred which included: "stevedores, longshoremen, lighters, terminal operators, warehousemen, truckers, agents, servants, any person, firm, corporation or other legal entity who performs services incidental to the goods and/or the carriage of the goods, including direct and indirect subcontractors and their servants and agents." In preparing and signing the bills of lading through their agents, the time charterers and sub-time charterers were performing "services incidental to the goods and/or the carriage of the goods" within the meaning of the definition clause and also fell within the term "indirect sub-contractors". Similarly, in providing P&I insurance against potential liability to cargo interests, the P&I insurers were also performing such services.

68. See generally, Merkin (ed.), *Privity of Contract* (2000).

69. Only limited guidance was given by the Law Commission on the level of designation, see "Privity of Contract: Contracts for the Benefit of Third Parties" (1996) No. 242, CM3329, para. 8.1–8.2.

70. Reflecting the requirements derived from the dicta of Lord Reid in *Scruttons Ltd* v. *Midland Silicones* [1962] AC 446 at p. 474.

71. See e.g. *Kodak* v. *Racine Terminal (Montreal) Ltd* [1999] AMC 2628 (Canada Fed Ct (Trial Div)). A stevedore was unable to rely on a Himalaya clause where the ocean carrier had been taken over by another company and the new carrier lacked authority because there was no new contract and the anti-assignment provisions of the old stevedoring contract precluded assignment to the new carrier.

72. *Robert C Herd & Co* v. *Krawill Machinery Corp* 259 U.S. 297 (1959). See e.g. *Taisho Marine and Fire Insurance Co* v. *Maersk Line Inc* [1993] AMC 705 (ND Ill 1992) at p. 709.

73. Sorkin, para. 14.15(2). In *James N. Kirby Pty Ltd* v. *Norfolk Southern Railway Co* [2002] AMC 2113 (11th Cir.), at p. 2122, the court felt that the words "other person" as a category too vague to define a class of readily identifiable persons (see, however, the Supreme Court judgment, below 3.19). On the other hand in *Thiti Lert Watana Co Ltd* v. *Minagratex Corp* [2001] AMC 80 (NC Cal 2000), a Himalaya clause which referred to "any person of whose services he makes use for the performance of the contract" reflected an intent to cover the receiving agent of the carrier, the court having noted that the title of the clause specifically referred to "servants and subcontractors". In *Chisso America Inc* v. *M/V Hanjin Osaka* [2003] AMC 2796 (D New Jersey), the owner and demise charterer of a vessel fell within the terms of a Himalaya clause and thus obtained the protection of a forum selection clause in a sea waybill issued by a slot charterer. They either fell within the words "agents" of the carrier or "others" by whom the carriage is performed, since they were intimately involved in the shipment.

benefits to a well defined class of readily identifiable persons, as in the Eleventh Circuit decision in *Certain Underwriters at Lloyd's* v. *Barber Blue Sea Line*.[74] In this case the court stated that when a bill of lading refers to a class of persons such as "agents" and "independent contractors" this includes all those persons engaged by the carrier to perform the functions and duties of the carrier within the scope of the carriage. This expressed a relationship between the carrier and beneficiary which, particularly in the context of whether the beneficiary can rely on COGSA, was often expanded into consideration of two factors to determine the extent of intended cover: the contractual relationship between the party seeking protection and the ocean carrier and the nature of the services compared to the carrier's responsibilities under the carriage contract.[75] The first factor was often reflected in a finding that an absence of privity between carrier and supplicant defeats reliance on the clause,[76] unless the terms of the clause clearly indicates an intention to stretch beyond the contractual tie.[77] A further factor which was sometimes referred to by the courts is whether the supplicant is performing service of a maritime nature.[78] This was particularly pertinent to the application of COGSA especially if the focus needed to

74. [1982] AMC 2638 (11th Cir.), at p. 2642.

75. *Taisho Marine and Fire Insurance Co* v. *Maersk Line Inc* above, fn. 53, at p. 710. The second factor was evident in *Bigge Equipment Co* v. *Maxspeed Int'l Transport Co Ltd* [2002] AMC 1409 (ND Cal 2001): "Even if the Hanjin bill had not so clearly identified MTC as beneficiary of the COGSA protections, it is clear that MTC, as stevedore, bailee and terminal operator, performed services which were necessary to the carrier so that it could perform its responsibilities under its bill". See also *Chisso America Inc* v. *M/V Hanjin Osaka*, above, fn. 73.

76. Sometimes presented dogmatically, as in *Prebena Wire Bending Machinery Co* v. *Transit Worldwide Corp* [1999] AMC 2623 at p. 2626 (SDNY) ("As Universal is not in privity with any contract that purports to limit its liability, the protections of COGSA do not apply"), or equally strongly denied as a general requirement, *Akiyama Corp of America* v. *M.V Hanjin Marseilles* [1999] AMC 650 (9th Cir. 1998) at p. 653 ("We reject appellants' argument that privity of contract is required in order to benefit from a Himalaya clause"). Other courts emphasise the wording of the clause particularly where it refers to persons "employed by the carrier", as in *Canon USA Inc* v. *Norfolk Southern Railway Co* [1997] AMC 1510 (ND Georgia (Atlanta Division), 1996) (see also *Yasuda Fire & Marine Insurance Co Ltd* v. *Japan Intermodal Transport Co Ltd* [1995] AMC 2737 (ND Ill) and *Taisho Marine and Fire Insurance Co* v. *The vessel "Gladiolus"* [1987] AMC 2047 (9th Cir. 1985)). In *Canon*, the clause extended protection to "owners and operators of the vessel . . . stevedores, terminal operators, warehousemen, road and rail transport operators and any independent contractor employed by the Carrier in performance of the handling, storage or carriage of the Goods . . . .". The court rejected the argument that the words "employed by the carrier" modified only independent contractor and not the other entities. This contrasts with *Akiyama* where such words modified only the reference to "other persons" and not specifically identified entities (see further *American Home*, fn below). A further distinction can be extracted from *James N. Kirby Pty Ltd* v. *Norfolk Southern Railway Co* [2002] AMC 2113 (11th Cir.) where the court (noting that "other person" is too vague to define a clearly identifiable class of persons, see above, fn. 73) indicated (p. 2123, n. 11) that privity is required where the category terms is relational e.g. "servant", "agent", "independent contractor" but not where the term is descriptive, e.g. "stevedore", "terminal operator". The court saw the Ninth Circuit in *Akiyama* as taking a different view, rejecting privity and focusing instead on comparing the nature of the services performed and the carrier's responsibility. This distinction may cease to be of relevance in light of the reversal of the Court of Appeals' decision by the Supreme Court, see 3.19.

77. As in *Standard Multiwall Bag Manufacturing Co* v. *Marine Terminals Corp*, see fn. 64, above, where the clause covered all other independent contractors as well as subcontractors which included direct and indirect subcontractors. Stevedores and terminal operators have also been held to be covered where the bill of lading extended protection to any agents, servants or independent contractors performing any part of the carriage, see *M.C. Watkins* v. *M/V London Senator*, above, fn. 62, and *Indemnity Insurance Co of North America* v. *Schneider Freight USA* [2001] AMC 2153 (CD Cal).

78. Sometimes as a separate factor or as a clarification of the second factor.

be on the Himalaya clause itself where no clear guidance was given by such clause as there may be which extends COGSA throughout the carriage. In *Caterpillar Overseas SA* v. *Marine Transport Inc*,[79] the terms of the bill of lading extended COGSA to the period of carriage before loading and after discharge and throughout the entire time the goods are in the custody[80] of the carrier. Shipment of a tractor had been due to take place from one port but was shifted to another port and, with knowledge of the shipper's agent the tractor was transported by road to the substituted port but was damaged en route. The trucking company was held unable to rely on the reference to independent contractors since it had custody and responsibility for the goods and was not performing an operation of a maritime nature.[81] Even in the context of clear through or combined carriage the absence of a reference, for example, to inland carriers in the Himalaya clause could mean that COGSA protection would not be extended to such carriers especially where the court could point to use of these words in other parts of the bill of lading.[82] On the other hand where a clause in a through bill of lading expressly extended protection to inland carriers and indicated that where the bill of lading covers carriage to or from the US the carrier's liability was limited to $500 per package, the rail carrier employed at the stage where the goods were lost would have been covered by the limit.[83] The fact that a through or combined transport bill of lading explicitly contemplates the use of other operators to handle inland transportation was sometimes used as support for a view that the parties intention was to cover them,[84] so that the lack of explicit reference to them in the Himalaya clause might be

79. [1991] AMC 75 (4th Cir. 1990).

80. In *Schramm Inc* v. *Shipco Transport Inc, In Personam* [2004] AMC 961 (4th cir), legal custody was sufficient in the context of an NVOCC for a paramount clause extending COGSA to all periods when goods "are in the actual custody" of the carrier.

81. The district court judge emphasised the change in custody clearly reflecting the limit in application of the COGSA extension clause. Similarly, where a multimodal movement from Illinois to Amsterdam was covered by a similar COGSA extension clause in the bill of lading, a company in Chicago hired to crate goods prior to shipment in Baltimore having received them from the trucker hired by the multimodal carrier, was held not entitled to the package limit, *Sony Chemicals Europe BV* v. *M/V Ingrita* [1997] AMC 754 (D Maryland 1996). At p. 762: "Transporting cargo down a public highway cannot be considered a 'normal maritime operation'; nor can packaging machines into crates hundreds of miles from where they are to be loaded aboard a ship". On the other hand in *Herr-Voss Corp* v. *Columbus Line* [1994] AMC 77 (D Maryland 1992) the bill of lading extended COGSA from receipt at the sea terminal at the port of loading to delivery at the port of discharge. The Package limitation was held to apply to a period of road carriage from the port indicated in the bill of lading to a different port from which the carrier's ships normally sailed under cover of a clause which authorised the carrier to carry goods by any substitute vessel or other means of transport. It applied also to cover the claim against the road carrier, notwithstanding that it was non-maritime, since this carrier's activities were essential for the sea carrier to enjoy a shipping presence and so were a critical link to the Line's maritime services.

82. *Lucky-Goldstar Int'l (America) Inc* v. *S.S. California Mercury* [1991] AMC 1018 (SDNY 1990). See also *Royal Insurance Co* v. *Westwood Transpacific Service* [1991] AMC 1028 (WD Wash 1990), with a similar COGSA extension clause as in *Caterpillar Overseas*, above, fn. 79. The point was specifically rejected in *Taisho Marine* (below, fn. 85) since the court saw the Himalaya clause as dealing with subcontractors in general and the reference to inland carriers in other clauses as confirmation of the intention to include them. However, the court was not dealing with an attempt to extend COGSA as such and this may account for the difference in approach.

83. *Tokio Marine & Fire Insurance Co* v. *Hyundai Merchant Marine Ltd* [1989] AMC 2672 (ND Ill). *Cf Sompo Japan Insurance of America* v. *Union Pacific Railroad Co* [2004] AMC 247.

84. As in *Tokio Marine*, see previous footnote.

disregarded by the court. This was the case in *Taisho Marine and Fire Insurance Co* v. *Maersk Line Inc.*[85]

An important feature of *Taisho Marine*[86] was the fact that the bill of lading provided that in no event was the carrier's liability to exceed the COGSA limit. This applied notwithstanding other provisions which varied liability on a network basis and would otherwise have confined COGSA to carriage by water.[87] Consequently it is important to recognise, especially in the context of through carriage, that the interpretation of a Himalaya clause depends not simply on interpretation of the clause itself. It must be read in the light of the other clauses which set out the scheme of liability of the principal operator. As in *Taisho Marine* a protective provision which operated across modes on a uniform basis might be more readily appealed to by a different mode carrier than provisions which are linked to a particular mode.[88] Thus in *Canon USA Inc* v. *Nippon Liner System Ltd*,[89] a through intermodal bill of lading covering a journey from Japan to Illinois applied COGSA to carriage by water but with respect to carriage by a subcontractor, the contracting carrier's liability was to be to the same extent as the liability of the subcontract as if a separate contract had been made between the shipper and the subcontractor. The court took this as an intention to limit the COGSA package to water routes and to provide a different set of liability rules for inland routes. On the other hand in *Canon USA Inc* v. *Norfolk Southern Railway Co*[90] as in *Taisho Marine*, a clause indicating that the carrier shall not in any event be liable beyond the package limit covered the road carrier notwithstanding the other network provisions in the bill.[91]

3.18

85. [1993] AMC 700 (ND Ill 1992). *Cf The Tokio Marine and Fire Insurance Co Ltd* v. *Mitsui O.S.K. Lines Ltd* [2003] AMC 2543 (CD Cal).

86. And *Tokio Marine*, see fn. 85. See also *Tamrock USA Inc* v. *M. V. Maren Mærsk* [1996] AMC 676 (SDNY). *Cf Russell Stover Candies Inc* v. *Double VV Inc* (1997) WL 809205 (D Kan).

87. The compensation clause provided that for shipments to or from the US neither the carrier nor the ship was to be liable beyond $500 per package and for all other trades where the Hague Rules apply no more than £100 per package. Another clause applied COGSA to water carriage to or from the US, applied the inland carrier's terms to such carriage and indicated that liability was not to exceed the amount in the compensation clause. The compensation clause could not be confined to water carriage since it would thereby be wholly redundant given the earlier reference to COGSA.

88. This is also illustrated by Australian cases where an agreement not to claim against subcontractors coupled with an indemnity extended inland. In *Broken Hill Pty Ltd* v. *Hapag-Lloyd Aktiengesellschaft* (1980) 2 NSWLR 572 the clause in a combined transport bill of lading provided a basis for a stay of proceedings against an inland carrier and in *Sidney Cooke Ltd* v. *Hapag-Lloyd Aktiengesellschaft* (1988) 2 NSWLR 588, similarly in favour of an inland container terminal. In both cases the effect of the Himalaya provision was to transfer the agreement to the inland subcontractor, see further, Livermore, in Kiantou-Pampouki, 69, at pp. 75–77.

89. [1994] AMC 348 (ND Ill 1992). *Cf Sun-Bar Materials Int'l Inc* v. *American President Lines* [1993] AMC 2639 (ND Cal, 17 May 1993), Sorkin, para. 14.15(3), n. 47.1, where a rail carrier was held not entitled to rely on the limit of $500 per freight unit. The APL bill of lading distinguished "carriers" which included APL and any connecting or substituted water carrier and "Joint Service Connecting Carrier" which included any non-vessel operating common carrier by rail etc. and sought to divide liability between them according to which was responsible. Since this latter entity was not one of the specified agents or independent contractors indicated in the Himalaya clause this demonstrated that the parties did not intend to extend COGSA protection to the rail carrier.

90. [1997] AMC 1510 (ND Georgia (Atlanta Div), 1996).

91. The case is stronger than *Taisho Marine* since the Himalaya clause expressly referred over to the compensation clause.

In *Thiti Lert Watana Co Ltd* v. *Minagratex Corp*[92] a paramount clause extended COGSA to carriage by inland waterway. This was held to cover also the period that the goods were in a warehouse prior to the on-carriage by inland waterway. For the court,[93] "when the parties broadly extend the coverage of COGSA to include carriage by inland waterways, they surely intend a continuous stream of coverage, rather than a disjointed intermittent coverage which starts and stops periodically". This meant that a forwarder, acting both as customs and forwarding agent for the consignee and as receiving agent for the carrier was able to obtain the protection of the Himalaya clause and the one year time limit in COGSA.[94]

3.19 A decision which illustrated the difficulties of construction in the context of a modern multimodal contract was that of the Court of Appeals for the Eleventh Circuit in *James N. Kirby Pty Ltd* v. *Norfolk Southern Railway Co.*[95] A forwarder, having issued an FBL,[96] subcontracted to an ocean carrier which in turn subcontracted inland transport to a rail carrier. The rail carrier was held unable to rely on the Himalaya clause in the forwarder's bill in respect of COGSA since its protection was not clearly extended to inland carriers. The court noted the network approach to carrier liability adopted by the FBL and concluded that the clause was not intended to extend the liability regime for sea carriers to inland carriers as opposed to those at the fringes of the sea regime, such as stevedores, terminal operators and the like. It should be noted that the FBL contains a COGSA paramount clause in clause 7.3 designed to ensure that COGSA will apply to carriage on deck and the court seems to have focused on this. The court did not consider the application of the other limitation clauses designed to operate in the absence of an international convention or mandatory national law applicable to the stage where loss occurred.[97] In the Supreme Court,[98] reversing the decision of the Court of Appeals, the court accepted the application of the Himalaya clause and in doing so acknowledged that a higher limit than the COGSA limit would apply to the land section under the FBL. Furthermore the court considered that the lower court was incorrect to interpret *Robert C. Herd & Co* v. *Krawill Machinery Corp*[99] as requiring a narrow

92. [2001] AMC 80 (NC Calif 2000).

93. At p. 82.

94. See above. In *Granite State Insurance Co* v. *Hanjin Shipping Co Ltd* [1995] AMC 196 (CD Cal 1994), an extension of time given by the ocean carrier did not apply to claims against railroads to whom the one-year time limit under COGSA was extended under the ocean carrier's Himalaya clause.

95. [2002] AMC 2113 (11th Cir.). Contrast *Aisin Seiki Co Ltd* v. *Union Pacific Railroad Co* [2002] AMC 2911 (SDNY) where COGSA protection was extended during the entire period of carriage and Himalaya clause protection extended to subcontractors and connecting carriers (defined as parties contracted by or acting on behalf of ["K" Line] participating in the transport of goods by land, water, or air under this bill of lading). The rail carrier for the final stage of the journey was held entitled to the COGSA package limit. Similarly, where the rail operator was included in the definition of subcontractor: *Sompo Japan Insurance of America* v. *Union Pacific Railroad Co* [2004] AMC 247 (SDNY 2003). See also *Toshiba International Corp* v. *M/V Sea-Land Express* [1994] AMC 995 (SDNY 1994), above, 3.7, *Fruit of the Loom* v. *Arawak* [2000] AMC 387 (SD Fla 1998), above, 3.7.

96. See below, 3.43.

97. Clauses 8.3 and 8.5, see further 3.134.

98. *Norfolk Southern Railway Co* v. *James N Kirby Pty Ltd,* 543 US 14, [2004] AMC 2705.

99. See fn. 72.

construction of Himalaya clauses. This decision simply says that contracts for carriage of goods by sea must be construed like any other contracts: by their terms and consistent with the intent of the parties. If anything, *Herd* stands for the proposition that there is no special rule for Himalaya Clauses. Use of the word "any" in the phrase "any servant, agent or other person (including any independent contractor)" has an expansive meaning. In the light of the extent of the carriage the court rejected the view that the clause was too vague and accepted that a railroad like Norfolk was an intended beneficiary of the clause. This more liberal approach, however, may only partially alleviate the difficulties of interpretation and the need to pay close attention to the exact wording of the clause.[100]

The extent to which Himalaya protection can extend will naturally depend on 3.20
whether any compulsory rules are applicable which preclude reliance on the carrier's conditions.[101] In *Colgate Palmolive Co* v. *S.S. Dart Canada*,[102] the contractual extension of COGSA did not override State law compulsorily applicable to the terminal operator.[103] If the subcontractor is a carrier it may be precluded from relying on Himalaya protection if a mandatory rule of carriage law renders the limitation or exclusion relied on null and void and the operator is regarded as a carrier for the purpose of the rule.[104] Furthermore, just as there may be an issue of demarcation whenever the question arises as to the capacity in which an underlying

100. See e.g. *American Home Assurance Co* v. *Hapag Lloyd Container Linie GmbH* [2006] AMC 1239 (2d Cir.), where the clause referred to "independent contractors employed by the Carrier" and this included the railroad for inland US transportation since although they were engaged by an intermediary, the intermediary was acting as agent for the carrier so that the railroad was "employed" by the carrier. In *Mazda Motors of America Inc* v. *M/V Cougar Ace* [2009] AMC 1220 (9th Cir.), a vessel subject to *in rem* proceedings was covered as an "agent, servant or sub-contractor" of the carrier.

101. For a Canadian example see *Boutique Jacob Inc* v. *Pantainer Ltd* [2006] AMC 1940 (Fed Ct of Canada, 20 February 2006), where a railway could not limit its liability by reference to a Himalaya clause since a written agreement with the shipper was required under the Canada Transportation Act.

102. 724 F. 2d 313, [1984] AMC 305 (2d Cir. 1983). See Tetley, JIML 9 [2003] 40, 57. See also *Mitsui Marine & Fire Insurance Co Ltd* v. *Hanjin Shipping Co Ltd* [2004] AMC 577 (Georgia, State Ct of Chatham County).

103. Compare the argument adopted by the claimant in *Sompo Japan Insurance of America* v. *Union Pacific Railroad Co* [2004] AMC 247 (SDNY 2003), which relied on a provision applying compulsory international or national rules where the stage of loss is known (i.e. the TCM network rule, see below, 3.61). Since the Carmack Amendment was said to apply to the period of rail carriage it was said that this led to its application to that period of carriage and so displaced COGSA. For the court, since the Carmack Amendment could be departed from by contract it was not within the rule. *Cf Sompo Japan Insurance of America* v. *Union Pacific Railroad Co* [2011] AMC 301 (2d Cir. 2010). See also *Royal & Sun Alliance Insurance plc* v. *Ocean World Lines* [2010] AMC 2784 (2d Cir); *Mitsui Sumitomo Insurance Co Ltd* v. *Evergreen Marine Corp* [2010] AMC 2775 (2d Cir).

104. In *Sidney Cooke Ltd* v. *Hapag-Lloyd Aktiengesellschaft* (1988) 2 NSWLR 588, Yeldham J, considered that those to whom all or part of a sea leg had been subcontracted were not carriers for the purposes of Art. III, r. 8 of the Hague Rules. However, in *The Starsin* [2003] UKHL 12, [2004] 1 AC 715, Lord Hobhouse considered that a shipowner relying on a Himalaya clause fell within the scope of the Hague Rules and was thereby subject to Art. III, r. 8. The relationship involved through the application of the clause was not "for" carriage but "of" carriage so long as carriage is performed which is sufficient to constitute the shipowner as a carrier under a contract of carriage for the purposes of the Hague Rules. Lord Bingham took the same view, as did Lord Hoffmann. Lord Steyn and Lord Millett disagreed and took, in effect, the Australian view.

operator is acting,[105] so a network scheme of liability will also raise issues of demarcation between modes, where Himalaya protection is attached to a particular mode. Again, US authority is helpful in illustrating this. For example in *Jagenberg Inc* v. *Georgia Ports Authority*[106] an ACL bill of lading extended the liability of the carrier to the destination of the goods but attached the COGSA limit to the period governed by the Harter Act. The court held that "proper delivery"[107] for the purpose of this Act had not yet occurred whilst the goods were still in the hands of the terminal operator prior to loading on to the vehicle of the inland trucker so that the terminal operator could still rely on the COGSA package limit.[108]

3.21 Apart from the protection offered to those performing part of a through or combined carriage movement via the contract made with the initial carrier[109] there may be further possibilities of reliance by such persons on their own conditions.[110] The obvious possibility in English law is that provided through the concept of bailment on terms.[111] In the US there seems to be the possibility that a forwarder or NVOCC can be treated as acting both as principal and as an agent so that the forwarder's customer can be drawn into the actual carrier's bill of lading by means of the clause defining a "shipper" in this bill of lading as in *Halm Industries* v. *Timur*

105. See above, 3.14.

106. [1995] AMC 2333 (SD Ga 1995).

107. The meaning of "delivery" may also be relevant where the court is concerned to interpret this word when used in the context of a contractual application of COGSA *Starrag-Heckert Inc* v. *Maersk Inc* [2007] AMC 1217 (9th Cir. 2006).

108. For the court, although the Harter Act, at its core a maritime law, in an intermodal contract does not reach much beyond its intended bounds it does reach to the point goods are loaded into the vehicle of the inland trucker. As this was an intermodal contract the alternative of constructive delivery was not available, see *Colgate Palmolive Co* v. *M/V Atlantic Conveyor* [1997] AMC 1478 (SDNY 1996) especially at 1484–5. In *Mannesman Demag Corp* v. *M/V Concert Express* [2000] AMC 2935 (5th Cir.) delivery had occurred, for this purpose, on handing over to the inland carrier (contrast *Philips-Van Heusen Corp* v. *Mitsui O.S.K. Lines Ltd* [2003] AMC 2471 (MD Pa 2002)). *Cf M.C. Machinery Systems Inc* v. *Maher Terminals Inc* [2001] AMC 927 (NJ Sup Ct 2000) where, according to the court majority, Harter Act delivery of a plastic injection machine had not occurred six days after discharge where it was damaged while being removed from a MAFI storage area of the defendant's marine terminal. Stripping of the cargo from the terminal operator's MAFI must take place before "proper delivery". There was no prospect of Harter Act applying where the goods were stolen whilst they were in the custody of a railway during the final stage of an intermodal transit, *Sony Computer Entertainment Inc* v. *Nippon Express USA (Illinois) Inc* [2004] AMC 1126 (SDNY).

109. This protection is relevant to claims by the cargo interest. A performing operator will not necessarily be able to rely on the terms of the through bill of lading where the claim is made by the carrier which contracted with it as in, e.g. *Levi Strauss & Co* v. *Sea-Land Service Inc* [2003] AMC 1447 (SDNY), where the only contract between a motor carrier and the claimant ocean carrier was an intermodal interchange agreement which did not incorporate the motor carrier's tariff.

110. Apart from where a direct contract is made with the performer who may e.g. be an on-carrier under a forwarder or joint type of through bill.

111. See *Singer Co (UK) Ltd* v. *Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164, and *The Pioneer Container* [1994] 2 All ER 250. In some jurisdictions the legal recognition afforded to an operator's standard terms and conditions may enable the operator to rely on them even when sued in tort, see *Bombadier and Another* v. *Canadian Pacific Ltd* (App Ct Ontario, 1991) LMLN 329, (1992) 27 ETL 491. A performing carrier unable to rely on his or the contracting carrier's conditions may be faced with a strict liability in tort in some circumstances and not merely a liability in negligence, see *The Termagent* (1914) 19 Com Cas 239 (strict liability in respect of the unseaworthiness of a lighter).

Star.[112] Furthermore in *Tamrock USA Inc* v. *M. V. Maren Mærsk*[113] the authority of an NVOCC to subcontract led through to the ocean carrier subcontractor's combined transport bill of lading which provided the basis for reliance on a Himalaya clause in that bill of lading to protect an inland trucking company engaged by the ocean carrier. It would seem unlikely for a similar result to be achieved through the concept of a bailment on terms.[114]

A contrasting approach was taken by the Court of Appeals for the Eleventh Circuit in *James N. Kirby Pty Ltd* v. *Norfolk Southern Railway Co.*[115] Here, a FIATA Multimodal Transport Bill of Lading (FBL)[116] was issued by an Australian freight forwarder. This was held to have been issued by him as a principal and, in signing the ocean carrier subcontractor's bill of lading as shipper, did not do so as an agent. In consequence the defendant railway, to which the final stage of the transport had been entrusted by the ocean carrier, could not take advantage of the Himalaya clause in the ocean carrier's bill of lading. However, this decision was reversed by the Supreme Court,[117] which held that it is not necessary to apply general agency law to bind the cargo owner to the ocean carrier's bill. The necessary agency is simply for this single limited purpose since it should be possible for carriers to assume unless the contrary appears that the intermediary has the right to agree the limitation.[118] 3.22

112. [1985] AMC 391 (SDNY). See: *All Pacific Trading* v. *Hanjin Container Line* [1994] AMC 365 (9th Cir. 1993), *Orion Insurance Co* v. *M/V Humacao* [1994] AMC 1922 (SDNY 1994); *Indemnity Insurance Co of North America* v. *Schneider Freight USA Inc* [2001] AMC 2153 (CD Cal, based alternatively on the authority of the NVOCC and the definition of merchant clause in the shipowner's bill of lading); *Kukje Hwajae Insurance Co Ltd* v. *M/V Hyundai Liberty* [2002] AMC 1598 (9th Cir.); *Cigna Insurance Asia Pacific* v. *Expeditors International of Washington* [2002] AMC 1085 (CD Cal 2001); *Jockey International Inc* v. *M/V Leverkusen Express* [2002] AM 2377 (SDNY); *Glyphics Media Inc* v. *M/V Conti Singapore* [2003] AMC 667 (SDNY); *Hartford Fire Insurance Co* v. *Novocargo USA* [2003] AMC 851 (SDNY); *Bronislaw Tarnawski* v. *Schenker Inc* [2003] AMC 2230 (WD Wash (Tacoma)); *Barbara Lloyd Designs Inc* v. *Mitsui O.S.K. Lines Ltd* [2003] AMC 2608 (D Nth Dakota, South Central Judicial District (County of Burleigh). Compare *Resources Recovery Inc* v. *China Ocean Shipping (Group) Co* [1999] AMC 780 (1998, SDNY) where the consignee could not recover against the actual carrier because of the failure to provide information to the actual carrier by the NVOCC. Contrast *Mediterranean Shipping Co SA Geneva* v. *Royale Gulf Shipping Co Inc* [2002] AMC 2562 (SD Texas (Houston Division) 2001).

113. [1996] AMC 676 (SDNY).

114. Since the sub-subcontractor is relying on the subcontractor's terms rather than his own. Further there would be no contract between the customer and the subcontractor on which to base the right of the sub-subcontract or via the Contracts (Rights of Third Parties Act) 1999, and the absence of such a contract would make it difficult to construe any offer being made through the subcontractor's contract to the sub-subcontractor under the traditional analysis applicable to Himalaya clauses.

115. [2002] AMC 2113 (11th Cir.), followed in *Mitsui Marine & Fire Insurance Co Ltd* v. *Hanjin Shipping Co Ltd* [2004] AMC 577 (Georgia, State Ct of Chatham County).

116. See 3.43.

117. *Sub nom Norfolk Southern Railway Co* v. *James N. Kirby Pty Ltd*, 543 US 14, [2004] AMC 2705.

118. See also in respect of a forum selection clause: *A.P. Moller Maersk* v. *Ocean Express Miami* [2008] AMC 1236 (SDNY). See further *Werner Enterprises Inc* v. *Westwind Maritime International Inc* 554 F.3d 1319 (11th Cir. 2009), where (the court applying *Kirby*) a failure to negotiate a liability limitation throughout the chain did not prevent the performing carrier from relying on the limitation clause agreed in its contract.

3.23 A similar conclusion to the more usual position in the US was reached in New South Wales in *The Cape Comorin*.[119] In England, the decision of the Court of Appeal in *Cho Yang Shipping Co Ltd* v. *Coral (UK) Ltd*[120] suggests that the forwarder might well be found to have taken a dual position as principal and agent where the forwarder's customer is named as shipper on the ocean carrier's bill of lading. This was in respect of an issue regarding the payment of freight and does not directly assist in determining whether a dual capacity in this particular context is likely to be accepted in English law.[121] Returning to the US position the fact of agency does not defeat a claim for indemnity by the forwarder against the carrier.[122] The forwarder does not have, however, the correlative right to rely on the clause as against his customer[123] and must ensure that his own bill is clear in respect of the protection under the COGSA paramount clause.[124] The US position is further complicated by the fact that a court may consider that the shipowner is not to be rendered liable under a bill of lading not expressly or impliedly authorised by him.[125]

3B.7 ISSUES OF SEGMENTED RESPONSIBILITY

3.24 It has been noted above that through bills of lading commonly involve a segmented responsibility split between the various carriers. For example, clause 6 of Conlinebill makes this clear whether or not transhipment is prearranged or occurs by reason of the exercise of the liberty granted by it. The existence of a segmented liability presents special difficulties which form a large part of the reason for the development of combined transport bills. This has come partly as a response from customers and cargo insurers. Nevertheless, through bills based on a segmented responsibility have continued in use notwithstanding the development of combined transport bills. Historically this was in part due to regulatory factors in some trades which is lessening in importance today.[126] More influential perhaps is the fact that a total transportation service with through responsibility involves a degree of control

119. (1991) 24 NSWLR 745, see S. Hetherington [1992] LMCLQ 32. This contrasts with the position taken in New Zealand in *Emery Air Freight Corp* v. *Nerine Nurseries Ltd* [1997] 3 NZLR 723 in the context of carriage by air.

120. [1997] 2 Lloyd's Rep 641.

121. Contrast *Freight Systems Ltd* v. *Korea Shipping Corp (The Korea Wonis-Sun)* (Hong Kong, 1990), LMLN 290.

122. *Insurance Co of N. America* v. *Ocean Lynx* [1991] AMC 64 (11th Cir. 1990). The indemnity is not limited by the COGSA package limitation, *Blue Anchor Line* v. *Yangming Marine Transport Corp* [1994] AMC 1758 (USCA, 3d Cir. 1994).

123. See *Mediterranean Marine* v. *Clarke* [1980] AMC 1732.

124. See *Atlantic Mutual* v. *President Tyler* [1991] AMC 452 (SDNY 1990), and *Gross Machinery Group* v. *M/V Alligator Independence* [1994] AMC 732 (SDNY 1992), *Project Hope* v. *M/V IBN Sina* [2000] AMC 1287 (SDNY).

125. See *I.N.A.* v. *American Argosy* [1984] AMC 1547 (2d Cir.), *Ultimo Cabinet Corp* v. *Mason Lykes* [1991] AMC 1343 (SDNY 1991). Compare *Cavcar Co* v. *Suzdal* [1984] AMC 609 (3d Cir.), *Halm Industries*, above, and where the ship is unseaworthy, *All Pacific Trading* v. *Hanjin Lines* [1991] AMC 2860 (CD Cal 1991). Compare further where the court accepts the liability of the shipowner in bailment, *Tokio Marine Management Inc* v. *M/V Zim Tokyo* [1995] AMC 2263 (SDNY 1995).

126. E.g. the regulatory regime in the US noted above at 3.7.

and risk which a carrier may not feel prepared to accept whilst still being prepared to accept traffic for the destination. A container operator unable to secure stable and cost effective arrangements with terminals or subcontract hauliers etc, may prefer to push the risks of increasing costs or difficulties in the chain onto his customer and so be prepared to issue only a through bill rather than accept an overall responsibility. This will be especially true in those few remaining sectors where container trade has not been fully developed.

3.25 The adoption of a segmented responsibility can pose issues distinct from those which arise in the context of a through or combined transport liability system. Clearly the central issue will be that of identifying the responsibilities of the principal or participating carriers. This can produce particular difficulties in the context of container carriage. The difficulty of proving where the loss or damage has taken place and the possibility of concealed damage are central in this context. *Prima facie* a claimant could be faced both with the task of proving that loss or damage occurred during carriage[127] and also the stage of transport during which loss or damage occurred. Some assistance can be derived from the presumptions that may be applied. In *Crawford and Law* v. *Allan Line*,[128] a case of rail-sea carriage, it was said that it was not for the plaintiff to localise the damage. Each succeeding carrier is bound by the statement of good order and condition issued by the first carrier and is obliged to notify the previous carrier of any loss or damage or otherwise give proof that the damage was done outside their possession or is covered by an excepted peril.[129] This was said in the context of a joint service bill of lading. The position in respect of a forwarding arrangement may not be so favourable to the shipper as against the on-carrier where the focus might well be on his own documentation rather than that issued by the original carrier.[130]

3.26 The fact that an on-carrier may be bound to some degree, whether by the statements in the documentation issued by the first carrier, or in his own has led to what has been termed the "last carrier" rule. This results in responsibility being pushed down the line of carriers by a failure to indicate loss or damage. This was applied in the US in *R. Badenhop Corp* v. *N/V Koninklijke*.[131] This case was based on the cargo receipt issued by the on-carrier plus that carrier's power to control loading.[132] Furthermore, in this case, the inability of the shipper to protect himself at the point of transhipment was emphasised.[133] So far the "rule"[134] has tended to

127. See 4G.3.5.
128. [1912] AC 130.
129. Lord Shaw at p. 146.
130. *Cf* the US cases considered below.
131. [1960] AMC 2114, 2116 (SDNY 1960), Tetley, p. 2269.
132. See further *Madow* v. *S.S. Liberty Exporter* [1978] AMC 425 (2d Cir. 1978).
133. See also *Societe Metallurgica Italiana* v. *Grace Line Inc* [1957] AMC 1371 (NY Sup Ct 1957). Compare the New Zealand decision of *Neill & Co Ltd* v. *The Shaw Saville & Albion Co Ltd* (1890) 8 NZLR 331 (SCNZ), Gaskell *et al.*, para. 9.35.
134. Which is not applicable in the absence of a through bill of lading, *AIG Europe SA* v. *M/V MSC Lauren* [1997] AMC 341 (ED Va 1996).

operate as a presumption.[135] The estoppel rule at common law or under the Hague-Visby Rules is, in theory, applicable to a transferred bill and was used in an US case against the holder of a through bill of lading in *Woodhouse, Drake and Carey* v. *M.V. Righteous*,[136] where the holder of the bill was held bound by the statements in the through bill indicating damage and shortages and thereby unable to produce contrary evidence. On principle, the estoppel rule relates solely to the condition of the goods at the commencement of carriage, so that no estoppel should operate in respect of the receipt of the goods by the on-carriers.[137] The position may be different if an ocean bill of lading is issued and incorporated into the through bill.

3.27 An illustration of the operation of the presumption is provided by the Canadian case of *Lufty Ltd* v. *Canadian Pacific Railway Co* (*The Alex*).[138] Here a through bill was issued for carriage of goods loaded into a container from London to Montreal by sea and rail. On delivery by the rail carrier the goods (knitted nylon) were found to be water damaged and an inspection of the container revealed that it had holes in the roof. The rail carrier had issued a clean receipt to the sea carrier. Testing of the water in the container revealed that it had a salt content but the court accepted the evidence that the quantity of salt was consistent with the theory that rain water during the rail stage had washed in salt deposits accumulated on the roof of the container. Since the container had been stowed under deck the assumption was that the deposits had accumulated on previous voyages. The court was guided to its conclusion by the presumption, since the conflict of expert testimony revealed in the case was decided against the rail carrier. In these and other cases the presumption is largely derived from the external condition of the container. Its defective condition on arrival was such that the court took the view that this could have been seen at the point of interchange so that the absence of comment led to an inference of damage during the final stage. In principle this should be a matter solely of proof derived from whatever examination has taken place and could be expected to reveal or based on what follows from the issue of a document which indicates a certain level of examination such as an interchange receipt.[139] There may be a specific rule requiring an examination attached to a particular model, for example in international carriage of goods by road where the CMR Convention applies.[140] More generally it may be regarded as part of the duty of care of a carrier to engage in an

135. Compare, however, *Madow*, above fn. 132. Note that it was rebutted in *Transatlantic Marine Claims Agency Inc* v. *M/V OOCL Inspiration* [1998] AMC 1327 (2d Cir.), *cf Canadian Forest Products Ltd* v. *B.C. Rail Ltd* [2003] AMC 1135 (Canada, Sup Ct of British Columbia). In *Phoenix Assurance Co of New York a/s/o Tommy Hilfiger USA Inc* v. *M/V Eagle Tide* [2001] AMC 1019 (SDNY 1999) and *Junior Gallery Ltd* v. *NOL* [1999] AMC 565 (SDNY 1998), the court rejected application of a wider state rule involving a rebuttable presumption where cargo has been entrusted to successive defendants in good order as being incompatible with the wider scheme laid down in COGSA.

136. [1984] AMC 479 (11th Cir.). *Cf Austracan* v. *Neptune Orient*, 612 F. Supp. 578, [1985] AMC 2952 (SDNY 1985).

137. Compare *Pioneer Land* [1957] AMC 50 (SDNY 1956) and *Carol Wright Sales Inc* v. *Yangming Marine Transport Co* [1987] AMC 1195 (NY Sup Ct App 1986) with *Madow*, above fn. 132.

138. [1974] 1 Lloyd's Rep 106.

139. As to the evidential value of a TIR see *Hartford Fire Ins.* v. *Savannah* [1991] AMC 1923 (SDNY 1991).

140. See Art. 8(1).

examination to an extent considered reasonable in the circumstances. In the US decision of *Mooney* v. *Farrell Lines*[141] the failure of the succeeding carrier to check the temperature reading of a refrigerated trailer was held to be negligence. The carrier was held bound by his signature on the trailer interchange receipt which, had he checked the trailer itself, would have put him on notice of a problem concerning the temperature of the goods.

3.28 Where the condition of the container reveals nothing on delivery a clean interchange receipt proves little. The usual presumptions will not thereby be applicable.[142] Nevertheless if the shipper is able to lead proof that the goods were in fact delivered to the carrier and in good condition and delivered in bad condition there must be an onus on the first carrier to lead proof that he was not responsible.[143] Alternatively the state of the outturn may be sufficiently indicative of the stage during which damage occurred.[144] It is not unknown for there to be provision in a through bill of a kind common in combined transport bills, which provides for a presumption in the case where the stage where loss or damage occurred cannot be established that the loss or damage occurred either during the ocean carriage or during the custody of the issuing carrier. Naturally this can be applied only once it has been established that the loss occurred whilst the goods were in the possession of the participating carriers.[145]

3.29 The decision in *The Alex* illustrates the fact that only after such evidence as existed was revealed in the case was the presumption able to be given its full weight. Had the evidence more firmly favoured the rail carrier the claimant would have been driven to action against the sea carrier, possibly in a different jurisdiction, and probably out of time. It was revealed in the case that the sea carrier had granted extensions of time to the claimant. Since they were not made on behalf of the rail carrier they did not bind him, which could have prejudiced the plaintiff had it not been for the fact that the court was able to apply the local law time limit. The claimant must choose carefully, therefore, with whom to treat and whom to pursue, facing the possibility of costs and expense in treating with all and pursuing all perhaps in a variety of jurisdictions.

3.30 Where a forwarder-type through bill is involved the claimant may be able to rely on agency principles to some extent. If agency is express or implied there may be a duty on the agent to preserve the interests of his customer in respect of potential

141. [1980] AMC 505 (2d Cir.).

142. Unless the court is determined to protect the shipper, *cf Madow* v. *S.S. Liberty Exporter* [1978] AMC 425 (2d Cir. 1978). The presumption does not assist the shipper seeking to sue an intermediate ocean carrier where inspection by the on-carrier revealed no breach of the container which must have occurred to account for the loss as in *American Home Assurance Co* v. *Dampskibsselskabet AF* 1912 [2003] AMC 216 (SD Fla (Miami Div)).

143. *Cf Carol Wright Sales Inc* v. *Yangming Marine Transport Corp* [1987] AMC 1195 (NY Sup Ct App 1986).

144. See *Matsushita Electric Corp* v. *S.S. Aegis Spirit* [1976] AMC 779 (WD Wash 1976), [1977] 1 Lloyd's Rep 93, *Caemint Food Inc* v. *Lloyd Brasileiro Companhia de Navegacao* [1981] AMC 1801 (2d Cir. 1981), *Goya Foods Inc* v. *S.S. Italia* [1987] AMC 817 (2d Cir. 1983), *M. Prusman* v. *M.V. Nathanel* [1988] AMC 297 (SDNY 1987).

145. See *Phoenix Assurance Co of New York a/s/o Tommy Hilfiger USA Inc* v. *M/V Eagle Tide* [2001] AMC 1019 (SDNY 1999).

claims. In *Marbrook Freight* v. *K.M.I. (London) Ltd*[146] a forwarder was held liable for failure to make a written claim on behalf of his customer under the terms of an air waybill under which the goods had been consigned.[147] There will be limits to this. A forwarding carrier could not be expected to pursue claims to action unless he had agreed to this. In some through bills, however, especially where a joint service is involved, provision may be made in respect of the handling of claims. It is not unknown, particularly in US trades, for the issuing carrier to agree to process claims to conclusion.[148]

3.31 *The Alex*[149] also illustrates the difficulty of aligning the appropriate term in the through bill to the appropriate stage of the transit. This can arise also in respect of combined transport bills but is exacerbated in through bills by the fact that the court will be dealing with a carrier with whom the plaintiff has not directly contracted. In *The Alex*, the railway sought to rely on the demise clause in the bill of lading which the court held governed only the sea stage. This contrasts with the use[150] of a demise clause in a combined transport bill which, where effective, might well be considered to cover the whole carriage.[151] Since the issuer of the bill will likely be a charterer who provides or arranges terminal and land carriage operations, the effect of the clause might well be to constitute the charterer as a subcontractor in respect of the non-sea stages.[152] In *The Alex*, at least specific terms relevant to the railway were set out in the bill. Often the court is faced with terms in the bill meant to cover all carriers alongside an incorporation by reference of the terms of participating carriers.[153] This may produce a circularity of terms whereby there is a reference back to the terms in the through bill as in *Quebec Liquor Corp* v. *The*

146. [1979] 2 Lloyd's Rep 341.

147. See also in respect of a through bill, *A.E. Pellett & Co Inc* v. *The M.V. Ouirgane* [1986] AMC 2749 (SDNY 1986).

148. See also *Cordis Dow Corp* v. *S.S. President Kennedy* [1985] AMC 2756 (ND Cal 1984).

149. Above fn. 138.

150. Which is not unknown, see *C.N. Marine Inc* v. *Carling O'Keefe Breweries of Canada*, LMLN 271.

151. Note that in a typical slot charterparty, since the intention will be for the charterer to take direct contractual responsibility, it will be provided that the charterer's bill of lading will not contain a demise clause, see "Slothire" cl. 13(a)(i); *cf*, however, *Coli Shipping (UK) Ltd* v. *Andrea Merzario Ltd* [2002] 1 Lloyd's Rep 608.

152. See, however, *M.B. Pyramid Sound N.V.* v. *Briese Schiffahrts GmbH & Co (The Ines)* [1995] 2 Lloyd's Rep 144, where Clarke J considered that a contract of carriage was made initially with the charterers on delivery of the goods to them through their agent, but that on issue of the bill of lading it was contemplated that the parties to the contract of carriage should be or become the plaintiff and the carriers under the bill who were the shipowners. The bill was an owner's bill in light, *inter alia*, of the demise clause. There was here no sub-bailment from the charterers to the owners, but rather a bailment to the charterers which came to an end when the goods were delivered to the owners. Here, however, the contract was essentially one for carriage by sea from Rotterdam to St. Petersburg, the bill of lading, although a received for shipment bill, was originally intended to be a shipped bill. The bill excluded pre-loading and post-discharge liability. It is not clear whether any carriage documentation was issued by the charterers. It is interesting to note that the demise clause was headed "Responsibility when Joint Service". The view that this was intended to deal with a different type of situation was rejected. For the judge joint service in this case meant no more than a service where a line is using one or more chartered vessels to provide its liner services. One might speculate as to what was the suggested alternative, but it is interesting to compare the kind of joint operational service that was before the same judge in *The Hamburg Star* [1994] 1 Lloyd's Rep 399.

153. Note also the kind of definitional problem which arose in *Transatlantic Marine Claims Agency Inc* v. *M/V OOCL Inspiration* [1998] AMC 1327 (2d Cir.), see above, 3.7.

Owners and Charterers of the vessel Dart Europe.[154] In this case the reference back to the through bill of lading had the effect of introducing the Hague Rules into consideration of the precise effect of the reference since there was also a paramount clause which applied the Hague Rules beyond the periods within Article II. Consequently Article III, rule 8, became relevant to restrict the application of the term limiting liability in the bill.[155] In *Dopplemayr Lifts Ltd* v. *Hapag-Lloyd Aktiengesellschaft*[156] the bill of lading issued by the ocean carrier gave an undertaking to procure inland transportation subject to the inland-carriers' contracts of carriage and tariffs and also guaranteed fulfilment of the inland-carriers' obligations. The rail carriers' contract provided for application of the lesser of differing limitations amounts, one of which being an amount equal to the liability of the steamship company and another being the value of the goods. The judge considered the double reference to be a reference in perpetuity and repugnant in law. The solution had to be sought in the bill of lading. Given that the bill of lading was house to house and another clause applied the Hague Rules where it cannot be determined in whose custody the goods were when lost or damaged the Rules had by extension been incorporated and covered the whole transport and the Hague Rules limit applied to cover the liability of both ocean carrier and the rail carrier.[157] On the other hand in *Phoenix Assurance Co of New York a/s/o Tommy Hilfiger USA Inc* v. *M/V Eagle Tide*,[158] although a bill of lading extended COGSA to the entire time the carrier was responsible for the goods, a further clause requiring a claim against a joint service carrier to be subject to the claims, filing, notice and time for suit requirements in the connecting carrier's terms and conditions, was held to be applicable to a claim against the connecting carrier. To the extent that COGSA governed the period after the containers were discharged from the ship, it did so only as a contract term and could be superseded by a specific term in the bill of lading.

3.32 Where there is an inconsistency between the terms in the through bill and other incorporated terms, the court has the task of reconciling them or deciding which to reject.[159] Where the issuing carrier engages liability as a forwarder, there may be a restriction on his ability to bind the shipper to terms inconsistent with those contained in the through bill. In the US decision of *The Cayo Mambi*,[160] the issuing carrier was held liable as a forwarder when the on-carrier's bill of lading contained a lower limit than that contained in the through bill, notwithstanding that the through bill was stated to be "subject to the terms and conditions of the local bill of lading". Consequently it is common to find the additional words in a through bill stating that the through bill is subject to the on-carrier's regular form of bill of lading

154. [1979] AMC 2382, [1980] ETL 145, see Harrington, p. 25.
155. *Cf Allied Chemical International Corp* v. *Lloyd Brasileiro* [1986] AMC 826 (2d Cir. 1985).
156. [1982] 2 CF 772.
157. The argument that the effect of the reference over to the ocean carrier's liability was merely to apply the unlimited liability of a land carrier was rejected as this would render the reference to the alternative limit based on full value redundant.
158. [2001] AMC 1019 (SDNY 1999).
159. See e.g. *E. Clemens Horst* v. *Norfolk and North American S.S. Co* (1906) 11 Com Cas 141 and *The Hibernian* [1907] P. 277.
160. [1933] AMC 1555 (2d Cir. 1933).

even though it may be less favourable to the shipper or consignee and may contain more stringent requirements as to notice of claim etc. Similar difficulties can arise in relation to through liability contracts where there is a conflict between the general terms and those of participating operators incorporated by reference.[161]

3.33 The use of an agency arrangement can mean that the goods owner may find himself bound by arrangements made by the carrier, provided that they are within his express, usual or apparent authority.[162] The authority of the pre-carrier[163] may well be sufficient to bind the customer to the on-carrier's terms where the on-carrier is considered to have taken sufficient steps to bring them to the attention of the pre-carrier as in e.g. *Promech Sorting Systems B.V.* v. *Bronco Rentals & Leasing Ltd.*[164] A similar question of authority arises even where no privity of contract is established between the goods owner and the on-carrier but where the on-carrier seeks to rely on his own trading conditions under a bailment on terms.[165] The goods owner may also be bound by the fact that so far as the on-carrier is concerned the previous carrier will take on the position of shipper and so bind the goods owner in the sense that the on-carrier may be able to rely on an exception from liability.[166] The forwarding carrier has a duty of reasonable diligence, however, in respect of the on-transit.[167] As indicated in the US decision of *A.E. Pellet & Co Inc* v. *The M.V. Ouirgane*[168] this may include a duty to notify the shipper of any damage noted at transhipment so that the shipper is not foreclosed in his remedy against the on-carrier. Furthermore, it may be possible to infer from the agreement that the goods are to be protected in a certain way throughout the transit so as to displace the exclusion of liability post-discharge from the ship.[169]

161. See *Amdahl Corp* v. *Profit Freight Systems Inc* [1995] AMC 2694 (9th Cir. 1995). *Cf*, *Commercial Union Insurance Co* v. *M.V. Bremen Express* [1999] AMC 2002.

162. *Cf The Idefjord* [1940] AMC 1280 (2d Cir. 1940) where the through carrier was held to have no apparent authority to arrange on-deck stowage with the on-carrier. Compare further where a freight forwarder was involved, *Morrow Crane* v. *Affiliated F.M. Ins.* [1990] AMC 601 D Ore 1987). Note that *The Idefjord* was used to justify the view expressed in *Madow* v. *S.S. Liberty Exporter* [1978] AMC 425 (2d Cir. 1978) at p. 430 that the on-carrier is subject to the liability imposed under the through bill since its acceptance of the cargo with knowledge of the clean through bill made the issuer of those bills its agent (*cf* also *Marine Office of America Corp* v. *N.Y.K. Line* [1987] AMC 652 (ND Ill 1985), *cf* further *Burns Philip & Co Ltd* v. *The West Australian Steam Navigation Co Ltd* (1923) 33 CLR 135 (High Ct Australia), see Gaskell, *et al.*, para. 9.35. This contrasts with the view taken of the position of the NVOCC as agent of his customer drawing the customer into the actual carrier's bill of lading via the definitions clause, see above, 3.21.

163. As with a forwarding agent, see 2.133. An express liberty in a forwarding contract bound the customer to the carrier's limitation in *ABN AMRO Verzekeringen BV* v. *Geologistics Americas Inc* [2003] AMC 834 (SDNY). There was no difference between the limit imposed by the forwarder and that of the carrier, *cf The Cayo Mambi*, above fn. 160.

164. (1995) 123 DLR (4th) 111 (Manitoba CA). *Cf HSBC Insurance Ltd* v. *Scanwell Container Line Ltd* [2002] AMC 411 (CD Cal 2001).

165. On the principles confirmed in *The Pioneer Container* [1994] 2 AC 324.

166. See *Mooney* v. *Farrell Lines* [1980] AMC 505 (2d Cir.). *Cf Crawford & Law* v. *Allan Line S.S. Co* [1912] AC 130 in respect of joint service bills.

167. See *Cliffe* v. *Hull & Netherlands S.S. Co Ltd* (1921) 6 Ll L Rep 136,

168. [1986] AMC 2749 (SDNY 1986).

169. See *Captain* v. *Far Eastern* [1979] 1 Lloyd's Rep 595 (Sup Ct BC). See also 2.59.

3B.8 THROUGH BILLS OF LADING AND THE HAGUE RULES

3.34 The application of the Hague Rules to sections of a through transit governed by a through or transhipment bill of lading has also been raised in a number of cases.[170] A particular issue faced by the courts has arisen once a transhipment or discharge from the original ship has taken place and the carrier seeks to rely on the exclusion of liability for damage occurring thereafter as in clause 6 of Conlinebill. Once the Hague or Hague-Visby Rules have attached to the original period of carriage the issue arises whether Article III, rule 8, of the Rules applies to negate the exclusion. The more fundamental question as to whether the Hague Rules can apply at all to through bills of lading and other types of through transit documents will be examined below. At this point it will be assumed that the first stage of the actual transport performed was by sea and under cover of a shipped bill of lading and that a later stage of transport occurred whether by sea or by another mode. At this stage the concern is with the liability of the first contracting carrier who issues the bill of lading.

3.35 In this context therefore a liberty to tranship will be required to prevent transhipment from amounting to a deviation.[171] Its exercise will not, in itself be a breach of the Rules[172] although it may have to be exercised reasonably to prevent it being an unreasonable deviation.[173] In the Canadian decision of *Z.I. Pompey* v. *ECU-Line N.V., M/V Conmar Fortune*,[174] a wide liberty to deviate was held not to excuse an unreasonable transhipment from sea to rail transport where the blank on the face of the bill of lading, which might have been used to indicate a place of delivery by any onward carrier was left open. This was therefore a confirmation of carriage by sea for the whole transit.

Under US case law in application of COGSA 1936, it seems that the original carrier will remain liable even after transhipment unless either the bill of lading indicates that there will be a transhipment or that is the understanding of the parties, on proof that the shipper or his agent knew that there would be a transhipment.[175] In the absence of such indication or knowledge the carrier is in breach of Article III, rule 8, of COGSA if he seeks to limit his liability for loss or damage occurring after the transhipment. Conversely, where transhipment is anticipated, there seems to be no difficulty with an exclusion of liability outside the

170. And provides a useful comparison with respect to the application of mandatory liability regimes to combined transport documents, see 3C.6.3.

171. The liberty being strictly construed, see *Cunard S.S. Co* v. *Buerger* [1927] AC 1, see also *SNC S.L.B.* v. *M/V Newark Bay* [1996] AMC 1764 (SDNY), reversed on different grounds [1997] AMC 1952 (2d Cir.), in respect of transhipment to a feeder vessel outside the contemplated route.

172. *Marcelino Gonzales* v. *Nourse* [1936] 1 KB 565.

173. *Cf Transocean Machine Co* v. *Orange Line and the Prins Willem IV* [1958] Ex. C.R. 227, see Tetley, p. 2282.

174. [2000] AMC 145 (Canada Fed Ct (Trial Div)) 1999 (see also (2000) 35 ETL 516) affirmed [2000] AMC 851.

175. *US* v. *Farrell Lines* [1982] AMC 1904 (D Md 1980), *El-Khateib* v. *Eurofreighter* [1980] AMC 893 (SDNY 1979), *cf Outboard Marine Int.* v. *S.S. American Lancer* [1976] AMC 1839 (SDNY 1976). *Cf* also *Captain* v. *Far Eastern* [1979] 1 Lloyd's Rep 595 (Sup Ct BC), distinguished in *Mayhew Foods Ltd* v. *O.C.L.* [1984] 1 Lloyd's Rep 317, see below, 3.87.

period of the carrier's custody.[176] This position can be compared with the provisions in the Hamburg Rules, Articles 10 and 11. Article 10 retains the liability of a contracting carrier by sea when the carriage is performed by an actual carrier. To negate the extended responsibility the contracting carrier needs to ensure that Article 11 is complied with. This requires an explicit provision that a specified portion of the carriage is to be performed by a named person other than the carrier before the original carrier can exclude liability. No equivalent provision to Article 11 appears in the Rotterdam Rules and the exact position will be a matter of interpretation particularly of the application of Article 12 governing the period of responsibility. Whilst the parties can agree the time and location of receipt and delivery of the goods a contractual provision is void if it provides that the time of delivery is prior to the completion of their final unloading under the contract of carriage. A strict interpretation of this might well treat the final unloading under the contract as referring to the last carrier unless the contract is explicit that the point of final unloading is at a point earlier than the actual final destination of the goods.

3.36 An approach which requires a specific indication of the point of transhipment to a different carrier, in effect, disallows the normal operation of a transhipment clause and gives effect only to a through bill type of arrangement. Logic may well dictate that it should also apply even after transhipment to a different means of transport since the exercise of the liberty might be seen as an evasion of the Rules. Alternatively it may be queried whether liability under the Hague Rules can apply once the goods have been discharged from a ship at least where Article VII can be invoked.[177] Even in respect of the Hamburg Rules it may be arguable that the protection to the shipper given in it only extends whilst successive periods of sea carriage are involved since by Article 1(6) the "contract of carriage by sea" relates to a contract to carry from one port to another. This argument is not available under the Rotterdam Rules since it applies to other modes of carriage as well, as long as there has been some carriage by sea. The possibility that a transhipment clause which excludes liability post transhipment may be effective under the Hague Rules is also supported by the view that the mandatory rules only apply to the service which the carrier has agreed to perform[178] so that if, in the exercise of a liberty, the carrier has in fact ceased to carry the goods himself he is no longer bound by the Hague Rules. That is because they are construed as not governing the extent of the carriage that the shipowner in fact undertakes. In *Renton* v. *Palmyra Trading*[179] a clause providing for discharge at a port other than the original discharge port named in the bill of lading and terminating the carrier's liability at that point was held to be valid under the Hague Rules. The clause was treated as defining the scope of the contract of carriage rather than as an exclusion of the carrier's liability. An important feature of the case, however, was that the clause gave the option to

176. See *The Pioneer Land* [1957] AMC 50 (SDNY 1956).

177. *Cf* Clarke [1989] LMCLQ 394 and *The Zhi Jiang Kou* [1991] 1 Lloyd's Rep 493, contrast the view of Kirby P in this case with *Kamil Export (Aust.) Pty Ltd* v. *N.P.L. (Australia) Pty Ltd* [1996] 1 VR 538.

178. *Pyrene Co Ltd* v. *Scindia Navigation Co Ltd* [1954] 1 Lloyd's Rep 321.

179. [1957] AC 149.

discharge only in defined circumstances and was held not to be so wide as to frustrate the object of the contract.[180] Had it been held to frustrate the object of the contract, the liberty could have been ignored and the discharge dealt with, presumably, as an unreasonable deviation. The same logic would seem to apply to a liberty to tranship. Nevertheless a decision supportive of a stricter approach was taken by Bingham J in *Mayhew Foods Ltd* v. *O.C.L.*[181] in the context of a combined transport bill of lading so that the Rules continued to apply even during a period of intermediate storage of a container between two periods of sea carriage.[182] As noted earlier the liberal approach to a transhipment clause under *Renton* does not seem possible under the Hamburg Rules because of the requirements of Article 12 and may be doubtful under the Rotterdam Rules.

Further issues arising in respect of the application of the Hague Rules in the 3.37
context of transhipment can conveniently be dealt with here. In *The Anders Maersk*[183] the court dealt with what was referred to as a through bill of lading issued for carriage from the US to Shanghai. The goods were transhipped at Hong Kong and were lost in the course of the on-carriage. The bill of lading incorporated US COGSA which the court applied to govern the liability of the initial carrier rather than, as the plaintiffs claimed, the Hague-Visby Rules which applied to shipments from Hong Kong. The court held that the absence of any reference to Hong Kong in the bill of lading meant that there could be no shipment from Hong Kong and the Rules applied to shipment and not transhipment. This contrasts with *Stafford Allen & Sons Ltd* v. *Pacific S.N. Co*,[184] where a through bill issued for carriage from Nicaragua to London specifically provided for the goods to be forwarded by the issuing carrier at Cristobal (held to be a US port) and for the on-carriage to be governed by the on-carrier's regular bill of lading. The court applied the paramount clause incorporating US COGSA in the on-carrier's bill of lading to govern the on-carrier's liability, notwithstanding the fact that this carrier did not issue a bill of lading. The argument that the paramount clause applying COGSA to shipments from a US port did not apply to transhipments was rejected. In *The Rafaela S*,[185] the Court of Appeal[186] saw the situation it was dealing with as closer to *Stafford Allen* than *The Anders Maersk*. Containers were shipped at Durban (South Africa) for carriage to Boston (USA) via Felixstowe in England where they were transhipped. The goods were damaged during the course of the second leg of the voyage. Felixstowe was indicated on the face of the bill of lading as the port of discharge and

180. See at p. 164 *per* Viscount Kilmuir LC.
181. [1984] 1 Lloyd's Rep 317.
182. Considered further at 3.87.
183. [1986] 1 Lloyd's Rep 483 (HK HC).
184. [1956] 1 Lloyd's Rep 104.
185. [2003] EWCA Civ 556, [2003] 2 Lloyd's Rep 113.
186. This aspect did not form part of the appeal to the House of Lords, [2005] UKHL 11, [2005] 2 AC 423, since it was agreed that the shipper could have required the issue of a bill of lading in the same form for the onward carriage and that it was no longer necessary to discuss the issues which are referred to in the text here.

Boston as the final destination (through transport). The bill of lading provided that such indications meant that it was a through bill. It was a forwarder type of through bill whereby the carrier arranged on-carriage as an agent. Although the on-carriage was performed in a ship belonging to the initial carrier it was held that it was performed on the basis of a separate contract of carriage. Although no bill of lading was issued for this stage, as a separate contract of carriage, the shipper was entitled to demand one so that this contract was "covered" by a bill of lading for the purpose of Article 1 of the Hague-Visby Rules. Consequently, since on this analysis Felixstowe was the port of shipment, the Hague-Visby Rules compulsorily applied rather than US COGSA which was indicated as applicable under the paramount clause in the through bill of lading. It was common ground that the contract for the on-carriage would have been in the form of a straight bill of lading[187] and the main issue in the case was whether a straight bill fell within the Hague-Visby Rules. It is not entirely clear, however, on what basis it was possible to say that the shipper was entitled to demand a bill of lading from Felixstowe. If this was by operation of the Rules themselves then this, it is submitted, involves a circular argument since the pre-condition to the application of the Rules is that the contract is covered by a bill. The contract must contemplate the issue or at least the right to demand a bill of lading before whatever rights are granted by the Rules are reached. In truth therefore the right to demand a bill of lading really stems from the contract made with the shipowner rather than the operation of the Rules as such.[188] Any right to demand a bill of lading from the on-carrier would have depended upon the contract made by the pre-carrier. Here the issue is confused by the fact that the carrier was the same for both stages of the contract. If they were to be different and the practice being followed is the same as that noted in *Plaimar Ltd* v. *Waters Trading Co Ltd,*[189] there may be no contemplation that a bill of lading would be issued at all in respect of the second stage at least for the purposes of controlling delivery. No doubt the bill of lading regularly adopted by the carrier for the on-carriage would form the basis of the terms of the contract and it, or a copy, would be made available should a claim need to be made. However, it is not the terms of the contract that are relevant but the issue of a bill which, according to another recent decision of the Court of Appeal, is the relevant factor.[190] Not only is this relevant to the Hague Rules but also goes to issues as to the role of the documents as vehicles for the transfer of rights. Whilst the pre-carrier contracts as agent with the on-carrier for whom does he act? Initially, at least, he acts for the shipper. Arguably the transfer of the through bill will successfully transfer contractual rights owed by the issuing pre-carrier and with it the duty to act as agent. Once the goods have been transferred to the on-carrier, however, such agency has been spent and it may be difficult to see how any further transfer can be effective to bind the on-carrier to a transferee of the

187. And on similar terms, see at first instance, [2002] 2 Lloyd's Rep 403 at p. 404.
188. See the explanation in *The European Enterprise* [1989] 2 Lloyd's Rep 185.
189. See above, fn. 29.
190. The *Happy Ranger* [2002] 2 Lloyd's Rep 357.

through bill.[191] For the moment it may be noted that normally it is the through bill that will be used to obtain delivery from the on-carrier. This may be a matter of practice but it is one engaged in by the pre-carrier as an agent and as a bailee who should ensure that the goods are on-carried on the basis that the goods are delivered only against the through bill,[192] especially as the through bill itself will contain the usual clause requiring presentation at delivery. Arguably this is sufficient to regard the on-carriage as being adequately "covered" by a bill of lading for the purposes of the Hague Rules if not for other purposes.[193] The problem does not arise under the Hamburg Rules or the Rotterdam Rules since there is no requirement for goods to be "covered" by a bill of lading. They can be applied in the normal way to the contract of carriage made with the on-carrier through the agency of the initial carrier.

Returning to the point as to how a transhipment is to be regarded it may be suggested that what is transhipment and not shipment from an initial carrier's viewpoint may well be shipment and not transhipment from the viewpoint of the on-carrier.[194] In *The Xingcheng*[195] the Privy Council overturned the decision of the Hong Kong Court of Appeal and applied Article III 6 bis of the Hague-Visby Rules[196] to an action for an indemnity by a shipowner who issued a through bill of lading for carriage from Shanghai to Melbourne. This bill provided for transhipment at Hong Kong. The court applied the indemnity against the on-carrier from Hong Kong since there was a contract of carriage subject to the Rules between the issuing carrier and the on-carrier, the application of Article 6 bis not being 3.38

191. This problem was noted by Carver in "Defects in the Bills of Lading Act, 1855" (1890) 6 LQR 289, at pp. 300–301. He considered a form of on-carrier's bill which referred to the through bill and acknowledged the right to delivery against the through bill if combined with the ocean bill (or on the basis of an indemnity if not). Carver saw difficulties in the way of applying the Bills of Lading Act 1855 to the on-carrier's bill since the through bill is the real bill for the purposes of the Act (since it is the document of title) but this does not incorporate the terms of the on-carriage bill which is the contract to be transferred. Arguably, the on-carrier is simply linking his contract on to the through bill which, through the agency contained within it, incorporates it by reference and provides a transferable obligation to deliver on the terms of the on-carriage bill. Carver's view that the through bill is the document of title may be doubted (on his analysis) once the goods are in the hands of the on-carrier but if the through bill is capable of carrying a transferable obligation to deliver on the part of the on-carrier this equally could assist an argument that it can be so regarded.

192. On analogy with *East West Corp* v. *DKBS 1912* [2003] EWCA Civ 83, [2003] 1 All ER (Comm) 525.

193. See further, Bateson, (1889) 5 LQR 424, and see, generally, 2C.4.4. *Cf* Lord Hobhouse in *The Starsin* [2003] UKHL 12, [2004] 1 AC 715 at [153].

194. In the Court of Appeal's judgment in *The Rafaela S*, *per* Rix LJ (see [28]–[29]) considered that had it been possible to regard the movement as involving one contract rather than two it may be that it would not have been so obviously decided that the port of shipment was Durban. The single contract would still have indicated Felixstowe as the port of discharge and as such this might yet be regarded as a port of shipment. The difficulty would be that different regimes might therefore apply to different parts of the transit, an unsatisfactory if not impossible possibility. He regarded this as ultimately a matter of interpretation but left undetermined in this case.

195. [1987] 2 Lloyd's Rep 210.

196. *Cf* Art. 20(5) of the Hamburg Rules and Art. 64 of the Rotterdam Rules. A possible issue is whether privity of contract is required to enable the initially contracting carrier to employ the extra time limit against another person made subject to such rules such as a maritime performing party under Art. 19 of the Rotterdam Rules.

dependent upon the rules governing the initial contract between the goods owner and the initial carrier.[197]

3C COMBINED TRANSPORT BILLS OF LADING

3C.1 INTRODUCTION

3.39 Combined transport bills of lading involve through, as opposed to segmented, responsibility on the part of the carrier issuing the bill. Both "first" and "second" generation bills are in use.[198] First generation bills provided an integrated liability ensuring that responsibility was accepted for terminal operations thus abandoning the "tackle to tackle" pattern, in particular, of standard through bills. These bills adopted a network pattern of liability so that the operator adopted the same liability as would have applied had the customer contracted separately with the performing carrier. This was intended to maintain the recourse position of the operator although other rules might be applied for particular parts of a movement e.g. CMR for the road movement.[199] In addition they might seek to manage in some way the possible application of international rules.[200] Finally these bills dealt with the problem of concealed damage. Although not such an acute problem as where there is segmented responsibility, it was still perceived as necessary to regulate this since a segmented liability was involved. Where a shipowner was the operator it was natural to presume that concealed damage had occurred on the sea leg and thus covered by the shipowner's own rules of liability. Equally where other types of operators began to develop through services it was natural for the presumption to operate in accordance with their mode.[201]

3.40 Second generation bills came about as a result of the TCM[202] Draft Convention 1970. As outlined in Chapter One, this developed out of work beginning in the 1930s by UNIDROIT and CMI which produced the Tokyo Rules of 1969. The two projects were amalgamated through a Round Table Conference in Rome in 1970 resulting in the TCM Draft Convention. Although the Convention was never formally adopted at a diplomatic conference, as will appear from the discussion, it has enjoyed a long-lasting commercial afterlife. The project was a drive to promote uniform rules which would reduce the proliferation of differing conditions and provide a recognisable minimum standard available for operators whose starting

197. *Cf* the position in the US regarding the application of COGSA as between carriers: see *Lyons-Magnus* v. *American-Hawaiian (The Exeter)*, 41 F. Supp. 575, [1941] AMC 1550 (SDNY 1941), Tetley, p. 934. See also *Ins. Co of N. America* v. *Ocean Lynx* [1991] AMC 64 (11th Cir.). *Cf* further *Patec* v. *Translink* (Singapore High Court, 3 December 2002), summarised by David Martin-Clark, www.onlinedmc.co.uk.

198. See 1.29 *et seq*.

199. See below, 3.69.

200. See the discussion at 1.29. See also the Hapag-Lloyd Bill of lading, discussed further at 3.69.

201. As in e.g. carriage by air where such a presumption is applied as a matter of law, see the Montreal Convention, Art. 18(4).

202. Transports Combinés des Marchandises.

point could be from different modal bases. This included freight forwarders who needed recognition of their combined transport documents once they had become involved in truly integrated combined transport services.

3.41 Much of the pressure to achieve these uniform rules came from banking and insurance interests keen to promote "bankable" documents[203] and reflected in the fact that the ICC through its Joint Committee on Containerisation[204] participated in the drafting of TCM. The banking interest requires security in carriage documents in making recovery for loss or damage to goods which depends on secure insurance. This in turn depends on carriage documents providing for integrated responsibility based on generally accepted and clear principles, leaving few loopholes for dispute, and limiting potential conflict with compulsory rules already applicable to particular carriage segments.

3.42 The essential features of TCM were:

(1) Recognition of the concept of a combined transport operator, so that the modal starting point of the particular operator or lack of it as in the case of a forwarder could cease to be the prime focus of the contract. The contract could then be seen as one for the performance or the procuring of performance of transport.
(2) Recognition of the choice between a negotiable and a non-negotiable transport document so as to overcome technical objections.[205]
(3) Adoption of a network system of liability so as to maintain minimum conflict with compulsory rules along with a minimum liability in the absence of compulsorily applicable rules so as to maintain the "bankability" of the document.
(4) Adoption of a rule to deal with concealed damage and "gaps" in the transport chain which would not be associated with any particular leg of the carriage and so could be uniform among different operators.

3.43 The pressure for uniform documentation led commercial bodies to take up TCM without waiting for its formal adoption. FIATA developed its Bill of Lading for forwarders (FBL) in 1970 and BIMCO its Combiconbill in 1971. Combiconbill had a particular role as the basis for the North Sea Standard Conditions of Carriage. Naturally, these documents were subject to revision, e.g. Combiconbill 1995 and NSSCC 1994.[206] BIMCO also provide a sea waybill form, the Combiconwaybill. In 1973 the ICC first published its Uniform Rules for a Combined Transport Document, Brochure No. 273, which were amended in 1975 and reissued as Brochure No. 298. The issue of the ICC Uniform Rules led BIMCO to issue an alternative to Combiconbill entitled Combidoc which was expressly stated to be subject to the ICC Uniform Rules. This has now been now replaced by Multidoc.[207] Subsequent FIATA FBLs, up to the amended version of 1987, also indicated that they were subject to these rules. In 1992 a new version of the FBL was introduced

203. See B.S. Wheble, "Combined Transport—A Banking View" (1975) 10 ETL 648.
204. Established in 1967.
205. See below, 3.55.
206. Later revisions of the NSSCC (2001) and the similar NSFCC (2011) are currently in operation but still adopt the original liability system.
207. See below, 3E.

and is issued subject to the UNCTAD/ICC Rules for multimodal transport documents.[208] Reference to the Uniform Rules was designed to encourage recognition of the documents by banks in documentary credit transactions. In the ICC's Uniform Customs and Practice for Documentary Credits 1983,[209] by Article 25(d), there was specific recognition of the FIATA FBL. This specific recognition has no longer been provided since UCP 500 (1993).[210]

3.44 Operators would state also that their documents were based on the Uniform Rules. However, the practice has developed in many trades to adopt liability conditions clearly based on the Rules although there may be variations at the level of detail as with for example, the DAMCO Bill of Lading. The Uniform Rules provide only a minimum set of conditions which must be worked into more general trading conditions and, in particular, the demands of some trades can require adjustment of them. It should be noted that the Uniform Customs do not explicitly require any particular set of liability conditions for a document to be acceptable under a credit. It can be said rather that the spread of the ICC Uniform Rules into commercial practice has promoted the recognition of present day combined transport documentation by banks. Thus the Uniform Customs and Practice for Documentary Credits (Brochure No. 400), in Articles 25 and 26, recognised the acceptability of wide-ranging forms of transport document and put the onus on the parties to the credit to specify a marine bill. Even where a marine bill was called for, it was possible for a combined transport document to satisfy such a credit. Under UCP 500 the newer terminology of multimodal transport was reflected in some of its provisions. By Article 26 it was possible to call for a multimodal transport document. By Article 30 a transport document issued by a freight forwarder could be accepted if issued by the forwarder as carrier or multimodal transport operator. Presumably there was nothing in a name and documents using the older combined transport terminology should still have been recognised. Certainly they are capable of satisfying the provisions where the credit calls for a marine or ocean bill of lading so long as the ports of loading and discharge stipulated in the credit are indicated as was provided for in Article 23. The trends noticeable in UCP 500 have developed further, in the latest version, UCP 600 (2007). Article 19 now refers to a transport document covering at least two different modes of transport (multimodal or combined transport document), thus catering for the variety of documents in use. The special reference to forwarders has been removed. Such documents issued by forwarders can be recognised where they sign as carriers or as a named agent for a carrier. The more traditional bill of lading can be called for under Article 20 but it must indicate shipment on-board and indicate shipment from the port of loading to the port of discharge stated in the credit. As under Article 19, it must indicate the name of the carrier and be signed by the carrier or a named agent on behalf of the

208. See below, 3.123 *et seq*. From February 1999 a non-negotiable FIATA Multimodal Transport Waybill (FWB) became available.

209. Brochure No. 400.

210. For the Uniform Customs and Practice for Documentary Credits see generally, P. Todd, *Bills of Lading and Bankers' Documentary Credits* (4th edn, 2007), R. Jack, A. Malik & D. Quest, *Documentary Credits* (4th revised edn, 2009).

carrier. In addition it can be signed by the master. Other carriage documents are recognised in Articles 21–24.

3.45 Since the adoption of the Uniform Rules for a Combined Transport Document, there has been the later development of the ICC/UNCTAD Rules for Multimodal Transport Documents.[211] The earlier Uniform Rules remain important since they still form the basis of much current transport documentation and may continue to do so for some time. For this reason the Uniform Rules are considered in some detail below in the light of their relation to other documents currently employed. This provides the main basis for consideration of the legal issues which arise in relation to the use of current documentation. Reference will also be made to provisions in use in other contract forms which provide for combined transport.[212]

3C.2 THE ICC UNIFORM RULES FOR A COMBINED TRANSPORT DOCUMENT 1975, BROCHURE NO.298

3C.2.1 Introduction

3.46 The Uniform Rules were first issued in 1973 as Brochure No. 273 but were amended and reissued in 1975.[213] There are 19 rules which, as explained in the introduction to the brochure, are intended for conversion into standard conditions. The Rules are concerned with the fundamentals of liability and the recognition of a combined transport document. Rule 6 recognises that additional conditions will be required to be included in a combined transport document for reasons of commercial desirability. Accordingly, clauses will be found in combined transport documents dealing with liens, freight, general average, jurisdiction, etc. In addition, combined transport bills of lading commonly contain clauses designed to manage the carriage of containers and to ensure that tariff rules are included. Rule 18 acknowledges the use of clauses designed to protect the servants or agents of the CTO, as well as other persons whose services are used for the performance of the contract. This rule provides that the protection granted by these clauses should not exceed that granted to the CTO under the rules.

3.47 Given the flexibility of container transport and the fact that the contract is intended to reflect this as a contract for combined transport a wide liberty clause is usually provided in standard conditions adopted by operators. Thus, for example, FBL, clause 12, provides that a reasonable liberty is reserved as to the means, route and procedure to be followed in the handling, storage and transportation of

211. See 3E.

212. E.g. the network approach adopted in some bills based on other influences such as the Indian Multimodal Transportation of Goods Act 1993, see *Bhatia Shipping and Agencies PVT Ltd* v *Alcobex Metals Ltd* [2004] EWHC 2323 (Comm), [2005] 2 Lloyd's Rep 336.

213. For descriptions and discussion of the Rules see: F.J.J. Cadwallader, "Uniformity in the Regulation of Combined Transport" [1974] JBL 193, B.S. Wheble, "The International Chamber of Commerce Uniform Rules for a Combined Transport Document" [1976] LMCLQ 145, and O.C. Giles, "Combined Transport" (1975) 24 ICLQ 379.

goods.[214] Given the fact that the exercise of such liberties does not involve a denial of liability thereafter by the carrier they would seem to present less difficulty than in the case of through bills.[215] Furthermore the fact is that in the context of container carriage it should rarely be the case that no means can be found to get the goods to their destination. Nevertheless operators still feel the need to retain freedom to deal with hindrances,[216] although a right to abandon may be made subject to a duty to exercise reasonable endeavours to deliver the goods at the destination.[217]

3C.3 ICC RULES: APPLICATION AND DEFINITIONS

3.48 ICC Uniform Rules, Rule 1 and Rule 2

1. a. These Rules apply to every contract concluded for the performance and/or procurement of performance of combined transport of goods which is evidenced by a combined transport document as defined herein.

These Rules shall nevertheless apply even if the goods are carried by a single mode of transport contrary to the original intentions of the contracting parties that there should be a combined transport of the goods as defined hereafter.

b. The issuance of such combined transport document confers and imposes on all parties having or thereafter acquiring an interest in it the rights, obligations and defences set out in these Rules.[218]

c. Except to the extent that it increases the responsibility or obligation of the combined transport operator, any stipulation or any part of any stipulation contained in a contract of combined transport or in a combined transport document evidencing such contract, which would directly or indirectly derogate from these Rules shall be null and void to the extent of the conflict between such stipulation or part thereof, and these Rules.[219] The nullity of such stipulation or part thereof shall not affect the validity of the other provisions of the contract of combined transport or combined transport document of which it forms a part.

2. For the purpose of these Rules :

a. **Combined transport means** the carriage of goods by at least two different modes of transport, from a place at which the goods are taken in charge situated in one country to a place designated for delivery situated in another country.

b. **Combined transport operator** (CTO) means a person (including any corporation, company or legal entity) issuing a combined transport document.

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214. *Cf* Combidoc, cl. 6; DAMCO Bill of Lading, cl. 11; TT CLUB 100, cl. 11; Combiconbill, cl. 6; Maersk Line Terms and Conditions, cl. 19.

215. See 3B.8. *Cf* in relation to feeder and relay services, *Parnass Intl* v. *Sea-Land Service* 595 F. Supp. 153, [1985] AMC 485 (SDNY 1984); *Ins. Co of Nth. America* v. *S.S. Zim Hong Kong* [1988] AMC 1047; *cf SNC S.L.B.* v. *M/V Newark Bay* [1996] AMC 1764 (SDNY), reversed on different grounds [1997] AMC 1952 (2d Cir.). See also *Herr-Voss Corp* v. *Columbus Line* [1994] AMC 77 (USDC, Maryland 1992).

216. See FBL 92 cl. 12.3, Maersk Line Terms and Conditions cl. 20, DAMCO Bill of Lading cl. 20, TT CLUB 100, cl. 13.

217. See Combidoc cl. 8, Combiconbill cl. 9. NSSCC (2001) cl. 9, NSFCC (2011) cl. 10. *Cf* Conlinebill, cl. 16.

218. This reflects the desire to give recognition to the document as a vehicle of rights according to its form which is discussed further in respect of rr. 2(c), 3 and 4 below.

219. This is effective only where the document is expressed to be based directly on the Rules (see further r. 2(c) below). This is the case with Combidoc and FBL. Other trading conditions are often based loosely but not directly on the Rules and so are not bound by r. 1(c).

Where a national law requires a person to be authorised or licensed before being entitled to issue a combined transport document, then combined transport operator can only refer to a person so authorised or licensed.

c. **Combined transport document** (CT Document) means a document evidencing a contract for the performance and/or procurement of performance of combined transport of goods and bearing on its face either the heading "Negotiable combined transport document issued subject to Uniform Rules for a Combined Transport Document (ICC Publication No. 298)" or the heading "Non-negotiable combined transport document issued subject to Uniform Rules for a Combined Transport Document (ICC Publication No. 298)".[220]

d. **Different modes of transport** means the transport of goods by two or more modes of transport, such as transport by sea, inland waterway, air, rail or road.

e. **Delivery** means delivering the goods to or placing the goods at the disposal of the party entitled to receive them.

f. **Franc** means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900.

3C.3.1 Application of ICC Rules and the definition of combined transport

3.49 The application of the rules seemingly depends upon the definition of combined transport given in Rule 2(a) by reason of the reference to combined transport in Rule 1(a). The definition of combined transport as carriage of goods by at least two different modes of transport in Rule 2(a) is that adopted by the TCM Draft Convention and by the UN Convention on International Multimodal Transport of Goods 1980. The definition begs several questions which also arise in respect of the 1980 Convention and which are considered further in the discussion of the Convention.[221] To some extent the difficulties are resolved by the focus placed by the Rules on the issue of a combined transport document as a reflection of the intention to contract for such carriage. Whilst this intention is also dependent on how such a contract is defined the Rules really enable the issue to be sidestepped since Rule 2(c) envisages that the document will be made expressly subject to the rules. The focus on the existence of a document represents a principal contrast with the UNCTAD/ICC Rules.[222] Further, Rule 1(a) also makes clear that the Rules will apply even where the goods are in fact carried by a single mode of transport.[223] Any issue of whether the contract displays an intention which enables it to be classified as being for combined transport is therefore irrelevant since the Rules will apply regardless unless there is some other evidence to show that the Rules were not intended to apply to the contract as actually performed. The issue of a Combidoc or FBL will therefore suffice to apply the Rules since they comply with Rule 2(c).

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220. See rr. 3 and 4, below.

221. See 3D.2.1.

222. See 3E. These rules require incorporation rather than issue of a document. It has been said that there is a more fundamental difference. Ramberg (*Law of Freight Forwarding*) at p. 33 states that the Rules apply by their mere existence *ex proprio vigore*. This appears to be inconsistent with the requirement that the contract be evidenced by a document which is stated to be subject to the Rules.

223. See also cl. 1 of Combiconbill, Combidoc and FBL. The form of wording ("contrary to the original intentions") has later been thought to be inappropriate since it could engage the carrier in liability for a deviation (Ramberg p. 33). Presumably the words envisaged the exercise of a permission to carry by a single mode.

3.50 Nevertheless the issue of such a document at least purports to evince such an intention and could be relevant to the deeper question of what it means to contract for combined transport. The problem stems from the definition itself since it is unclear whether the use of more than one mode of transport must actually be envisaged or merely be possible. Must it specify the modes to be adopted or can the contract be open as to mode? Again, in general, this should not present any problem in determining the application of the contractual terms. Even if a document does not expressly apply the Rules, if its terms are clearly applicable to whatever transport is provided it makes little difference how the contract is described or document evidencing it describes itself. Problems will arise if the contract distinguishes between different types of contractual performance and much will depend on the clarity of definition attached to them. A particular difficulty arises from the fact that the Rules and contractual conditions purporting to deal with combined transport have no legal recognition apart from their use as a set of contractual terms. TCM was meant to have the force of law and so would have provided a legally recognised code. The absence of this means that documents in use may well be subject to mandatory law which conflicts with and will displace the solution adopted by the Rules. In particular the courts may well reject attempts to present the issue of a combined transport document as revealing a contract which is *sui generis* and so not subject to mandatory law governing particular modes of transport especially international transport Conventions. This is considered further below in relation to the liability provisions set out in Rules 11–19.

3.51 The Rules are also intended to be capable of applying to all forms of combined transport regardless of whether a period of carriage by sea is contemplated by the parties. Consequently the reference is to a combined transport document (CTD) rather than to a bill of lading. This is most closely reflected by Combidoc which is based directly on the Rules. The dominance of carriage by sea, however, means that the use of documents entitled combined transport bill of lading, or equivalent, is common.[224]

3C.3.2 Port to port and combined transport bills of lading

3.52 Commercial combined transport bills of lading more usually make a distinction between port to port and combined transport which can be determined by the indications as to place of receipt and delivery on the face of the bill, so that the document might more accurately reflect the contractual intention.[225] Obviously, leaving the place of receipt and delivery sections blank will mean that the bill is one for port to port transport.[226] In *New Holland Australia Pty Ltd* v. *TTA Australia Pty Ltd (The Resolution Bay)*[227] a bill of lading was held to be for port to port shipment notwithstanding that the letters "CFS" (Container Freight Station) were inserted in the "Place of Acceptance" and the "Place of Delivery" boxes. These letters did not

224. See further Gaskell *et al.*, para. 1C and ch. 9.
225. See, e.g. *The Antwerpen* [1994] 1 Lloyd's Rep 213 (CA NSW) and *Finagra (UK) Ltd* v. *OT Africa Line Ltd* [1998] 2 Lloyd's Rep 622.
226. See e.g. *M.C. Watkins* v. *M/V London Senator* [2000] AMC 2740 (ED Va).
227. (1995) 397 LMLN 4 (SC NSW, 6 December 1994).

trigger the use of the document as a combined transport bill of lading because they were not a meaningful address and were accordingly meaningless. This had the consequence that the defendant was unable to limit its liability in accordance with the terms of the bill. On the other hand, in a French decision, the indication of Jeddah CY[228] in "place of delivery" had the effect of extending the responsibility of the carrier beyond the place of discharge. The attempt to limit responsibility by reference to article 1(e) of the Hague-Visby Rules was rejected.[229] A similar approach was taken by the Court of Appeal in *East West Corp* v. *DKBS 1912.*[230] The case involved P&O Nedlloyd and Maersk bills of lading. The face of the P&O Nedlloyd bill contained boxes headed Port of Loading and Port of Discharge which were completed with the name of the load and discharge ports. To their right were larger boxes headed Place of Receipt and Place of Delivery. These latter boxes contained the notation: "(Applicable only when the document is used as a Combined Transport Bill of Lading)". The place of receipt was indicated as "Hong Kong/CY and the place of delivery had been filled out with the name of the discharge port. The Maersk bill similarly had the names of the ports inserted into the spaces for place of receipt and place of delivery. The court rejected the argument that the way in which the P&O Nedlloyd bill was completed must have been mistaken or over-zealous since there was no indication of any transport leg outside the port area. In respect of both bills it was held that they were combined transport bills. This had the consequence that the exclusion of liability for pre-shipment and post-discharge loss or damage, relevant when the carriage agreed was port to port, did not apply.[231] Both bills of lading involved an option between port to port and combined transport and combined transport had been chosen. *The Antwerpen* was distinguished since, in that case there was a requirement that the indication of place of receipt or delivery should include an address and the absence of an address in the court's view, in that case, was probably not an oversight but rather the consequence of the fact that no inland carriage was contemplated.

Given the history of such bills and the association with the ICC Uniform Rules 3.53
it may seem odd that a bill should be regarded as being for combined transport despite the absence of a leg of transport involving a different mode. Nevertheless, the technique used by these forms of bill of lading provides a simple means by which the two forms can be distinguished in a particular case and the relevant level of liability determined with some certainty. Further for Mance LJ,[232] treating the bills as combined transport bills made perfect sense since loss or damage to goods in the port area before or after discharge is a known peril of sea carriage. A container operator, such as P&O Nedlloyd might well wish to offer an alternative scheme of liability. The burden of proof was on them to show that evidence in respect of the

228. Held to correspond to container yard.

229. Cour d'Appel, Paris, 16 February 96 Bulletin des Transports, 1996, No. 2663, p. 402, *cf* Cour de Cassation, 4 July 2000 (2000) 35 ETL 524.

230. [2003] EWCA Civ 83, [2003] 1 All ER (Comm). 525.

231. Although in the circumstances, where there had been a delivery without production of the bill of lading, this provided no protection.

232. At para. 75.

surrounding circumstances, such as the terms of the booking, displaced the appearance on the form of the bill.[233]

3.54 Since combined transport terms involve an extended liability they may have the advantage of providing a degree of flexibility for the carrier which might not be available to carriage on simple port to port terms. In *Z.I Pompey* v. *ECU-Line N.V., M/V Conmar Fortune*[234] the Federal Court of Canada (Trial Division) held that where there was a port-to-port bill of lading and the sea carrier, on his own initiative, discharges at a different port in order subsequently to organise inland carriage by rail to deliver the goods to the contractually agreed port of discharge, he acts outside the bill of lading and loses the protection of the contract. Even where a carriage is on terms covering multimodal transport there may yet be the possibility of applying a deviation concept, even to non-sea sections of a transport, especially where the Hague Rules have been extended to cover such sections.[235] In *Sea-Land Service Inc* v. *Lozen International, LLC*,[236] the liberty clause in the contracting sea carrier's bill of lading did not unequivocally insulate the company from liability where a container was put on the wrong train and missed the connection to the ocean sailing. There was a genuine issue of fact as to whether the refusal of the rail carrier to cooperate in remedying the difficulty amounted to an unreasonable deviation.

3C.4 ICC RULES: DOCUMENTATION

3.55 **ICC Uniform Rules, Rule 3, Rule 4 and Rule 9**

3. Negotiable document

Where a CT document is issued in negotiable form:

a. it shall be made out to order or to bearer;

b. if made out to order it shall be transferable by endorsement;

c. if made out to bearer it shall be transferable without endorsement;

d. if issued in a set of more than one original it shall indicate the number of originals in the set;

e. if any copies are issued each copy shall be marked "non-negotiable copy";

f. delivery of the goods may be demanded only from the CTO or his representative, and against surrender of the CT document duly endorsed where necessary;

g. the CTO shall be discharged of his obligation to deliver the goods if, where a CT document has been issued in a set of more than one original, he, or his representative, has in good faith delivered the goods against surrender of one of such originals.

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233. See para. 76.

234. Fn. 174, above.

235. For US courts, if the carrier intentionally and deliberately deviates from the regular or (in the case of an underlying carrier) instructed route this can amount to an unreasonable deviation. The point has been made in the context of road carriage within a multimodal movement, see *Vistar SA* v. *M/V Sea-Land Express* 792 F 2d. 469 (5th Cir. 1986) at p. 472. There was no unreasonable deviation where a container was inadvertently left on the vessel in New York and sailed to Japan and California before being discharged when the vessel returned to New York: *Fireman's Fund Insurance Co* v. *Orient Overseas Container Line Ltd* [2003] AMC 1795 (NY Civil Ct).

236. [2002] AMC 913.

4. Non-negotiable document

Where a CT document is issued in non-negotiable form:

a. it shall indicate a named consignee;

b. the CTO shall be discharged of his obligation to deliver the goods if he makes delivery thereof to the consignee named in such non-negotiable document, or to the party advised to the CTO by such consignee as authorised by him to accept delivery.

9. The CTO shall clearly indicate in the CT document, at least by quantity and/or weight and/or volume and/or marks, the goods he has taken in charge and for which he accepts responsibility.

Subject to paragraph 1 of this Rule, if the CTO has reasonable grounds for suspecting that the CT document contains particulars concerning the description, marks, number, quantity, weight and/or volume of the goods which do not represent accurately the goods actually taken in charge, or if he has no reasonable means of checking such particulars, the CTO shall be entitled to enter his reservations in the CT document, provided he indicates the particular information to which such reservations apply.

The CT document shall be prima facie evidence of the taking in charge by the CTO of the goods as therein described. Proof to the contrary shall not be admissible when the CT document is issued in negotiable form and has been transferred to a third party acting in good faith.[237]

3C.4.1 Negotiable or non-negotiable documents

Whether a document is a negotiable[238] or non-negotiable document may be simply indicated on its face. Where sea transport is the dominant mode of transport the document is likely to be entitled a bill of lading and this may be sufficient for the document to be said to take a negotiable form, especially where the document contains an attestation clause as is common in bills of lading referring to its surrender to obtain delivery. In many cases a choice between a bill of lading and a waybill is available as with e.g. MSC,[239] Combiconbill and Combiconwaybill, FBL and FWB. Even with a negotiable form of bill of lading there will commonly be a box to indicate the consignee and a box to indicate a notify party, as well as a statement that if the bill is to order, a notify party should be indicated.[240] In *The Chitral*,[241] it was accepted that such a form of bill of lading contemplates that it may be used as a straight consigned bill or as a negotiable bill as might be required by the shipper. In the case, as no notify party was indicated and the bill of lading was made out to the consignee without the addition of the words "or order", the bill of lading was considered to be straight consigned, notwithstanding the further printed words that delivery was to be "unto the above-mentioned consignee or to his or their assigns". Similarly in *The Rafaela S*[242] the bill was accepted as being a straight and *3.56*

237. Rule 9 provides for the evidential function of the document which links in with the guarantee of accuracy provided for by r. 7 and r. 10 which refers to the description of the goods in the CT document in respect of notice of loss on delivery, see further below, 3.92. These provisions are reflected in various ways in documents in use: see cl. 17 of Combiconbill, cll. 13, 16 and 17 of Combidoc, cll. 3.3, 5.1 of FBL (3.2, 5.1 FBL 92) and cl. 14 of DAMCO Bill of Lading.

238. The issue of recognition of a negotiable document is considered below, at 3.58.

239. See: www.mscgva.ch/bl_terms/bl_standard_terms.html.

240. Or it may, as does FBL cl. 3.2. refer to the bill as constituting title unless marked non-negotiable (*cf* FBL 92, cl. 3.1).

241. [2000] 1 Lloyd's Rep 529.

242. [2005] UK HL 11, [2005] 2 AC 423.

not an order bill where the consignee was simply indicated in the relevant box without the words "to order" and printed by the box were the words "(B/L not negotiable unless ORDER OF)".[243] In *Parsons Corp* v. *CV Scheepvaartonderneming Happy Ranger*,[244] however, the bill of lading was held to be an order bill where there was no printed indication of the need to state a notify party or to include the words "order of". The printed words on the front of the bill referred to the delivery of the goods to the consignee or to their assigns and it was accepted that the latter words meant "or order". The words "or order" did not appear in the consignee box but there was nothing in that box or elsewhere in the bill to show that it was not intended that they should not have that effect. That intention could not be spelt out from the mere fact that only a named consignee appeared in the consignee box. As a matter of contract the two have to be read together.[245]

3.57 In *The Rafaela S*[246] a view was taken, which had not previously been accepted generally in England, that a straight bill must still be presented in order to obtain delivery and thus may be regarded as a document of title to the limited extent that its transfer to the consignee transfers a right to delivery to the consignee but no further. It is not negotiable in the sense of being generally transferable. The attestation clause is not to be regarded as applicable only where the bill is being used as an order bill. In the Court of Appeal Rix LJ noted the availability of waybills as forms with a wholly distinct nature,[247] and, as noted above, a clear choice between forms is common in combined transport. Thus rather than the twofold distinction made by the ICC Rules a threefold distinction can be made between order bills which are fully negotiable, straight bills and non-negotiable waybills. This threefold distinction is, however, made later in the UNCTAD/ICC Rules for multimodal transport documents.[248] It will be reinforced further if the Rotterdam Rules come into force.[249]

3.58 Where the document takes a negotiable form the question will arise as to whether it can take the status of a document of title, be a means whereby the contract of carriage can be transferred under the Carriage of Goods by Sea Act 1992 and enable the contract to be regarded as "covered" by a bill of lading for the purpose of the Hague Rules. The ICC Rules contemplate a document which may be issued by a variety of persons who may not be carriers by sea or actual operators of any means of transport. Where a negotiable document is issued by a shipowner or charterer there might be the possibility that the document may be treated as sufficiently close to a bill of lading for it to be recognised as equivalent. This appears to be the case, for the purposes of the Hague Rules, at least where the document is

243. See also *Voss* v. *APL Co Pte. Ltd* [2002] 2 Lloyd's Rep 707 (Singapore CA) where the consignee box stated: "Non-Negotiable Unless Consigned to Order". *Cf* Maersk Line bill of lading.

244. [2002] EWCA Civ 694, [2002] 2 Lloyd's Rep 357.

245. Compare, however, *The Brij* [2001] 1 Lloyd's Rep 431 (HK High Ct), but see the comments of Rix LJ in the Court of Appeal, in respect of that case in *The Rafaela S* [2003] EWCA Civ 694, [2003] 2 Lloyd's Rep 113, at para. 197.

246. See fn. 242.

247. At [128]. See also Lord Bingham in the House of Lords (above, fn. 242) at [5].

248. See 3E.

249. See Arts 41(b)(ii), 46, 51(2). See further 3F.2.2.

entitled a bill of lading,[250] notwithstanding that it purports to evidence a contract for combined transport.[251] The same recognition would likely apply to bills and waybills issued by such operators for the purposes of the Carriage of Goods by Sea Act 1992.[252] Where a carrier other than a carrier by sea, or a freight forwarder[253] issues the document the degree of legal recognition to be afforded the document is considerably less certain but the direct recognition given to such documents by banks in the UCP[254] may go some way to establishing a custom that such documents are acceptable as documents of title. These issues arise also in the context of bills issued by freight forwarders and the reader is referred to the discussion at that point.[255]

3C.5 ICC RULES: CTO RESPONSIBILITIES

ICC Uniform Rules, Rule 5 3.59

By the issuance of a CT document the CTO:

a. undertakes to perform and/or in his own name procure performance of the combined transport—including all services which are necessary to such transport—from the time of taking over the goods in charge to the time of delivery, and accepts responsibility for such transport and such services to the extent set out in the Rules;

b. accepts responsibility for the acts and omissions of his agents or servants, when such agents or servants are acting within the scope of their employment, as if such acts and omissions were his own;

c. accepts responsibility for the acts and omissions of any other person whose services he uses for the performance of the contract evidenced by the CT document;[256]

d. undertakes to perform or to procure performance of all acts necessary to ensure delivery;

e. assumes liability to the extent set out in these Rules for loss of or damage to the goods occurring between the time of taking them into his charge and the time of delivery, and undertakes to pay compensation as set out in these Rules in respect of such loss or damage;

f. assumes liability to the extent set out in Rule 14 for delay in delivery of the goods and undertakes to pay compensation as set out in that Rule.

3C.5.1 Undertaking to perform or procure performance

3.60 This rule provides for the undertaking of responsibility by the CTO for the whole of the carriage falling within the contract of combined transport. That is regardless of whether the CTO is an actual operator of any of the means used to accomplish

250. In *Bhatia Shipping and Agencies PVT Ltd* v *Alcobex Metals Ltd* [2004] EWHC 2323 (Comm), [2005] 2 Lloyd's Rep 336, the judge noted that since the documents issued in that case were MTDs (multimodal transport documents) they were not governed by the Hague or Hague-Visby Rules.

251. *Mayhew Foods Ltd* v. *O.C.L.* [1984] 1 Lloyd's Rep 317, see further below, 3.87.

252. *Cf* the Law Commission and the Scottish Law Commission Report on *Rights of Suit in Respect of Carriage of Goods by Sea* (Law Com No. 196, Scot Law Com No. 130), para. 2.49.

253. See *Bhatia*, fn. 250.

254. See above, 3.44.

255. See 2.81 *et seq*.

256. See below, fn. 264.

the transit. By issuance of the CTD the CTO accepts liability as a carrier. This is based on the obligation he adopts to perform the carriage or personally to procure it. This is, in turn, based on the purpose underlying the TCM Draft Convention which was to enable different types of transport operator and freight forwarders to engage in provision of combined transport under a recognised standard of responsibility. By undertaking a "total" responsibility as opposed to the segmented liability commonly adopted in through bills of lading[257] the CTO receives recognition of his transport document as a "bankable" document for purposes of international trade.[258] This is illustrated by the FBL, the principal international forwarding document for combined transport, whereby the obligation personally to procure the necessary transport is spelt out by clause 2.[259] In *James N Kirby Pty Ltd* v. *Norfolk Southern Railway Co*[260] the court recognised that by issuing an FBL a forwarder assumes the role of carrier.

3C.6 ICC RULES: LIABILITY OF THE CTO

3.61 ICC Uniform Rules, Rules 11–18

A. Rules applicable when the stage of transport where the loss or damage occurred is not known[261]

11. When in accordance with Rule 5(e) hereof the CTO is liable to pay compensation in respect of loss of, or damage to, the goods and the stage of transport where the loss or damage occurred is not known:

a. such compensation shall be calculated by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with the contract of combined transport they should have been so delivered;

b. the value of the goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price, or, if there is no

257. See above, 3.9 *et seq*.

258. See B.S. Wheble, "Combined Transport—A Banking View" (1975) 10 ETL 648.

259. As noted earlier, specific recognition of the FBL was granted by Art. 25(d) of the Uniform Customs and Practice for Documentary Credits (ICC publication No.400). Article 25(b) provided for a general recognition of combined transport documents (see also Art. 26). UCP 500 (1993) dealt with Multimodal Transport Documents in Art. 26 and Freight Forwarder documents in Art. 30. Specific recognition of the FBL is no longer provided. See, further, ICC publication no. 511, UCP 500 and 400 compared, p. 87 and UCP 600, above, 3.44.

260. [2002] AMC 2113 (11th Cir., reversed on different grounds by the Supreme Court, 543 US 14, [2004] AMC 2705, *sub nom Norfolk Southern Railway Co* v. *James N Kirby Pty Ltd*), citing Ramberg, *The Law of Freight Forwarding and the 1992 FIATA Multimodal Transport Bill of Lading*, at p. 7.

261. As has been often been noted it can be a difficult matter to determine when loss or damage occurred in the context of container transport. In reefer transport a temperature recording device may be attached to the reefer container which can produce a chart providing important evidence of when any malfunction occurred, see *Tasman Orient Line CV* v. *New Zealand China Clays (The Tasman Pioneer)* [2009] NZCA 135, [2009] 2 Lloyd's Rep 308 [74]–[93]. No substantial change on the finding of facts in the Court of Appeal were made by the Supreme Court, [2010] NZSC 37, [2010] 2 Lloyd's Rep 1, see [36]–[37].

commodity exchange price or current market price, by reference to the normal value of the goods of the same kind and quality;

c. compensation shall not exceed 30 francs per kilo of gross weight of the goods lost or damaged,[262] unless, with the consent of the CTO, the consignor has declared a higher value for the goods and such higher value has been stated in the CT document, in which case such higher value shall be the limit.

However, the CTO shall not, in any case, be liable for an amount greater than the actual loss to the person entitled to make the claim.[263]

12. When the stage of transport where the loss or damage occurred is not known the CTO shall not be liable to pay compensation in accordance with Rule 5(e) hereof if the loss or damage was caused by:

a. an act or omission of the consignor or consignee, or person other than the CTO acting on behalf of the consignor or consignee, or from whom the CTO took the goods in charge;

b. insufficiency or defective condition of the packing or marks;

c. handling, loading, stowage or unloading of the goods by the consignor or the consignee or any person acting on behalf of the consignor or the consignee;

d. inherent vice of the goods;

e. strike, lockout, stoppage or restraint of labour, the consequences of which the CTO could not avoid by the exercise of reasonable diligence;

f. any cause or event which the CTO could not avoid and the consequences of which he could not prevent by the exercise of reasonable diligence;[264]

g. a nuclear incident if the operator of a nuclear installation or a person acting for him is liable for this damage under an applicable international Convention or national law governing liability in respect of nuclear energy.

The burden of proving that the loss or damage was due to one or more of the above causes or events shall rest upon the CTO.

When the CTO establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more of the causes or events specified in (b) to (d) above, it shall be

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262. Apart from delay the Rules do not specifically refer to consequential loss (*cf* r. 6.5 of the UNCTAD/ICC Rules, see below, 3.132. Kindred and Brooks suggest (see, p. 120) that since the limits are set in respect of the rateable value of the goods and there being no express reference to consequential loss, there is no limit in respect of such loss with the result that all consequential loss (subject, presumably to remoteness) can be recovered. It might equally be suggested that the rules exclude liability for consequential loss, at least where referable to the loss of or damage to the goods. Some combined transport bills of lading exclude liability for consequential loss (e.g. the Mitsui OSK Lines bill, see Gaskell *et al.*, para. 16.4) which is permissible under both views. So long as consequential loss is not too remote and is causally related to the loss of or damage to the goods, either extreme seems contrary to the spirit of the rules, and it seems likely that the courts will see such loss as within them but subject to the limit of liability which will likely be confined to the weight of the goods physically lost or damaged as in *Serena Navigation Ltd* v. *Dera Commercial Establishment (The Limnos)* [2008] EWHC 1036 (Comm), [2008] 2 Lloyd's Rep 166 (2.290 fn. 1176), *cf* Combiconbill, cl. 12.

263. The ICC Rules compare with the Multimodal Transport Convention (Art. 18(5)) and the UNCTAD/ICC Rules (r. 6.6) which provide for an aggregate liability for loss, damage and delay up to the limit for total loss. See further Kindred and Brooks, p. 121. See also Hamburg Rules, Art. 6(1)(c), Rotterdam Rules, Art. 60.

264. In *Nissho Iwai Australia Ltd* v. *Malaysian International Shipping Corp Berhad* (1989) 167 CLR 219 (High Ct Australia), a similar exception was held to exclude the liability of the carrier for the negligence of an independent contractor. The exception referred to the "carrier" and the decision rested on the restrictive definition of a "carrier" in the bill of lading in comparison with more expansive definitions elsewhere in the bill. The same interpretation would not appear to be possible in respect of this exception, given the responsibility for independent contractors imposed on the CTO by r. 5(c), see above, 3.59.

presumed that it was so caused. The claimant shall, however, be entitled to prove that the loss or damage was not, in fact, caused wholly or partly by one or more of these causes or events.

B. Rules applicable when the stage of transport where the loss or damage occurred is known

13. When in accordance with Rule 5(e) hereof the CTO is liable to pay compensation in respect of loss or damage to the goods and the stage of transport where the loss or damage occurred is known, the liability of the CTO in respect of such loss or damage shall be determined:

a. by the provisions contained in any international Convention or national law, which provisions:

i. cannot be departed from by private contract, to the detriment of the claimant, and

ii. would have applied if the claimant had made a separate and direct contract with the CTO in respect of the particular stage of transport where the loss or damage occurred and received as evidence thereof any particular document which must be issued in order to make such international Convention or national law applicable; or

b. by the provisions contained in any international Convention relating to the carriage of goods by the mode of transport used to carry the goods at the time when the loss or damage occurred, provided that:

i. no other international Convention or national law would apply by virtue of the provisions contained in sub-paragraph (a) of this Rule, and that

ii. it is expressly stated in the CT Document that all the provisions contained in such Convention shall govern the carriage of goods by such mode of transport; where such mode of transport is by sea, such provisions shall apply to all goods whether carried on deck or under deck; or

c. by the provisions contained in any contract of carriage by inland waterways entered into between the CTO and any sub-contractor, provided that:

i. no international Convention or national law is applicable under sub-paragraph (a) of this Rule, or is applicable, or could have been made applicable, by express provision in accordance with sub-paragraph (b) of this Rule and that

ii. it is expressly stated in the CT Document that such contract provisions shall apply; or

d. by the provisions of Rules 11 and 12 in cases where the provisions of sub-paragraphs (a), (b) and (c) above do not apply.

Without prejudice to the provisions of Rule 5(b) and (c), when, under the provisions of the preceding paragraph, the liability of the CTO shall be determined by the provisions of any international Convention or national law, this liability shall be determined as though the CTO were the carrier referred to in any such Convention or national law.[265] However, the CTO shall not be exonerated from liability where the loss or damage is caused or contributed to by the acts or omissions of the CTO in his capacity as such, or his servants or agents when acting in such capacity and not in the performance of the carriage.

265. The Rules assume that the position of the CTO is separate from that of the underlying unimodal carriers that the CTO makes use of or can be treated as such even where the CTO is an actual carrier in respect of a particular mode of transport. Since the provisions do not have the force of law this treatment of the contract made by the CTO as a distinct form of contract of carriage and not one to be identified as being for the modes utilised is unlikely to be accepted by the courts. This is discussed further at 3C.6.3. The fact, however, that the Rules envisage the application of compulsory rules, albeit as a matter of contract, reduces the potential for conflict at least in respect of provisions governing liability for loss or damage.

14. The CTO is liable to pay compensation for delay only when the stage of transport where a delay occurred is known,[266] and to the extent that there is liability under any international Convention or national law, the provisions of which:

i. cannot be departed from by private contract to the detriment of the claimant;

ii. would have applied if the claimant had made a separate and direct contract with the CTO as operator of that stage of transport and received as evidence thereof any particular document which must be issued in order to make such international Convention or national law applicable.

However, the amount of such compensation shall not exceed the amount of the freight for that stage of transport, provided that this limitation is not contrary to any applicable international Convention or national law.

15. Failure to effect delivery within 90 days after the expiry of a time limit agreed and expressed in a CT document or, where no time limit is agreed and so expressed, failure to effect delivery within 90 days after the time it would be reasonable to allow for diligent completion of the combined transport operation shall, in the absence of evidence to the contrary, give to the party entitled to receive delivery the right to treat the goods as lost.[267]

16. The defences and limits of liability provided for in these Rules shall apply in any action against the CTO for loss of, damage, or delay to the goods whether the action be founded in contract or in tort.[268]

17. The CTO shall not be entitled to the benefit of the limitation of liability provided for in Rule 11 hereof if it is proved that the loss or damage resulted from an act or omission of the CTO done with intent to cause damage or recklessly and with knowledge that damage would probably result.

18. Nothing in these Rules shall prevent the CTO from including in the CT document provisions for protection of his agents or servants or any other person whose services he uses for the performance of the contract evidenced by the CT document, provided such protection does not extend beyond that granted to the CTO himself.[269]

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266. The first edition of the Rules in r. 14 provided for a liability for delay (as such not based on TCM) and required payment of compensation not exceeding the amount of the freight (*cf* Combiconbill, cl. 12). The amended Rules abolished this and liability for delay is imposed only if the stage during which a delay occurred is known and liability is imposed by a mandatory rule applicable at that stage, but limited to the amount of the freight. This change was made because operators were concerned about the fact that monopoly rail operators in some countries refuse to accept any liability for delay so that a CTO could find himself exposed to a liability without recourse, see N.R. McGilchrist, "In Perspective —International Chamber of Commerce Uniform Rules for a Combined Transport Document, [1974] LMCLQ 25. A restriction on liability for delay limitation is maintained in the latest UNCTAD/ICC Rules, see below, 3.130. It is common in bills of lading to exclude liability for delay whilst preserving a limit up to the freight in case such liability is upheld, see e.g. Maersk Line Terms and Conditions, cl. 8.1, DAMCO Bill of Lading, cl. 8.1, TT CLUB 100, cl. 6(3)(D). *Cf* further NSFCC, cl. 14, Combidoc, cl. 12, FBL, cl. 9 (which provides a limit of double the freight if there is liability for delay, as does cl. 8.7 of FBL 92). See, further, Gaskell *et al.*, para. 10F.

267. *Cf* Art. 5(3) of the Hamburg Rules, but no similar provision appears in the Rotterdam Rules. See also Combidoc, cl. 14(2), FBL, cl. 18 (FBL 92, cl. 6.4). This provision is not found in Combiconbill.

268. *Cf* Art. IV*bis*, r. 1, of the Hague-Visby Rules and *The Captain Gregos* [1990] 1 Lloyd's Rep 310.

269. Some of the documents contain somewhat simple provisions for the protection of servants etc., see Combidoc, cl. 15(2), FBL, cl. 11, Combiconbill 1971, cl. 16 (see, however, the 1995 revision, cl. 14). These provisions would likely have proved inadequate to satisfy the technical requirements of English law for effective Himalaya clauses under the analysis provided in *New Zealand Shipping Co Ltd* v. *A.M. Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154. They are now more likely to prove effective in light of the Contracts (Rights of Third Parties) Act 1999. More complex clauses find their way into other documents, see cl. 4.2 DAMCO Bill of Lading, Maersk Terms and Conditions, cl. 4.2(c) and NSFCC, cl. 15(2). See further Gaskell *et al.*, ch. 12; above, 2.45, and below, 3.140 and 3.119. Apart from these provisions, however, the fact that the possibility of subcontracting is clearly implied by this rule, and follows from the obligation of the CTO indicated by r. 5, would seem sufficient to allow for the

3C.6.1 Network scheme of liability and limitation

3.62 The ICC Rules are essentially designed to provide for a network scheme of liability whilst also dealing with the problem of concealed loss. In line with this its provisions, in respect of loss or damage,[270] are divided between those which deal with the stage where the loss or damage is not known and those where it is known. Some documents follow this format. Others, based on the earlier Combiconbill, may reflect a slightly different format[271] whereby a basic liability is set out along with special provisions dealing with where the stage of loss, etc, is known. Ultimately they are to substantially the same effect.[272]

3.63 In respect of concealed damage the Rules provide for a basic limit of liability and a set of exclusions which, in effect, underpin the obligations of the CTO imposed by Rule 5, above. The limit of liability in Rule 11 of 30 gold francs per kilo based on the value of the goods at the place and time of delivery is the same basic limit as Article IV, rule 5, of the Hague-Visby Rules. This represents, in part, a compromise between adopting the original Hague Rules limit and the much higher limits in other conventions. Furthermore there is no package limitation or container formula.[273] Since there is no longer an official gold value most bills of lading adopt the amended Hague-Visby limit of 2 SDRs.[274] As commonly provided by regimes of liability and in the documents,[275] Rule 11 provides for the possibility of exceeding the limit by means of making an *ad valorem* declaration. By Rule 17, however, the CTO is deprived of his right to limit if it is proved that the loss or damage resulted from an act or omission of the CTO done with intent to cause damage or recklessly with knowledge that damage would probably result.[276] Rule 17 does not tend to appear in documentation not issued under institutional auspices.[277] The defences available to the carrier under Rule 12 are, in part, standard defences to be found

operation of the principle of a bailment on terms. This can apply in favour of a subcontractor who takes possession of the goods and the bailor expressly or impliedly consents to the terms adopted by the subcontractor, implied consent normally being granted to usual terms: *Morris* v. *Martin* [1966] 1 QB 716, [1965] 2 Lloyd's Rep 63, see also above, fn. 111. The wording of r. 18 is not consistent with any express consent (*cf* below) but might be sufficient to suggest an implied consent to subcontracting on terms. The restriction indicated in r. 18 will confine this implied consent to those provisions which do not exceed the protection granted to the CTO by the Rules. This will be true of those documents which follow the Rules such as the FBL. Furthermore, in respect of terms not within the scope of the Rules (such as a jurisdiction clause), the implied consent will be limited to those which are in the known and contemplated form. Where, however, the document contains a clause which entitles the carrier to subcontract the carriage on any terms whatsoever consent will thereby have been given to a wider range of terms, see *The Pioneer Container* [1994] 2 AC 324.

270. For delay see above, fn. 266.

271. Including the FBL.

272. In respect of rr. 11–13, dealing with liability for loss or damage, comparison should be made generally with: cll. 10–12 of Combiconbill, cll. 9–11 of Combidoc, cll. 6–8 of FBL, cll. 6 and 7of the DAMCO Bill of Lading, cll. 6 and 7 of Maersk Line Terms and Conditions, cl. 6(2) and (3) TT CLUB 100, cll. 13 and 16 of NSFCC.

273. See 4.127.

274. See e.g., DAMCO Bill of Lading, cl. 7.2(c). *Cf* UNCTAD/ICC Rules, r. 6.1, below, 3.132.

275. See e.g., DAMCO Bill of Lading, cl. 7.3.

276. *Cf* Art. IV, r. 5(e) of the Hague-Visby Rules, Art. 8 of the Hamburg Rules and Art. 61 of the Rotterdam Rules. See Combidoc, cl. 15(4), FBL, cl. 10.2 (FBL 92, 8.9), Combiconbill, cl. 14(2). See further, below, 3E.5. Even an *ad valorem* declaration is likely to be treated as a limit for this purpose, see *Antwerp United Diamond B.V.B.A.* v. *Air Europe (a firm)* [1995] 3 All ER 424.

277. Quite the opposite, see DAMCO Bill of Lading, cl. 10.

generally in regimes of liability, such as act or omission of the consignor and inherent vice. They do not include the management or fire exceptions as appear in the Hague Rules. Nevertheless defence (f) indicates that the basic liability of the CTO is a liability for fault. This puts the bias of the rules more towards sea and air regimes than the stricter regimes imposed in respect of road,[278] rail,[279] and the more recent developments in air.[280] The burden of proof is placed on the carrier although he gets the benefit of a presumption where a defect relating to the goods or their packing or the involvement of the customer in the loading of the goods etc, could be involved.[281] This presumption was explored in *Exportadora Valle de Colina SA* v. *A.P. Moller-Maersk A/S*[282] in the context of its manifestation in the Maersk Line Terms and Condition expressed in a bill of lading issued for the carriage of grapes in reefer containers stuffed by agents of the exporters. There was rapid deterioration of the grapes after outturn and a claim against the carriers was successful on a full consideration of the evidence. The presumption played little part in the result but Flaux J did reject a possible analogy with CMR[283] suggesting that once the presumption had been set up by the carrier showing one or more of the special defences could plausibly have caused the damage it was sufficient for the claimant to merely suggest but not prove another hypothesis sufficient to reduce the plausibility of the cause alleged by the carrier. In the context of contractual rather than conventional interpretation he considered that once the presumption had been set up it was for the claimant to prove on a balance of probabilities that the matter relied on by the carrier did not cause the loss. The claimant had proved this in this case.

3.64 Where loss or damage is known, Rule 13 gives expression to the network principle so that the liability of the CTO is to be governed by such compulsory liability as would have applied in respect of the relevant mode. Such compulsory liability may be contained in an international convention or national law. Failing the application of such a compulsory regime, the contractual application of a relevant international Convention is to be made.[284] Failing the availability of such an international Convention the liability is to be determined by application of the liability expressed in relation to concealed damage.

3.65 An example of the partial application of these rules is provided by clause 7.2(a) of the DAMCO Bill of Lading. By this clause, Article 1–8 of the Hague Rules[285] are

278. See the CMR Convention, Art. 17, see Clarke, CMR, para. 74.
279. CIM (1999), Art. 23, see Clarke & Yates, para. 2.532.
280. See Art. 18 of the Montreal Convention 1999.
281. *Cf* Art. 18(2) of CMR and Art. 5(5) of the Hamburg Rules, *cf* also cl. 9(5) of Combiconbill.
282. [2010] EWHC 3224 (Comm), see further Glass, 8(4) S&TI (2011) 19.
283. Which contains a similar presumptive scheme in the combination of Art. 17(4) and Art. 18(2), see further Clarke, CMR, ch. 7, and *Hill and Messent*, ch. 6.
284. This should be applied in full (see r. 13 (b)(ii), otherwise there should be reversion back to rr. 11 and 12 (see r. 13(d)).
285. Which avoids the effect produced by incorporating the limitation provisions of the Hague Rules as a whole which resulted in a high level of liability being imposed on the carrier in *The Rosa S* [1989] QB 419. As a partial incorporation of an international convention this does not follow the requirements of r. 13(b)(ii).

applied by virtue of clause 6.2 (c),[286] along with a limit of £100 sterling per package or unit. This keeps more or less to the object of the ICC Rules by maintaining a recognisable conventional rule, so far as possible, applicable to a stage of transport where the loss can be localised. Clause 12(2) of the original Combiconbill applied the Hague Rules to carriage by sea where there was no compulsory rule.[287] This was a dangerous practice in light of *The Rosa S*.[288] The1995 revision in clause 11(2) now makes reference to the Hague/Visby Rules.[289] Apart from this, special clauses may be required due to the exigencies of a legal regime affecting a particular trade. For example, in carriage to or from the US it is common to include a US COGSA paramount clause both to avoid the penalty involved in not providing such a clause and also to enable COGSA limits to apply to "Harter Act" stages.[290]

3.66 An exception to the object just noted is granted by the Rules under Rule 13(c) whereby, in the case of inland waterways, the CTO is permitted to incorporate the provisions of any subcontractor. This appears to provide recognition of the notoriously restrictive nature of such conditions in use particularly at the time. Such clauses can prove detrimental to the CTO if the subcontractor does not, in fact, adopt conditions which limit liability.[291] The proviso in Rule 13(c)(i) would appear to relate to any international Convention etc, which specifically relates to carriage by inland waterway rather than application of a Convention, such as the Hague Rules, which could be related to inland waterways otherwise the proviso would have unlimited application. Most documents, however, simply apply the Hague Rules to carriage by inland waterway.[292] Apart from inland waterways the Rules, in effect, prohibit simple adoption of subcontractors' terms.[293]

3.67 Since the Rules are applied as a matter of contract they may have only limited application in the face of the application of compulsory rules of liability applicable to a mode of transport forming part of a combined transport.[294] Even if the contractual rules can apply, the network approach provided for by rule 13 creates immense difficulties of interpretation in terms of working out, for example, what exactly is meant by a "stage" of the transport, when exactly does one stage end and another begin, and how exactly one determines which provisions would have

286. Which applies them to carriage by sea where no compulsory rule applies under cl. 6.2(a) (the equivalent to r. 13(a) or 6.2(b)—the US COGSA paramount clause).

287. See also Combidoc, cl. 11(1)(b), *cf* FBL, cl. 7 (FBL 92, cl. 7.2). The FBL clauses operate as general Hague/Hague-Visby Rules paramount clauses.

288. See above fn. 285.

289. *Cf* NSFCC, cl. 16(4) and NSSCC cl. 13.2.

290. See e.g. DAMCO Bill of Lading, cl. 6.2(b), Maersk Line Terms and Conditions, cl. 6.2 (a)(i), *cf* TT CLUB 100, cl. 6(1)(A), 6(3)(B).

291. See e.g. *Konica Business Machines USA. Inc* v. *Intransit Container Inc* [1997] AMC 2685 (Comm Mass 1996).

292. *Cf*, however, Combidoc which, on its face, notes that liability for inland waterways is matched to that of the CTO's subcontractors and provides for indication of the name of the subcontractors.

293. Although some bills of lading depart from this, e.g., DAMCO Bill of Lading, cl. 6.2(d) and (e) provide for application of inland carrier contracts or tariffs where loss or damage is known to have occurred in the custody of such a carrier, *cf* Maersk Line Terms and Conditions, cl. 6.2(a)(ii) and (c)(ii).

294. See 3C.6.3.

applied to a particular stage. Similar problems of interpretation arise in respect of the Multimodal Transport Convention and some are considered at that point.[295]

At this point a particular problem relevant to the interpretation of the conditions 3.68
for the application of compulsory regimes provided for in Rule 13(a) can be noted. The provision is reminiscent of Article 2 of the CMR Convention which applies a network approach where a road vehicle is carried on another means of transport. This article applies the provisions prescribed by law which would have applied had the sender made a contract with the carrier by the other means of transport.[296] Some courts take the view that this involves a legal fiction which requires the court to apply the mandatory rules appropriate to the form of transport rather than the particular circumstances of the transport.[297] The ICC Rules are worded differently and focus attention on those compulsory rules which would have applied if the claimant and CTO had made a separate contract for the particular stage. As with the argument noted in respect of CMR it may be argued that it can never be known as a fact what contract these two parties would have made for the relevant "stage" of transport so that a level of fiction appears similarly to be involved. If this view is taken this suggests that the whole of Rule 13(a)ii should be regarded as hypothetical so that it should be interpreted as meaning that it is to be presumed that the relevant document would have been received by the claimant. This hypothetical contract would have to be linked with some objective facts in order to attach it to a specific compulsory rule.[298] An alternative view might be to regard the issue of what contract would have been made as capable of proof so that, if necessary, evidence concerning the practice of the CTO in respect of contracts made and documents issued for particular stages could be considered.[299] If there is no such practice or evidence of it the court can fall back on the remaining rules. The burden of proof would fall naturally on the party seeking to persuade the court to apply the compulsory rule.

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295. See 3.107.

296. See generally Clarke, CMR, para. 15, and *Hill and Messent*, pp. 45 *et seq.*

297. See decision of the Dutch Supreme Court, *The Gabriele Wehr*, HR 29 June 1990 (1990) 25 ETL 589, and see Clarke, CMR, para. 15a(iii), *Hill and Messent*, paras 2.36 *et seq.*, Glass [2000] JBL 562 and Hoeks, 4.3.5.

298. At least the termini in respect of the particular stage. Less certain is whether other facts impacting on the application of a compulsory rule and occurring during the transit should be considered. Such facts may well reflect the actual contract made by the CTO and represent choices which might not be made by the goods owner e.g. whether a container should be carried on deck.

299. The problem arises in respect of carriage by sea because of the requirement in the Hague and Hague-Visby Rules for a contract to be covered by a bill of lading. This depends on whether the contract of carriage contemplates its issue (see above, fn. 188) which may not be the case if it is not the practice in the particular trade to issue them. In respect of CMR evidence of the practice of the underlying operator in the particular trade is taken by some courts to determine the contract that would have been made between the goods owner and that operator. With CMR, however, the wording of Art. 2 means that there is always an underlying carrier with whom a contract could have been made for the specific stage, although not necessarily for the goods separate from the road vehicle. This means also that it is always possible to say that this carrier would have contracted to carry which, for most regimes, is a sufficient condition without any further documentary requirement. In the context of combined transport, however, it may be more likely that a CTO has no practice in respect of a particular stage and any question as to what his practice might be would be purely speculative. This suggests that the intention behind the rule is for a hypothetical contract which also assumes the issue of any necessary documentation.

3C.6.2 Cases on the construction of combined transport documents

3.69 Various decisions have touched on issues of construction in the context of conditions used in combined transport bills. Few have dealt with the exact wording used in the ICC Rules but it is convenient to draw them together and compare them at this point. In *Princes Buitoni Ltd* v. *Hapag-Lloyd*[300] the Court of Appeal dealt with a point arising in respect of a bill of lading of a type belonging to the first generation of combined transport bills. This was issued for the carriage of containers from Vancouver to Liverpool. The port of discharge was Felixstowe and the containers were to be transported by road to Liverpool. The bill of lading was a North America Europe Services Short Form Bill of Lading and set out the liability of the carrier both in terms of area and mode of transport. Thus there was a special term dealing with transport in North America, then terms providing separately for carriage by sea, road and rail, and then a general catch-all term. A container was lost in the course of road carriage from Felixstowe to Liverpool and the question arose as to which term applied. The relevant terms competing for application were:

(i) a clause applying the CMR Convention to road carriage in Europe, and
(ii) a catch-all term which stated that during carriage, except as otherwise provided, the terms of the performing subcontractor should apply.

Naturally, since the loss occurred during road carriage in Europe, the plaintiff cargo owner argued that CMR should apply in accordance with the first term. The defendant's argument was that since CMR, by its terms applied only to international carriage, it could not be applied here. The reference to CMR meant a reference to all its terms including those which restricted its application. The basis for this argument was that in general, as indicated by the catch-all term, the carrier's liability was to be back to back with that of the performing operator and that this therefore necessitated a restrictive construction to be placed on the CMR clause. The court, however, declared the wording of the clause to be "plain, unlimited and unqualified". It involved an express reference to CMR which was to be applied without regard to any provision restricting its application. In other words the clause was treated as a paramount clause which must of necessity be construed so as to reject those parts of the incorporated provisions which contradict the point of the incorporation.[301]

3.70 A contrast can be made with the paramount clause considered in the US decision of *Sony Chemicals Europe B.V.* v. *M/V Ingrita*[302] which stated that if the bill of lading is issued in or the goods are delivered to a locality where there is a compulsorily applicable Carriage of Goods by Sea Act or similar statute, such legislation shall apply. In a combined transport from Chicago to the Netherlands, since the goods were never delivered in the Netherlands the relevant "compulsory rules" adopted in Holland were not applicable. Even if the clause could be read as meaning that the goods "were to be delivered", since the Dutch legislation did not apply by way of

300. [1991] 2 Lloyd's Rep 383.
301. See *Adamastos Shipping Co* v. *Anglo-Saxon Petroleum Co Ltd* [1959] AC 133.
302. [1997] AMC 755 (D Md 1996).

mandatory law to incoming traffic, they were not compulsorily applicable.[303] This meant that US COGSA applied to the damage to the goods which occurred as they were being unloaded from the truck at the Baltimore terminal on completion of road carriage from Chicago. The clause paramount applied COGSA, unless as otherwise specifically provided,[304] and stated that it would govern before loading and after discharge and throughout the entire time the goods are in the actual custody of the carrier. A waybill covering multimodal transport which was less clear as to the breadth of application of the Hague Rules was considered in *Indemnity Insurance Co of North America* v. *Hanjin Shipping Co.*[305] It covered carriage from China to Indiana and stated that the Hague Rules "shall apply to this bill of lading". The face of the waybill specified the place of receipt, identified the pre-carrier, the port of loading, the port of discharge and the place of delivery by on carrier and indicated that the box for the last of these as to be completed "only when used for multimodal or through transportation". It was held that the reference to the Hague Rules was intended to apply the Rules to all phases of the trip. This made more sense than the inefficient alternative of applying different substantive law to the container depending on whether it is sitting on board a ship, on a rail car, or on a truck.[306]

A different problem faced Rix J in *Finagra (UK) Ltd* v. *OI Africa Line Ltd.*[307] A combined transport liability clause applied (save as otherwise provided in the bill of lading) the Hague Rules where the stage of loss or damage was unknown (or the Hague-Visby Rules where compulsorily applicable by any national law) or these or other conventional rules depending on which stage the loss or damage was known to have occurred. A nine-month time limit was also imposed, but subject to contrary provisions in the same clause. The issue was whether the nine-month time limit applied or the limit of one year imposed by the Hague Rules which applied (but not compulsorily) because the stage of damage was unknown. A construction was adopted which gave effect to both time limits. The nine-month limit was held applicable only to those circumstances which fell outside the conventional time limits, e.g. loss or damage which is not in connection with the goods carried. The argument that the clause was meant to provide a uniform time limit which cut across the conventional time limits was rejected. In consequence the claim was not out of time.[308] 3.71

303. Compare generally *Parsons Corp* v. *CV Scheepvaartonderneming Happy Ranger* [2002] EWCA Civ 694, [2002] 2 Lloyd's Rep 357, *Trane Co* v. *Hanjin Shipping Co Ltd (The Hanjin Marseilles)* [2001] 2 Lloyd's Rep 735 (HK High Ct).

304. See *Sony Computer Entertainment Inc* v. *Nippon Express USA (Illinois) Inc* [2004] AMC 1126 (SDNY), where these words were not considered satisfied so as to incorporate a railway's conditions in place of COGSA which was applied by virtue of the paramount clause.

305. [2003] AMC 2705 (7th Cir.).

306. Before the final stage of the journey the container was called in for customs inspection and, on instructions given by the consignee's agent, was delivered over to a carrier which delivered it to the customs' facility from where it went missing. The contracting carrier was held not liable either because there was an intervention which amounted to delivery or on the basis of the COGSA defence of Act or omission of the shipper, the consignee's agent being the agent of the shipper for this purpose.

307. [1998] 2 Lloyd's Rep 622.

308. *Cf Mannesman Demag Corp* v. *M/T Concert Express* [2000] AMC 2935 (5th Cir.) at p. 2939.

3.72 Difficulties of interpretation have arisen in the context of air waybills when applied in the context of combined air and road carriage. The compulsory air regimes are confined essentially to the carriage by air and other periods where the goods are in charge of the air carrier in an airport. The question can arise as to whether a limit of liability or other conditions concerning liability, designed to operate when a compulsory regime does not apply, also extend to periods when the goods are not being carried by air. In *Quantum Corp Ltd* v. *Plane Trucking Ltd*,[309] Tomlinson J rejected an argument that the Warsaw Convention had been extended by the terms of the air waybill to cover periods of carriage by road. The definition of carriage by air in the conditions of carriage included the period in which the goods were in the charge of the carrier. However, this expanded definition was for the particular purpose of special provisions on liability and these set out a regime different from that contained in the Convention. It should be noted that the general conditions which were incorporated by the air waybill were expressed to apply to all carriage of cargo. The High Court of Australia had more difficulty with the general terms contained in the air waybill adopted by FIATA which largely follows the standard IATA form of air waybill. In *Siemens Ltd* v. *Schenker International (Australia) Pty Ltd*,[310] the majority of the court was prepared to accept that the waybill, although indicating the airport of destination, had to be read in light of the fact that it was contemplated, under the terms of a wider agreement, that there would be a carriage by road to a bonded warehouse just outside the airport from where delivery would be made. A clause in the waybill providing for a limit of liability "in carriage to which the Warsaw Convention does not apply" extended to this period of road carriage. The argument, which had been accepted at first instance that this limit applied only when the Warsaw Convention did not apply to any part of the carriage, was rejected.

3.73 Careful drafting is required to ensure that a jurisdiction clause in a catch-all term is not displaced by a reference to conditions relevant to a particular stage of the transport. In *Commercial Union Insurance Co* v. *M.V. Bremer Express*[311] an ocean carrier's law and jurisdiction clause required the application of Japanese law and jurisdiction in Tokyo. A further clause provided, however, that notwithstanding the earlier clause, the ocean carrier's liability for loss during a land carrier's leg of multimodal transport should be the extent to which the land carrier is responsible under the terms and conditions of its contract documents where loss occurred during motor carriage. Both the ocean carrier and the motor carrier were held to be liable under the motor carrier's bill of lading and the ocean carrier could not enforce the jurisdiction clause in its bill of lading.

3.74 The reference over to terms adopted by a subcontractor for a particular mode, as in the case just noted might produce a difficulty of circularity of terms where there is a reference back to the terms in the document issued by the contracting carrier. This is perhaps less likely to occur in the context of a combined transport document than with a through bill or hybrid type of bill as in *Dopplemayr Lifts Ltd* v. *Hapag-*

309. [2001] 2 Lloyd's Rep 133, reversed on different grounds, see below, 3.83.

310. (2001) 162 FLR 469, Gummow, Callinan and Heydon JJ, McHugh ACJ and Kirby J dissenting.

311. [1999] AMC 2002 (SDNY, 1998).

Lloyd Aktiengesellschaft.[312] This issue is considered further in the discussion of through bills of lading.[313]

A further difficulty has arisen from the use of COGSA paramount clauses, particularly in US trades where COGSA is extended to pre-loading and post-discharge operations.[314] Such a clause might have the effect of displacing a further clause which purports to apply a different rule to a land transit. In *Hartford Fire Insurance* v. *OOCL Bravery*[315] a clause required each stage of the transport to be governed by any law or tariffs applicable to such stage.[316] This pointed to application of the CMR Convention but since this would have resulted in a lower recovery than the COGSA limit, the court at first instance applied the COGSA limit by operation of the paramount clause. This was reversed on appeal[317] as based on the erroneous view that COGSA applied mandatorily to the extended period.[318] The Court of Appeals sought to reconcile the conflicting choice of law clauses by deciding that they apply COGSA unless there is a different law specifically directed at the particular stage of transport, in which case the latter governs. In *HSBC Insurance Ltd* v. *Scanwell Container Line Ltd,*[319] the court held that ambiguities in the bill of lading should be construed against the ocean carrier. Consequently a clause making transportation by inland carriers from the port of discharge subject to the inland carriers' contract of carriage was applied in preference to a clause applying COGSA as a default rule, to loss of goods from a container freight station whilst awaiting clearance through customs. In later proceedings[320] the inland transportation terms were found to have been sufficiently incorporated by course of dealing.[321] In *Mannesman Demag Corp* v. *M/V Concert Express*[322] a clause applied COGSA to the extent that the provisions of the Harter Act would otherwise be compulsorily applicable. A different clause applied inland carriers' contracts of carriage or tariffs. Since the Harter Act did not apply compulsorily to the period of inland carriage the court felt able to apply the inland carrier's limit of liability rather than that applied under COGSA. In *Cigna Insurance Asia Pacific* v. *Expeditors International of Washington*[323] the mere use of the words "door to door" on the face of the bill of

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312. [1982] 2 CF 772.
313. See above, 3.31.
314. See also cases referred to above, 3B.6.
315. [2000] 1 Lloyd's Rep 394, [2000] AMC 1305 (SDNY 1999).
316. Discussed further at 3.77. *Cf Sompo Japan Insurance of America* v. *Union Pacific Railroad Co* [2004] AMC 247 (SDNY 2003), where the court considered a provision applying compulsory international or national rules where the stage of loss is known (i.e. similar to r. 13 above). Since the Carmack Amendment was said to apply to the period of rail carriage it had been argued that this led to its application to that period of carriage and so displaced COGSA. For the court, since the Carmack Amendment could be departed from by contract it was not within the rule.
317. [2001] AMC 25 (2d Cir. 2000).
318. *Cf Phoenix* v. *Eagle Tide* [2001] AMC 1019 and see also *PT Indonesia Epsom Indemnity* v. *Orient Overseas Container Line* [2002] AMC 2769 (SD Fla (Miami Div)) which seems to fall into a similar trap.
319. [2001] AMC 1621 (CD Cal).
320. [2002] AMC 411.
321. Contrast *Sony Computer Entertainment Inc* v. *Nippon Express USA (Illinois) Inc* [2004] AMC1126, where the inland carrier's terms did not override the COGSA paramount clause with the result that the claimant received greater compensation. The broad reference to these terms was not specific enough to fall within the words "unless specifically provided otherwise herein" in the paramount clause.
322. [2000] AMC 2935 (5th Cir.).
323. [2002] AMC 1085 (CD Cal 2001).

lading did not have the effect of applying the COGSA package limit beyond tackle to tackle in the absence of a clear clause doing so.

3.76 Where COGSA is made applicable to non-sea sections of a carriage there may be issues regarding how the particular maritime defences should be applied. For example, in *Vistar SA* v. *M/V Sea Land Express*,[324] the defence of error in navigation was held not to apply to a motor carrier since it was not a ship.[325] In *Levi Strauss & Co* v. *Tropical Shipping & Construction Ltd*,[326] the court considered application of the "Q" clause in COGSA to the theft of a container-load of pants during the inland portion of a multimodal transport. The carrier was held unable to rely on the defence since the truck driver was negligent in stopping and leaving the container untended overnight without sufficient precautions. The driver made an unscheduled stop to see a relative and this was a deviation in the sense of increasing the foreseeable dangers to the cargo.[327] This extension may also raise the possibility of applying the concept of unreasonable deviation to non-sea sections of the transport.[328]

3.77 Further illustrations of cases involving the application of network type provisions can be given. A straightforward example can be found in *Bhatia Shipping and Agencies PVT Ltd* v *Alcobex Metals Ltd.*[329] The multimodal transport document contained a clause based on the Indian Multimodal Transportation of Goods Act 1993 and provided that when the stage of transport where loss or damage occurred is known, liability in respect of such loss and damage shall be determined by the applicable Indian law if the loss and damage occurs in India or by the provisions of the applicable law of the country where the loss or damage occurred. The contractual carriage in this case was from Mumbai to Stafford via Avonmouth. The goods were misdelivered at Avonmouth. Since this occurred in England, English law was applied to the loss.[330] As noted above, in the case of *Hartford Fire Insurance* v. *OOCL Bravery*,[331] the network provision required each stage of the transport to be governed by any law or tariffs applicable to such stage. Whilst the court noted that this meant laws drafted with specific intent to govern a stage of transport, it still approached the matter by reference to the law of the place where the loss occurred i.e. Belgium, in the context of road carriage from Belgium to Holland. Since Belgium had ratified the CMR Convention, this convention applied. Quite possibly, had Belgium not been a Contracting State (but Holland had) the CMR Convention would not have been applied despite the fact that this stage of the carriage would still have fallen within its terms.

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324. 774 F. 2d (5th Cir. 1985), Sorkin, para. 14.14(3) n. 42.
325. *Cf Fruit of the Loom* v. *Arawak* [2000] AMC 387 (SD Fla, 1998), above, 3.7.
326. [2003] AMC 283 (SD Fla (West Palm Beach) 2002).
327. Citing *Asahi America Inc* v. *M/V Arild Maersk* [1986] AMC 53 (SDNY 1985).
328. See generally *Carver on Bills of Lading*, para. 9–036 *et seq.*
329. [2004] EWHC 2323 (Comm), [2005] 2 Lloyd's Rep 336.
330. The court was able to take jurisdiction due to a further clause which granted jurisdiction to *inter alia* a court in the country of the place of delivery.
331. Citation at fn. 315.

3C.6.3 Combined transport documents and mandatory rules

These minimum rules as well as the provisions used in respect of both first and second generation bills have no legal recognition apart from their use as a set of contractual terms. TCM was meant to have the force of law and so might have provided a legally recognised code. The absence of this means that these commercial solutions have only limited operation as contractual provisions, which may be displaced by mandatory rules. This is recognised by some documents which seek to manage this possibility, especially with a view to encouraging severability of offending stipulations.[332] The absence of distinct legal recognition, by means e.g. of an international convention, has the following implications: 3.78

(i) On the assumption that mandatory rules are applicable to a contract of combined transport[333] the operator must adjust his terms either to avoid penalties imposed by particular rules or to take advantage of opportunities provided by them.[334] For example, if an air leg is anticipated the operator must issue a waybill which contains the Warsaw Statement or notice, if there remains the possibility that they might apply, otherwise he risks being unable to rely on rights granted by the Warsaw Convention where this applies.[335] The CT document can count as a waybill[336] but it must comply with the notice provision. Some conditions purport to give this notice by means of a term in the standard conditions.[337] However, at least for the Hague Protocol, this may not be sufficient since what is required is a true "notice" on the air waybill i.e. a discrete form of words warning the reader of the potential applicability of the Convention , a warning which is something different from the conditions of carriage.[338] Similarly, if the operator's trade involves carriage by sea from the USA the operator must ensure that his document contains the clause paramount required by COGSA 1936, s. 13.

(ii) If a mandatory rule applies it might well overrule any of the uniform terms provided in a contract based on the Rules and could apply regardless of the precise terms of the type of network provision in the ICC Rules. For the moment this issue depends upon the interpretation of unimodal mandatory rules and the extent to which they might apply beyond a

332. E.g., TT CLUB 100, cl. 19.

333. See (ii) in this paragraph. Apart from mandatory transport conventions issues also arise in relation to the application of rules designed to control exclusion clauses such as UCTA. The EC Council Directive of 5 April 1993 on unfair terms in consumer contracts is unlikely to have much practical effect, given the business context of most combined transport contracts.

334. See further D. Glass and R. Nair, "Towards flexible carriage documents? Reducing the need for modally distinct documents in international goods transport" (2009) 15 JIML 37.

335. Despite the fact that Montreal Protocol No. 4 and the Montreal Convention 1999 are in force and do not require such a statement there yet remains, for the moment, some possibility that either the original Warsaw Convention or the amendments made by the Hague Protocol, both of which require such a statement, might apply to an air leg.

336. Article 31 of the Warsaw Convention, as amended (Art. 38(2) of the Montreal Convention 1999), states that the parties can include conditions relating to other modes of carriage.

337. *Cf* TT CLUB 400, cl. 46 although expressed as a notice.

338. *Fujitsu Computer Products Corp* v. *Bax Global Inc* [2005] EWHC 2289 (Comm), [2005] 2 CLC 760.

contract which is purely for carriage by a single mode. The other side of the coin is, of course, how a multimodal contract should be defined and whether a distinct demarcation is possible. Even if a mandatory code existed it might still overlap with other unimodal regimes. Arguably there is no reason why the interpretation of the current scope of unimodal regimes should alter depending upon whether a mandatory regime exists for multimodal transport. The issue really becomes one of conflict of conventions which would need to be dealt with in some way. In practice, however, the lack of any clear international regime providing a definition of multimodal transport makes it possible that courts could be wary of argument that multimodal transport is a distinct sui generis contract outside the scope of a mandatory regime.[339] This perspective could change if an international regime applied giving a clear definition enabling a clear demarcation to be made.

3.79 A unimodal convention might impact in a narrow way on a multimodal contract because it applies to one of the modes forming part of the wider contract or in a wider way because its scope reaches further than the particular mode. Regimes can be expected to vary but it may be possible to identify some general considerations. In a few cases the criteria for application of a unimodal rule are so narrow that in practice they exclude many contracts on a wider basis. The CIM Rules have, until recently, applied only to a railway and so, in effect were confined to the physical performer of rail transport. Only if a multimodal operator were to physically perform rail transport could there be any prospect of the CIM applying. Further, it would seem that a contract going beyond rail carriage on listed railway lines and including other modes could have fallen outside the scope of CIM unless the service was listed.[340]

3.80 Most regimes, however, are not necessarily confined to those who contract to physically perform the transport. Whilst they may make reference to aspects of

339. A common suggestion is that a multimodal transport contract is *sui generis* in the sense of being independent of a contract for any specific mode and distinguishable from such a contract. It is really a contract by any mode, Richter-Hannes, D, *Die UN-Konvention über die internationale multimodale Güterbeforderung*, Vienna, 1982, cited by Ramberg in Theunis, at p. 22. See also, in the context of discussion of the MMTC, E. Selvig, "The Background to the Convention", in *Multimodal transport, The 1980 UN Convention, Papers of a one day seminar held at Southampton University, Faculty of Law*, 12 September 1980, A17 and D.C. Jackson, *ibid.*, G2. This may depend upon it being possible to construe a contract in this open way rather than being for contemplated modes. Even if so construed, its potential as a means for evading mandatory rules could make a court reluctant to accept it as a basis for distinguishing it from a contract for the individual parts (see below fn. 356) unless a legislative rule forces the distinction to be made.

340. In accordance with Art. 2(1) and 3(3) of COTIF 1980. Listing the service enabled CIM 1980 to apply to the whole of the transport and not merely the rail carriage, subject to the possibility of applying exceptions appropriate to sea carriage (Art. 48 of the CIM Rules). Given the general framework of CIM 1980 and the strict requirement of a consignment note covering the exact rail carriage it would seem likely that it was not intended to apply in any way to a wider contract except in accordance with these provisions. Under CIM 1999 the concept of a contracting carrier is substituted for railway and now the Convention operates more like CMR. There is still, however, the possibility of listing sea and inland waterway services supplemental to rail carriage (Art. 1(4) of CIM Rules and Art. 24(1) of the Convention). The change in the nature of the framework might make it possible to argue that these provisions are confined to enabling CIM to apply beyond its normal scope but do not affect the application of CIM to the rail section of multimodal contracts in general.

physical performance they normally can be interpreted as contemplating the possibility of a split between contracting for the performance of the carriage and its actual performance.[341] This creates, at least, a practical possibility that a wider range of operator can be brought within the scope of a unimodal regime. It also means that an agreement might be categorised as sufficiently connected to a means of transport to fall within a scope provision notwithstanding that it is performed by use of a different means in whole or in part or where transit is suspended. The application of the unimodal regime will depend therefore on the criteria necessary to characterise the contract as being within the scope of the regime. Some or all of these criteria might come into play if it is thought necessary to differentiate between different regimes. Thus different considerations come into play, for example if a multimodal contract must be distinguished from a unimodal one or if it is thought that they can overlap.

3.81 Relevant criteria may take a positive or negative form. A court might interpret a scope provision as requiring the contract positively to specify or at least contemplate performance by a particular mode. This would have the effect of excluding a contract which is construed as leaving open the mode of performance. A court might, however, be wary of contractual provisions designed to evade application of the rule and so may focus on facts surrounding the contract to exclude this possibility, such as the fact that the operator is a sea carrier. Further, it will need to decide whether the existence of a liberty within the contract necessarily excludes the operation of the regime, even if not exercised, and the effect if it is. Other criteria may be incorporated to reinforce a characterisation of a contract as being for a particular mode, such as the type of document issued or the type of operator.[342]

3.82 The latter factor comes close to seeing subcontracting as outside the scope of a regime but this might not be the intent. If the relevant scope rule is interpreted as requiring that a contract be "for" a particular mode the fact that the carrier is a certain type of operator might be used to reinforce the idea that the contract contemplates a mode of performance and therefore is "for" it. This might be especially relevant if seeking to demarcate one type of modal contract from another. For example, the CMR Convention in Article 2 contemplates that road carriage can fall within its scope even if the vehicle is carried by another means of transport. Although Article 2 may be seen as dealing with a form of multimodal transport it is still, arguably, subject to Article 1 which applies the Convention to contracts for the carriage of goods by road. Unless a court regards Article 2 as extending the Convention to a contract which is not otherwise regarded as a contract for carriage by road it must still be possible to regard the contract as being one for carriage by road. A court therefore might be tempted by an argument that a ferry operator

341. Ramberg, e.g., notes in "Deviation from the Legal regime of CMR (Art. 2)" in Theunis, pp. 19–42, at p. 21 that the literal wording of CMR assumes that at the time of contracting the intention was for the CMR carrier to undertake performance, but case law has included contracting carriers, *cf* *Quantum*, below, 3.83.

342. There may be little to determine whether a particular mode or combination of modes is contemplated and whether exclusively contemplated. A court might be confident in seeing a contract made with a person who supplies a road vehicle as contemplating carriage by road at least in part but it might not regard carriage by another means, in part, as necessarily excluded. The more so if a container is supplied.

issuing a sea waybill and providing a door to door service by subcontracting road carriage does not contract to carry by road[343] and so is outside the scope of CMR altogether.[344] A further possibility is to regard a contract as being for a particular mode where it is predominantly for that mode.[345] A contract for multimodal transport could then be drawn into one unimodal regime rather than another depending upon the criteria used to determine predominance. A negative perspective might regard a uniform regime as applicable only where the contract covers the specified mode, as appeared to be the case, in general, with the previous CIM Rules. This would clearly enable any contract that was construed as being "for" multimodal transport as being outside its scope. Regardless therefore of how a contract for multimodal contract is defined a unimodal regime might still impact on it depending upon how its application rule is interpreted.

3.83 Issues of this nature have received some treatment in a leading decision of the Court of Appeal in the context of the CMR Convention. In *Quantum Corp Inc* v. *Plane Trucking Ltd,*[346] an air carrier agreed to carry goods from Singapore to Dublin. The contract was evidenced by an air waybill covering the whole journey but which contained indications that the goods would be carried by air to Paris and thence by road to Dublin.[347] The goods were stolen during the period of carriage between Paris and Dublin which had been subcontracted to a road carrier. At first instance,[348] Tomlinson J, held that despite the fact that international road carriage was involved, the CMR Convention did not apply to the loss. At that point the contract terms in the air waybill applied rather than any mandatory rule. Although the Warsaw Convention applied to the carriage by air, by its terms this did not extend to the road carriage nor was it contractually extended. On the assumption that the carrier was not obliged to carry by road,[349] the judge characterised the contract as being predominantly one for carriage by air so that the concept of taking over by road in CMR could not sensibly be applied to the taking over of the goods

343. *Cf* Ramberg, in Theunis, at p. 24 who gives the example of a ro-ro carriage from a place a few miles from the port of Gothenberg to the port of Felixstowe which might well be regarded as carriage by sea under the Swedish Maritime Code.

344. The indication in Art. 2 that the Convention shall nevertheless apply to the whole of the carriage might suggest that the definition in Art. 1 is extended to cover it. On the other hand it may be intended merely to indicate that this form of carriage may be regarded as being within Art. 1 without necessarily dictating this result.

345. Depending on the criteria used to determine identification, i.e. specification, contemplation or permission. Criteria would also be necessary to determine prominence: length of journey, cost etc. This type of criteria is relevant in carriage by air where, under the Warsaw Convention a distinction appears to be required between feeder traffic and combined transport (*cf* Art. 18(3) and Art. 31(1), see Art. 18(4) and 38(1) of the Montreal Convention). Distance criteria is made expressly relevant to the CMNI Convention which does not apply where the distance carried by sea is greater than carriage by waterway (Art. 2(2)).

346. [2002] EWCA Civ 350, [2002] 1 WLR 2678.

347. I.e. this was a form of substitution carriage common in the context of air carriage, permitted either under the terms of an air waybill, under IATA Resolution 507b or by express agreement, see Giemulla/Schmid, Art. 18 (WC) paras 53 *et seq*.

348. [2001] 2 Lloyd's Rep 133. For criticism see Clarke [2002] JBL 210, cited in the Court of Appeal judgment.

349. This was open to argument but he regarded it as implausible that the carrier had obliged itself to carry only by road from Paris. He addressed the position on either possibility however.

at Singapore.[350] Even if the contract had obliged the carrier to carry by road from Dublin, he would have regarded the contract as being for mixed carriage by air and road and still outside the terms of the Convention.[351]

3.84 In the Court of Appeal, Mance LJ[352] saw the issue in terms of two questions: whether the application of the Convention depends upon a carrier having contractually obliged itself to carry by road and to what extent a contract can be both for carriage by road within Article 1 of CMR and for some other means of carriage. The first question was analysed in terms of four possibilities:[353] the carrier may have (a) promised unconditionally to carry by road and on the trailer; (b) promised this, but reserved either a general or limited option to elect for some other means of transport for all or part of the way; (c) left the means of transport open, either entirely or as between a number of possibilities at least one of them being carriage by road; or (d) undertaken to carry by some other means, but reserved either a general or limited option to carry by road.[354] In his view in case (a) a contract was definitely for carriage by road, and was so in case (b) until the carrier elected otherwise under the option. In case (c) a contract was for such carriage in the sense of providing for or permitting it when it actually occurred. Case (d) was more doubtful but he thought it difficult to draw any clear or satisfactory distinction between this and the other cases.[355] He was able to draw on supportive European decisions apart from a few cases relevant to (d).[356] The second question was

350. Drawing on the analysis by Fitzpatrick [1968] JBL 311. This analysis was rejected by the Court of Appeal, but the difficulties of applying the concepts of taking over and delivery employed in CMR to carriage by road to a wider contract where the goods are taken over by or delivered to a carrier by a different means is still seen by some as a valid objection, see Berlingieri [2003] ULR 265, at p. 270. See also the discussion in the context of the development of the Rotterdam Rules: "General remarks on the sphere of application of the draft instrument, Note by the Secretariat", UNCITRAL, A/CN.9/WG.III/WP.29, 31 January 2003, paras 62–63 noting the case for the non-application of CMR to door-to-door transport; *cf*, however, the position in respect of the Warsaw/Montreal regimes, para. 72 in light of the "combined transport" provisions in Arts 31(1) and 38(1) respectively.

351. In his view there was no provision for multimodal transport other than the limited case in Art. 2 which applies only where the contract starts as a carriage by road. This conclusion is not possible in respect of carriage by air since multimodal transport in a wider sense is specifically provided for in the air regime.

352. Giving the judgment approved by the court. See also Clarke [2003] JBL 522.

353. At para. 15.

354. The judgment does not delve further into the criteria necessary to determine what has been promised. This will depend on a consideration of the contract terms as a whole. Included among this consideration may well be whether the means of transport is specified or contemplated. A different analysis might suggest that a contract is for a particular means only if that means is specified.

355. The cases concern a contract which can be construed as at least permitting the actual mode adopted. Different considerations arise where this is not the case. There would then be a deviation.

356. Typical was a Belgian case reported in 1976 (District Court, Antwerp, 11 ETL 279) which concerned a combined transport bill of lading issued for carriage from Hong Kong to Antwerp. The bill of lading provided for optional discharge ports and the goods were discharged at Rotterdam, carried by a subcontracting haulier to Antwerp and damaged in the course of this period of road carriage. The court rejected the application of the nine-month time limit in the bill of lading and applied instead the one-year limit imposed by the CMR Convention. The court specifically rejected the argument that the carrier had not contracted to carry by road but had contracted for combined transport which might or might not involve carriage by road. Here the court relied on the fact that international road carriage had in fact taken place which was then incorporated into the contract by virtue of the exercise of the liberties granted by the contract (contrast another Belgian decision, noted in 1984 in the *Annual Review of Belgian Jurisprudence*, where a bill of lading indicated Antwerp/Rotterdam as the intended port of shipment. The goods were shipped from Rotterdam yet the court applied Art. 91 of the Belgian Maritime Law in favour

answered in favour of the application of CMR even where international road carriage takes place within the scope of a wider contract.[357] More generally there was rejection of the idea that Article 1 of CMR required any contract to be characterised as a whole and that whether there exists a contract for the carriage by road within Article 1 should take into account the actual operation of the contract under its terms. On this approach therefore, and if it can be extrapolated beyond the confines of CMR in particular,[358] even if a contract for multimodal transport is defined or construed in a sense which suggests that it is a different type of contract, either because it is one which leaves the mode of transport unspecified, or because it covers more than one mode, this will not prevent it from also being a contract for the individual mode. One implication of this is that it might suggest that it is possible to identify a carrier as being a carrier for a particular mode whether or not physically providing the carriage and even if the particular mode is not specified or contemplated at the outset. Where, however, it is necessary to distinguish different types of carrier, further criteria will need to be adopted. For example, Article 2(2) of CMR refers to where the carrier by road is also the carrier by another means of transport. Criteria linked to such matters as ownership or control of the different means will be necessary to determine when a carrier is acting in one capacity or another. This is one dimension of the problem which arises where there is an interchange between modes and potential overlap of more than one regime during it.[359]

3.85 The Court of Appeal's decision in *Quantum* has not received universal approbation and any hoped for uniformity of approach at the higher levels of decision making on CMR has been negated by a number of important contrary decisions. The Belgian Supreme Court[360] has rejected the application of CMR to road carriage by a courier service under a framework agreement where the mode of transport was not specified and it was not clear from the circumstances that road transport was envisaged. Clearly the court characterised the contract as different from a contract for carriage by road and might regard a contract for multimodal

of the holder of the bill of lading. Proof of the actual port of loading was not admitted). The Court of Appeal in *Quantum* noted also Antwerp, 4 January 77 [1977] 12 ETL 843, Rb. Rotterdam 28 October 99, BGH, 17 May 89 (1 ZR 211/87), in the context of substitution of air by road carriage under IATA Resolution 507B and BGH 24 June 87 (1 ZR 127/85) rejecting the application of the concept of *Gesamtbetratchung* (overall consideration) in the context of carriage by several means of transport (see Hoeks, p. 167). The rejection of *Gesamtbetratchung* was not without criticism in the context of air/road substitution, see Giemulla/Schmid, Art. 18 (WC), para. 59. Further contrary cases from France in the context of carriage by air were noted in *Quantum*: Bobigny, 24 September 94 and 24 November 95. Contrast further the approach taken in Italy, see Salesi and Pesce, "Multimodal mayhem" (2002) 17 M. Advocate, 22–23, citing *Andrea Merzario SPA* v. *Vismara Associates*, Court of Cassation, 2 August 1998, No. 8713.

357. Otherwise, the fact that a small period of carriage by another means takes place might take a case outside CMR, see para. 26.

358. In *The Starsin* [2003] UKHL 12, [2003] 2 WLR 711, a majority of the House of Lords (see especially the judgment of Lord Hobhouse at para. 153) have taken the view that the Hague Rules can be applied where a contract can be regarded as a contract *of* carriage by sea rather than a contract *for* carriage. This was in the context of the application of a Himalaya clause and is directly linked to actual performance (*cf The Marielle Bolten*, see above, fn. 67). It is not thought that it necessarily excludes an alternative identification of a contract as being for carriage by sea.

359. See below 3.90.

360. 8 November 2004, 2005(3) Uniform Law Review 628.

transport similarly. However, the case may be distinguishable on the basis that where a courier service is involved a customer would generally have little expectation as to how the goods are to be carried and would leave the form of carriage entirely to the decision of the carrier. More directly contradictory to *Quantum*, and despite a previously favourable approach, the German Supreme Court has moved away from acceptance of the application of CMR to part of a multimodal movement. In a case involving carriage from Tokyo to Mönchengladbach in which the goods were carried by sea to Rotterdam and then loaded on a road vehicle for the remaining carriage at which point loss occurred, the court rejected the jurisdiction of the German courts via Article 31 of CMR which the court held could not be applied.[361] The same conclusion has been reached by the Dutch Supreme Court in *The Godafoss*,[362] so that Article 31(1) was held not to apply to a contract covering carriage by sea from Reykjavik to Rotterdam with on carriage by road to Naples. Both decisions used similar reasons for rejecting the *Quantum* approach[363] and dismissed the authorities from which the Court of Appeal had drawn support as not being based on an autonomous interpretation of CMR. An important consideration for the Dutch court was the difficulty of determining jurisdiction where the parties disagree as to where the loss occurred along with the possible further question, which might indirectly depend on where the loss occurred, of which law applies to the dispute.

3.86 These decisions of the German and Dutch Supreme Courts simply deal negatively with the application of CMR in respect of part of a multimodal contract. They do not necessarily reflect on the correct approach to determine whether a contract as a whole falls within the scope of a unimodal convention such as CMR notwithstanding that some element of the contract falls outside the standard paradigm. A decision of the Supreme Court of Denmark can be used to illustrate this and to display a similar approach to that taken in *Quantum* in that the court focused on the actual performance of the transport adopted by the carrier. This arose also in the context of CMR but produced a different result. In *Scan-Service A/S* v. *D.F.D.S. A/S*,[364] a freight forwarder brought a recourse action against D.F.D.S. in respect of loss of a load of TV sets carried in a container from Denmark to England. The freight forwarder had contracted with his customer on CMR terms and compensated him on that basis. In the course of making the subcontract D.F.D.S. had offered different terms depending on the method used to carry the goods. If a trailer was used then CMR terms would apply but if a container then there was an 11-month time limit. The freight forwarder hoped to persuade the court to apply CMR to break that limit. The court refused and applied the contractual limit to defeat the forwarder's claim. The container was carried by road to the ship, offloaded on to a ship's trailer for movement on to the ship. This had the

361. BGH 17 July 2008, (2008), I ZR 181/05. (2009) XLIV *European Transport Law* 196, TranspR, 365–368. See further P. Luarussen, (2009) XLIV ETL 143) and Hoeks, para. 4.1.2.1, who notes that the court followed the opinion generally supported by the German legal literature.

362. 1 June 2012, see Spanjaart (2012) TranspR 278, the court noting the decision of the BGH.

363. That since Art. 2 explicitly deals with one form of multimodal transport other forms are excluded and that the protocol of signature evinces the future intention to deal with multimodal transport (see Hoeks, p. 174, Spanjaart, p. 281.

364. (1989) 24 ETL 345.

effect of breaking CMR since there was not a continuous movement on a road vehicle within Article 2 of CMR. This was a case where the carrier (D.F.D.S.) had a choice whether to use a trailer, which would involve a continuous movement, or a container which, on the facts, did not. The forwarder was aware that a container was in fact to be used and aware of the existence of the conditions. He had not appreciated, however, the difference between trailer and container carriage. The majority of the court construed the case as being, in effect, like case (c) above. One judge dissented, however, on the grounds that D.F.D.S. should have stated their choice and made sure that the freight forwarder knew the consequences of this choice. It has been suggested that this is a better approach,[365] but equally, in the context of the case, a freight forwarder might be considered to be better placed than most to appreciate the consequences of giving a free choice to the carrier.

3.87 Two further cases may provide a contrast in giving less weight to the actual mode of performance. The District Court of Rotterdam[366] held CMR applicable to damage occurring to a crane during the road leg performed in Egypt in the course of a contract of carriage which involved carriage from Cairo to Geleen (Holland), including a sea leg from Alexandria to Antwerp in the course of which the crane was unloaded from the truck. This may either reflect a characterisation approach or a performance approach but involving a somewhat literal interpretation of the criteria in Article 1 of CMR. The second case, this time not involving CMR, is *Mayhew Foods Ltd* v. *O.C.L.*[367] A combined transport bill of lading was issued for carriage of the plaintiff's cartons of frozen chicken and turkey in a refrigerated container from Uckfield in Sussex to Jeddah, Saudi Arabia. On the face of the bill of lading the intended vessel was indicated as the *Benalder* and the intended port of shipment was Southampton. The container was in fact carried to Shoreham, carried by feeder vessel to Le Havre where it was off-loaded, stored for a few days, reloaded on the *Benalder* for carriage to Jeddah. At Jeddah damage to the goods was discovered which was due to faulty setting of the refrigeration unit. The carriers argued that they were entitled to rely on their general limit in the CT bill, rather than be subject to the limit imposed by the Hague-Visby Rules as applied by COGSA 1971, because the damage had occurred to the goods before they were reshipped at Le Havre. This was probably during the period of storage, and was not thereby covered by any compulsory rules. This argument rested on two contentions : first, that since the bill of lading related to shipment on the *Benalder*, the prior stage from Shoreham to Le Havre was not covered by the bill of lading; secondly, that even if the first leg was subject to the Act, it did not cover the period of storage during which the damage occurred since the Rules only applied " . . . in relation to and in connection with the carriage of goods by sea in ships . . . ".[368] These arguments were rejected by Bingham J who found, in respect of the first contention: that the Rules attach to

365. Clarke, CMR, para. 14. This would treat the case as one where continuous road carriage was promised without liberty to choose a different mode. Possibly the court was overly influenced by Art. 2 in assuming that merely because there was no continuous international road carriage the case was necessarily outside CMR.

366. In a decision of 24 January 1992, see *Cleton* (1992) II ULR 186 at p. 191. See further Hoeks, para. 4.1.1.1.

367. [1984] 1 Lloyd's Rep 317.

368. Section 1(3).

a contract,[369] that the contract here was from Uckfield to Jeddah and that whilst the Rules did not apply to the period of inland transport prior to shipment, the contract clearly provided for shipment at a UK port, intended to be Southampton but in the event Shoreham, and from the time of that shipment the Act and the Rules applied. It did not matter that the goods left the country on a different ship since that was an exercise of the liberty to substitute vessels etc. Nor did it matter that the bill of lading was issued some days after the goods arrived at Le Havre. The parties clearly expected and intended a bill of lading to be issued and when issued it duly evidenced the parties' earlier contract.

3.88 In respect of the second contention he held that the storage of the goods still amounted to operations in connection with a carriage by sea. This was because the contract was, between the port of shipment and the port of discharge, a contract for carriage by sea.[370] The learned judge emphasised the lack of knowledge of the plaintiff of any voyage to Le Havre and distinguished *Captain* v. *Far Eastern*,[371] a case involving a through bill of lading where the shipper was told when the contract was made that there would be transhipment and a separate bill of lading was issued in respect of the on-carriage. It may be arguable that more weight might have been given to the freedom granted by the liberty clause to qualify the performance agreed to by the carrier on an analogy with *G.H. Renton & Co Ltd* v. *Palmyra Trading Corp of Panama.*[372] Less weight might have been given to the form of the document as a bill of lading and therefore its categorisation as a contract for carriage by sea as opposed to a contract for combined carriage exercised at the choice of the carrier. A document which more closely follows the ICC Rules and is not expressed as a bill of lading,[373] might, perhaps, stand a greater possibility of ensuring that the contract evidenced by is regarded as being "for" combined transport rather than "for" carriage by sea.[374]

3.89 The application of mandatory provisions may well leave therefore, in many cases, little scope for the contractual provisions to take effect. Once a clause *ex facie* offends a mandatory rule it is likely to be struck down despite an argument that the situation falls outside the compulsory application of the rule. Thus in the US decision of *Tokio Marine Management Inc* v. *M/V Zim Tokyo*,[375] the fact that goods were stolen from a terminal and outside the compulsory application of the Hague Rules did not permit the CTO to rely on a limitation clause in its bill of lading which was rendered void by operation of the rules. To be effective the clause must be expressed as applying to the situation where COGSA is not applicable. Even the provisions seeking to deal with concealed damage may not have a role whenever a compulsory rule applies to part of the carriage. Unless the carrier proves that the

369. *Pyrene Co Ltd* v. *Scindia Navigation Co Ltd* [1954] 2 QB 402.

370. Despite the wide language of the liberty clause, see especially p. 320. *Cf Schramm Inc.* v. *Shipco Transport Inc., in personam* [2004] AMC 961 (4th Cir.)

371. [1979] 1 Lloyd's Rep 595.

372. [1957] AC 149.

373. E.g. Combidoc.

374. The more so if, e.g. a document issued by a forwarder is not regarded as a bill of lading for the purposes of the Hague Rules, see above 2.81, *et seq*.

375. [1995] AMC 2263 (SDNY 1995), *cf Continental Insurance Co Inc* v. *CLX Services* [2003] AMC 2251 (California, Sup Ct, County of Alameda, 2002).

loss occurred outside the period of application of the mandatory rule, the operation of the rule will naturally draw the carrier's liability into it. Where more than one mandatory rule applies to different sections, the carrier may find himself drawn to the stricter rule.[376] The position becomes even more delicate where the mandatory rules operate a presumption as to the stage of loss as in the case of carriage by air.[377] The validity of a concealed damage provision deeming loss to have occurred at sea has, however, been upheld in some cases.[378]

3.90 Furthermore, as noted above, where more than one set of compulsory rules applies to parts of a combined transport, the courts may be faced with resolving conflicts between them if it is possible for them to overlap at a particular stage. This may be especially the case if, for example, the scope of an international convention is not perceived as necessarily having a temporal limitation.[379] In *Quantum*,[380] Mance LJ alluded to the possible clash of conventions in the context of combined air and road carriage. Goods might be in an airport in the charge of the air carrier after it had also taken them over for road carriage[381] or possibly while road carriage was being completed. He was confident that this could be resolved either by recognising the difference in capacity in which the goods were held, or if both conventions could apply at the same time, by recognising that nothing in either prevents the carrier from undertaking a higher responsibility.[382] This begs the question as to what criteria are relevant to determine when a carrier is acting in one capacity rather than another.[383] Where only one mandatory regime is applicable in any one transit, although compulsorily applicable to only one part, the effect of a paramount clause, which may be required by the regime, can sometimes have the effect of extending it contractually to the whole transit so that it becomes unnecessary to demarcate one stage of the transit from another.[384]

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376. This was the approach taken in Germany in the decision of the BGH of 24.6.87 (see above, fn. 356). Where the stage of damage is unknown the application of the rule that the burden of proof is on the carrier leads to the conclusion the law most favourable to the customer applies, see further Paschke, in Kiantou-Pampouki, 113 at pp. 115–116. Under the recent reform of German transport law 1998, however, application of legal provisions relevant to a particular stage depends upon proof, otherwise the general rules of liability apply, the burden being upon the person seeking to apply them (s. 452a). The Dutch civil code (Book 8, ss. 42 and 43) adopts a rule similar to that of the BGH, see Van Beelen in Kiantou-Pampouki, 159 at p. 166. See also, below, 3.170, in respect of the Rotterdam Rules.

377. E.g. Art. 18(4) of the Montreal Convention.

378. *Consumers Distributing Co Ltd* v. *Dart Containerline Co Ltd* (Fed Ct Canada, No. T–2480–76, unreported), noted by Harrington, p. 9, *Halm Industries* v. *Timur Star* [1985] AMC 391 (SDNY 1984).

379. In the context of the Hague Rules, see Clarke [1989] LMCLQ 394 and *The Zhi Jiang Kou* [1991] 1 Lloyd's Rep 493 at p. 498, contrast *Kamil Export (Aust.) Pty Ltd* v. *N.P.L. (Australia) Pty Ltd* [1996] 1 VR 538.

380. See above, fn. 346, at para. 28.

381. See Art. 18(4) of the Montreal Convention.

382. In fact this is not strictly true since Art. 41 of CMR permits no derogation except in accordance with its terms.

383. *Cf* the difficulty faced by Neill J, in *Thermo Engineers Ltd* v. *Ferrymasters Ltd* [1981] 1 Lloyd's Rep 200 in respect of Art. 2 of the CMR Convention. Here both modes of carriage were in operation at the same time and he found the demarcation in the commencement of sea carriage rather than the end of road and in being able to describe the process of loading a ship as having begun.

384. See e.g. the decision of the Cour D'Appel De Paris, 19 February 2003, 2003 (4) ULR 1012.

3C.7 RESPONSIBILITY OF THE CONSIGNOR

ICC Uniform Rules, Rules 7 and 8 3.91

7. The consignor shall be deemed to have guaranteed to the CTO the accuracy, at the time the goods were taken in charge by the CTO, of the description, marks, number, quantity, weight and/or volume of the goods as furnished him, and the consignor shall indemnify the CTO against all loss, damage and expense arising or resulting from inaccuracies in or inadequacy of such particulars.[385]

The right of the CTO to such indemnity shall in no way limit his responsibility and liability under the CT Document to any person other than the consignor.

8. The consignor shall comply with rules which are mandatory according to the national law or by reason of international Convention, relating to the carriage of goods of a dangerous nature, and shall in any case inform the CTO in writing of the exact nature of the danger before goods of a dangerous nature are taken in charge by the CTO and indicate to him, if need be, the precautions to be taken.

If the consignor fails to provide such information and the CTO is unaware of the dangerous nature of the goods and the necessary precautions to be taken and if, at any time, they are deemed to be a hazard to life or property, they may at any place be unloaded, destroyed or rendered harmless, as circumstances may require, without compensation, and the consignor shall be liable for all loss, damage, delay or expenses arising out of their being taken in charge, or their carriage, or of any service incidental thereto.

The burden of proving the CTO knew the exact nature of the danger constituted by the carriage of the said goods shall rest upon the person entitled to the goods.[386]

3C.8 CLAIMS AND ACTIONS

ICC Uniform Rules, Rules 10 and 19 3.92

10. Except in respect of goods treated as lost in accordance with Rule 15 hereof, the CTO shall be deemed prima facie to have delivered the goods as described in the CT document unless notice of loss of, or damage to, the goods, indicating the general nature of such loss or damage, shall have been given in writing to the CTO or to his representative at the place of delivery before or at the time of removal of the goods into the custody of the person entitled to delivery thereof under the CT document, or, if the loss or damage is not apparent, within seven consecutive days thereafter.[387]

19. The CTO shall be discharged of all liability under these Rules unless suit is brought within nine months after,

i. the delivery of the goods, or

ii. the date when the goods should have been delivered, or

385. *Cf* Art. III, r. 5 of the Hague-Visby Rules, Art. 17 of the Hamburg Rules and Art. 31(2) of the Rotterdam Rules. See also Gaskell *et al.*, ch.15 and cl. 18 of Combiconbill, cl. 17 of Combidoc, cl. 5 of FBL (and FBL 92), cl. 14 of DAMCO Bill of Lading.

386. *Cf* Art. IV, r. 6, of the Hague-Visby Rules, Art. 13 of the Hamburg Rules and Art. 32 of the Rotterdam Rules. See also cl. 22 of Combiconbill, cl. 18 of Combidoc, cl. 4 of FBL (and FBL 92) and cl. 21 of DAMCO Bill of Lading.

387. *Cf* Art. III, r. 6, of the Hague-Visby Rules, Art. 19 of the Hamburg Rules and Art. 23 of the Rotterdam Rules. See also Gaskell *et al.*, ch. 17.

iii. the date, when in accordance with Rule 15, failure to deliver the goods would, in the absence of evidence to the contrary, give to the party entitled to receive delivery the right to treat the goods as lost.[388]

3D MULTIMODAL TRANSPORT—THE INTERNATIONAL MULTIMODAL TRANSPORT CONVENTION 1980

3D.1 INTRODUCTION

3.93 As noted in the outline in part one the starting point to this Convention was the end of TCM. TCM was to be finalised at a UN/IMCO Container Conference in 1972. However, focus had shifted to the work being undertaken by UNCTAD in the shipping field. In 1965 the UNCTAD Committee on shipping had been established and within a few years had created its working group on international shipping legislation. The fact that modern liner shipping had become involved in combined transport meant that UNCTAD, through its committee of shipping, also became involved in it.[389] The interest of UNCTAD in liner shipping had meant that by 1971 projects had commenced under its aegis, leading ultimately to the Code of Conduct for Liner Conferences (1974), and the Hamburg Rules (1978). These two projects had been initiated largely at the insistence of developing countries reflecting their concern over existing rules or regulatory measures which had not involved their active participation. The upshot was that the UN/IMCO Container Conference did little more than request further study by UNCTAD and that an Intergovernmental Preparatory Group (IPG) with adequate geographical representation be established to prepare a new draft Convention. This was set up by UNCTAD in 1973 with 67 member countries.

388. See Combidoc, cl. 4, FBL, cl. 19 (FBL 92, cl. 17), DAMCO Bill of Lading, cl. 9, NSFCC, cl. 12. It is somewhat unclear as to how the last two dates mentioned are to be reconciled. The time limit is more restrictive than is common in carriage regimes (*cf* the one-year limit provided by Art. III, r. 6 of the Hague-Visby Rules) in order to give the CTO time to exercise recourse within the usual limit. As with the Hague-Visby Rules the time limit applies to actions against the CTO and not to actions by him. Variations on the ICC rule exist. Clause 4 of Combiconbill provides for a limit of 11 months running from the delivery of the goods or the date when the goods should have been delivered. See further *Trafigura Beheer BV* v. *Golden Stavraetos Maritime Inc (The Sonia)* [2003] EWCA Civ 664, [2003] 1 WLR 2340 in respect of similar references to delivery and the date when goods should have been delivered under Art. III, r. 6 of the Hague-Visby Rules.

389. See further for references to background documentation, G.F. Fitzgerald, "The Proposed Convention on International Multimodal Transport of Goods: A Progress Report", *1979 Canadian Yearbook of International Law*, 247. See also the Southampton Seminar, E. Chrispeels, "The United Nations Convention on International Multimodal Transport of Goods: A Background Note" (1980) 15 ETL 335; Driscoll & Larsen, "The Convention on International Transport of Goods" [1982] *Tulane Law Review* 193; S. Mankabady, "The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions" (1983) 32 ICLQ 120; K. Nasseri, "The Multimodal Convention" (1988) 19 JMLC 231; De Wit, paras 2.191 *et seq*. For the text of the Convention see UN Doc. TD/MT/CONF/16 (1980).

3.94 Two special features of the Convention are explained by reference to this background:[390]

(a) The fact that it reflects the concerns of developing countries. The IPG's task was not to commence drafting a new Convention with TCM as a starting point but rather to review, on the basis of studies prepared by the UNCTAD secretariat, a wide range of economic, social and commercial problems. These were in large measure inspired by the concerns of developing countries. These fears led to calls for positive measures of control such as sanctioning a licensing system or minimum ownership rules in respect of domestic operations. The western countries, on the other hand argued that the Convention should be concerned only with private law matters and pointed to the danger of conflict with the Liner Conference Code. Once this was accepted a compromise was reached in 1977 when the IPG adopted, by consensus, a "common understanding" whereby the Liner Code should be left to deal with regulation in the field of shipping, regulation of domestic transport should be a matter of national law, and the Convention should relate to private law but that there should be recognition of the right of regulation at the level of national law. This compromise can be found reflected specifically in the Convention in the Preamble and Article 4. Even apart from this several detailed features of the rules reflect compromises reached to reconcile perceived differences between the interests of developing and developed countries.

(b) The process outlined above is reminiscent of the process leading to the adoption of the Hamburg Rules and a feature of the Convention is that many of its rules are markedly similar to the Hamburg Rules and reflect a particular interest in shipping. This was due in part to the fact that the IPG considered the problems of multimodal transport mainly from the point of view of shipping. Although, in principle, the Convention is meant to cover all modes of transport the background of many of the participants was in shipping law and policy. It is also due to the fact that the major parts of the Convention were prepared subsequent to the Hamburg Conference and many of the participants had also participated in that conference.

3.95 The Convention is divided into eight parts and consists of 40 articles which are generally of the type to be found in a Convention governing the liability of a carrier. There is also an annex which contains provisions on customs matters. This relates to Article 32 which requires Contracting States to authorise the use of the procedure of customs transit for international multimodal transport which should be in accordance with the rules and principles contained in Articles I to VI of the annex to the Convention. This is designed to encourage adoption of a through transit procedure by states which have not yet adopted the Customs Container Convention. By Article 36 ratification by 30 States is needed to bring the Convention into operation and few States have done so. By Article 3(1) the Convention is expressed

390. See Selvig, Southampton Seminar.

as having mandatory application.[391] The argument for optional adoption[392] was rejected. Article 3(2) goes on to state, however, that nothing affects the right of the consignor to choose between multimodal and segmented transport. It is not clear whether this is a requirement that there must be a choice. Presumably the choice can be dictated by the commercial realities. Also the meaning of "segmented" is presumably determined by reference to the definition of multimodal transport and multimodal transport operator in Article 1[393] so as not to mean merely specified transport, otherwise there would be little room for application of the Convention.

3.96 Note that in respect of the interpretation of the Convention, no equivalent to Article 3 of the Hamburg Rules is reproduced in the Convention. Nevertheless English courts would apply a principle in the same spirit as expressed in *Stag Line* v. *Foscolo Mango.*[394] Furthermore on adoption of the Convention by the UK, the principles stated in Section 3 of the Vienna Convention on the Law of Treaties, Articles 31–33, would become applicable.[395]

3D.2 DEFINITIONS AND APPLICATION OF THE CONVENTION

3.97 **Multimodal Transport Convention, Articles 1 and 2**

Article 1. Definitions

For the purposes of this Convention:
1. "International multimodal transport" means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country. The operations of pick-up and delivery of goods carried out in performance of a unimodal transport contract, as defined in such contract, shall not be considered as international multimodal transport.
2. "Multimodal transport operator" means any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and who acts as a principal, not as an agent or on behalf of the consignor or of the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract.
3. "Multimodal transport contract" means a contract whereby a multimodal transport operator undertakes, against payment of freight, to perform or to procure the performance of international multimodal transport.
4. "Multimodal transport document" means a document which evidences a multimodal transport contract, the taking in charge of the goods by the multimodal transport operator, and an undertaking by him to deliver the goods in accordance with the terms of that contract.
5. "Consignor" means any person by whom or in whose name or on whose behalf a multimodal transport contract has been concluded with the multimodal transport operator,

391. See also Art. 28.
392. As was to be the case under TCM.
393. See below, 3.97.
394. [1932] AC 328 at p. 350.
395. See further *Fothergill* v. *Monarch Airlines* [1981] AC 251 at p. 282.

or any person by whom or in whose name or on whose behalf the goods are actually delivered to the multimodal transport operator in relation to the multimodal transport contract.[396]
6. "Consignee" means the person entitled to take delivery of the goods.[397]
7. "Goods" includes any container, pallet or similar article of transport or packaging, if supplied by the consignor.[398]
8. "International convention" means an international agreement concluded among States in written form and governed by international law.
9. "Mandatory national law" means any statutory law concerning carriage of goods the provisions of which cannot be departed from by contractual stipulation to the detriment of the consignor.
10. "Writing" means, *inter alia*, telegram or telex.

Article 2. Scope of application

The provisions of this Convention shall apply to all contracts of multimodal transport between places in two States, if:

(a) The place for the taking in charge of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State, or

(b) The place for delivery of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State.[399]

3D.2.1 Application to multimodal transport contracts

3.98 The application of the Convention depends both on the definitions in Article 1 which give substance to the concept of a multimodal transport contract and to the geographical points of contact specified in Article 2. Article 1(2) and (3) embody the concept of a contract personally to procure the performance of the carriage as forming the object of the contract. Adoption of the Convention would give legal recognition to and involve regulation of contracts of combined transport, now termed multimodal transport, regardless of whether the operator actually performs part of the carriage or can be considered as having contracted to carry by any particular mode. It would thus give distinct recognition to the NVO. On the other hand traditional forwarding contracts and most forms of through bill are excluded from control by the Convention. Difficult issues would likely arise in the context of forwarding contracts as to how such contracts are to be classified. This would be especially the case if the distinction between a narrow obligation to procure transport, but without undertaking responsibility, and a wider obligation to personally procure performance is a valid one.[400]

396. *Cf* the definition of shipper in Art. 1(3) of the Hamburg Rules and Art. 1(8) of the Rotterdam Rules.

397. *Cf* Art. 1(4) of the Hamburg Rules and Art. 1(11) of the Rotterdam Rules.

398. *Cf* Art. 1(5) of the Hamburg Rules and Art. 1(24) of the Rotterdam Rules. See further the discussion at 4.91.

399. This is a wide scope provision in comparison with Art. 1(1) of the Warsaw (and Montreal) Convention but is in similar terms to the equivalent provision in the CMR Convention (Art. 1(1)). It represents a compromise between the suggested provision of yet more contact points (*cf* the Hamburg Rules, Art. 2 and the Rotterdam Rules, Art. 5) and the view that a more narrow scope provision was appropriate, see Driscoll and Larsen, fn. 389, above, at p. 241.

400. See above, 2.55.

3.99 The definition of multimodal transport in Article 1(1) raises two questions which commonly need to be asked in respect of the application of any set of rules in this area. The first is the question as to what is meant by "two different modes of transport". In general, where transit proceeds across several modes on a mode to mode basis there is little difficulty in identifying this as multimodal transport.[401] The main difficulty arises in determining the correct categorisation of mode on mode transport[402] such as the carriage of a road vehicle on a ferry. For some this is not multimodal transport because no transhipment is involved and because the promotion of the goods to the next stage is not effected by a different mode of transport, the transport of the next stage being of both goods and carrying vehicle.[403] The opposing view[404] seems to be based largely on practical considerations.[405] A possible answer is to regard this from the perspective of the goods owner. Once the goods are on a ship they are being carried by ship. The road vehicle has become the goods' container. From that perspective the total carriage is by more than one mode, just as with carriage in a container, and can be regarded as multimodal transport.[406] The drafters of the MMTC thought it advisable to avoid doubt by including a specific exclusion, by Article 30(4), of carriage within Article 2 of the CMR Convention.[407]

3.100 The second question is what further content must be infused into the definition of multimodal transport in order to give it concrete meaning.[408] In what sense does a carrier "undertake" to perform or procure it? Does, therefore, the application of the Convention depend on whether more than one mode is contemplated by the parties or does it depend on the actual way in which the carriage is performed? If it depends on contemplation must this be specific, i.e. depend on some specification of the transport modes to be used, or perhaps a requirement that there shall be more than one mode, or can the contract be an open one so long as multimodal transport is a contractual possibility? Alternatively it could be a mere matter of form, i.e. issue of a multimodal transport document. Although such a document is required by Article 5(1), its classification as such depends on whether it evidences a multimodal transport contract.[409] Whilst this document should state the modes of transport,[410]

401. Mode should be distinguished from medium i.e. a change of medium does not necessarily constitute a change of mode as where a sea-going vessel is able to penetrate inland by inland waterway, see De Wit, p. 171.

402. For Hoeks, means on means could be considered a more accurate description, p. 99 n. 323.

403. Kiantou-Pampouki, General Report, in Kianou-Pampouki, pp. 3–66 at p. 10. See further the references cited in De Wit, p. 185, n. 1224.

404. De Wit, p. 185 and see references at n. 1226.

405. The Convention could then apply to ro-ro situations in States not party to CMR and avoidance of CMR, by redefining the contract as one for multimodal transport so as to fall outside its scope, is prevented. The latter point seems to conflate the specific issue of Art. 2 with the more general issue of whether a multimodal transport contract is *sui generis*.

406. See further, Hoeks, para. 2.3.3.3.

407. See below, 3.118.

408. For De Wit, at p. 179, Art. 1(1) does not offer an actual definition of international multimodal transport. See further, Diamond, "Legal Aspects of the Convention", Southampton Seminar, and Schmitthoff and Goode, ch. 3.

409. Article 1(4).

410. Article 8(1)(m), See below, 3.102.

this may not have great significance given that Article 8(2)[411] indicates that the absence of the particulars required in Article 8(1) shall not affect the legal character of the document as a multimodal transport document. If a similar approach to that taken in *Quantum* in respect of the CMR Convention can be applied to the definition in Article 1(1), a contract could be regarded as being "for" multimodal transport whenever such actually occurring transport falls within the scope of what is permitted by the contract.

3.101 Article 1(1) contains an exception to the standard rule in respect of operations of pick-up and delivery of goods carried out in the performance of a unimodal transport contract, as defined in such contract. It seems that this provision largely derives from the objections of airlines which were keen that there should be no disruption of established patterns of contracting built around the Warsaw Regimes. It is a common feature of air carriage to provide pick-up and delivery services attached to the main air carriage and taking place under cover of the air waybill. The exception was, however, generalised and is unclear as to criteria necessary to determine it.[412] The reference over to the contract suggests that the parties can determine when it exists but this may be subject to abuse.[413] Some criteria would therefore seem to be necessary based perhaps on distance or rather other criteria indicating its ancillary nature.[414] In air carriage, a criterion based on a movement to or from the airport closest to the respective reception and delivery points has been suggested as a determinant of feeder traffic.[415]

3D.3 DOCUMENTATION

Multimodal Transport Convention, Articles 5–13 *3.102*

Article 5. Issue of multimodal transport document[416]

1. When the goods are taken in charge by the multimodal transport operator, he shall issue a multimodal transport document which, at the option of the consignor, shall be in either negotiable or non-negotiable form.
2. The multimodal transport document shall be signed by the multimodal transport operator or by a person having authority from him.
3. The signature on the multimodal transport document 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 multimodal transport document is issued.
4. If the consignor so agrees, a non-negotiable multimodal transport document may be issued by making use of any mechanical or other means preserving a record of the particulars stated in article 8 to be contained in the multimodal transport document. In such a case the multimodal transport operator, after having taken the goods in charge, shall deliver to the consignor a readable document containing all the particulars so recorded, and such

411. See below, 3.102.
412. See Diamond, above fn. 408, at C4.
413. De Wit, p. 180.
414. Selvig, "The Background to the Convention" in Southampton Seminar, at A4. See further Hoeks, para. 2.3.3.2.2 especially in respect of the Dutch and German transport laws.
415. Giemulla/Schmid, WC, Arts 18, 50.
416. *Cf* Art. 14 of the Hamburg Rules and Art. 35 of the Rotterdam Rules.

document shall for the purposes of this Convention be deemed to be a multimodal transport document.

Article 6. Negotiable multimodal transport document[417]

1. Where a multimodal transport document is issued in negotiable form:
   (a) It shall be made out to order or to bearer;
   (b) If made out to order it shall be transferable by endorsement;
   (c) If made out to bearer it shall be transferable without endorsement;
   (d) If issued in a set of more than one original it shall indicate the number of originals in the set;
   (e) If any copies are issued each copy shall be marked "non-negotiable copy."
2. Delivery of the goods may be demanded from the multimodal transport operator or a person acting on his behalf only against surrender of the negotiable multimodal transport document duly endorsed where necessary.
3. The multimodal transport operator shall be discharged from his obligation to deliver the goods if, where a negotiable multimodal transport document has been issued in a set of more than one original, he or a person acting on his behalf has in good faith delivered the goods against surrender of one of such originals.

Article 7. Non-negotiable multimodal transport document[418]

1. Where a multimodal transport document is issued in non-negotiable form it shall indicate a named consignee.
2. The multimodal transport operator shall be discharged from his obligation to deliver the goods if he makes delivery thereof to the consignee named in such non-negotiable multimodal transport document or to such other person as he may be duly instructed, as a rule, in writing.

Article 8. Contents of the multimodal transport document

1. The multimodal transport document shall contain the following particulars:[419]
   (a) The general nature of the goods, the leading 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 gross weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the consignor;
   (b) The apparent condition of the goods;
   (c) The name and principal place of business of the multimodal transport operator;
   (d) The name of the consignor;
   (e) The consignee, if named by the consignor;
   (f) The place and date of taking in charge of the goods by the multimodal transport operator;
   (g) The place of delivery of the goods;
   (h) The date or the period of delivery of the goods at the place of delivery, if expressly agreed upon between the parties;
   (i) A statement indicating whether the multimodal transport document is negotiable or non-negotiable;
   (j) The place and date of issue of the multimodal transport document;
   (k) The signature of the multimodal transport operator or of a person having authority from him;

417. *Cf* Art. 1(15) of the Rotterdam Rules.
418. *Cf* Art. 1(16) of the Rotterdam Rules.
419. *Cf* Art. 15 of the Hamburg Rules and Art. 36 of the Rotterdam Rules.

(l) The freight for each mode of transport, if expressly agreed between the parties, or the freight, including its currency, to the extent payable by the consignee or other indication that freight is payable by him;
(m) The intended journey route, modes of transport and places of transhipment, if known at the time of issuance of the multimodal transport document;
(n) The statement referred to in paragraph 3 of article 28;
(o) Any other particulars which the parties may agree to insert in the multimodal transport document, if not inconsistent with the law of the country where the multimodal transport document is issued.

2. The absence from the multimodal document of one or more of the particulars referred to in paragraph 1 of this article shall not affect the legal character of the document as a multimodal transport document provided that it nevertheless meets the requirements set out in paragraph 4 of article 1.

Article 9. Reservations in the multimodal transport document

1. If the multimodal transport document contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the multimodal transport operator or a person acting on his behalf knows, or has reasonable grounds to suspect, do not accurately represent the goods actually taken in charge, or if he has no reasonable means of checking such particulars, the multimodal transport operator or a person acting on his behalf shall insert in the multimodal transport document a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.[420]

2. If the multimodal transport operator or a person acting on his behalf fails to note on the multimodal transport document the apparent condition of the goods, he is deemed to have noted on the multimodal transport document that the goods were in apparent good condition.

Article 10. Evidentiary effect of the multimodal transport document

Except for particulars in respect of which and to the extent to which a reservation permitted under article 9 has been entered:

(a) The multimodal transport document shall be *prima facie* evidence of the taking in charge by the multimodal transport operator of the goods as described therein; and
(b) Proof to the contrary by the multimodal transport operator shall not be admissible if the multimodal transport document is issued in negotiable form and has been transferred to a third party, including a consignee, who has acted in good faith in reliance on the description of the goods therein.[421]

Article 11. Liability for intentional misstatements or omissions

When the multimodal transport operator, with intent to defraud, gives in the multimodal transport document false information concerning the goods or omits any information required to be included under paragraph 1(a) or (b) of article 8 or under article 9, he shall be liable, without the benefit of the limitation of liability provided for in this Convention, for

420. *Cf* Art. 16 of the Hamburg Rules and Art. 40 of the Rotterdam Rules. See further the discussion at 3.164.

421. *Cf* Art. 16 of the Hamburg Rules and Art. 41 of the Rotterdam Rules. See further the discussion at 3.163.

any loss, damage or expenses incurred by a third party, including a consignee, who acted in reliance on the description of the goods in the multimodal transport document issued.[422]

Article 12. Guarantee by the consignor

1. The consignor shall be deemed to have guaranteed to the multimodal transport operator the accuracy, at the time the goods were taken in charge by the multimodal transport operator, of particulars relating to the general nature of the goods, their marks, number, weight and quantity and, if applicable, to the dangerous character of the goods, as furnished by him for insertion in the multimodal transport document.
2. The consignor shall indemnify the multimodal transport operator against loss resulting from inaccuracies in or inadequacies of the particulars referred to in paragraph 1 of this article. The consignor shall remain liable even if the multimodal transport document has been transferred by him. The right of the multimodal transport operator to such indemnity shall in no way limit his liability under the multimodal transport contract to any person other than the consignor.[423]

Article 13. Other documents

The issue of the multimodal transport document does not preclude the issue, if necessary, of other documents relating to transport or other services involved in international multimodal transport, in accordance with applicable international conventions or national law. However, the issue of such other documents shall not affect the legal character of the multimodal transport document.

3D.3.1 The multimodal transport document

3.103 As with TCM and as incorporated in the ICC Rules the Convention provides for the issue of a multimodal transport document which can be in negotiable or non-negotiable form. As noted with the earlier rules[424] the Convention contemplates that only a document in negotiable form is to be used as a document of control. The provisions of the Convention represent a compromise between those who wanted a document to be issued in all cases and those who insisted that the document should only be issued on demand of the shipper and further that there should be provisions which recognised the increased use of electronic data processing (EDP) which was becoming evident at that time. The effect of Article 5 is that a negotiable document has to be issued only when demanded by the shipper. The document must be signed but, in line with the Hamburg Rules,[425] there is provision for mechanical reproduction of the signature. As a further concession to EDP, Article 5(4) permits the use

422. *Cf* Art. 17(2)–(4) of the Hamburg Rules which deals specifically with letters of indemnity which are to be void against a third party transferee of the bill of lading and effective against a shipper unless the absence of a reservation is intended to defraud a third party acting in reliance on the description of the goods (*cf* at common law *Brown Jenkinson & Co Ltd* v. *Percy Dalton (London) Ltd* [1957] 2 QB 621). Sub-paragraph 4 goes on to deprive the carrier of the benefit of limitation as against a third party in the case of intended fraud. Article 11 of the MMTC appears to be clearer in tying the loss of limitation to the fraud in giving the false information rather than occurring in the context of a letter of indemnity to which, as a possible interpretation, it might be considered to be tied. No equivalent to Art. 11 appears in the Rotterdam Rules. Consequently any issue as to whether the carrier loses the right to limit will depend on whether Art. 61, which deals more generally with loss of the right to limit, applies in this situation. See 3.175.

423. *Cf* Art. 17(1) of the Hamburg Rules and Art. 31(2) of the Rotterdam Rules.

424. See above, 3.55.

425. Article 14(3).

of computer preservation of consignment details where a non-negotiable document is issued[426] although a copy containing the details recorded in accordance with Article 8 must be delivered to the consignor.[427] This limited recognition of computer use contrasts with their increased use today and the need to make provision for the effectiveness of computer messages shorn of any requirement to produce paper. Recognition of this, specifically for multimodal transport, came with the UNCTAD/ICC Rules[428] and continues with the more recent efforts to provide for multimodal transport in the context of reform of carriage by sea.[429]

3.104 In reverse of the trend towards document simplification, already discernible at the time of creation of the Convention, Article 8 sets out a lengthy list of required details, including a statement that the carriage is subject to the Convention as required by Article 28(3).[430] Article 8(2) states that the absence of any particular does not affect the legal character of the document as a multimodal transport document.[431] Unlike some Conventions[432] it does not say that the absence of the document does not affect the contract. It is not clear what the effect of absence of an MTD is supposed to be. A multimodal contract is not defined in terms of a document. There is no penalty indicated for the absence of a document. The only protective provision is provided in respect of Article 28(3), by Article 28(4), which is in the same terms as Article 23(4) of the Hamburg Rules. The provision in Article 13 which permits the issue of other transport documents deals with documents in addition to the MTD[433] if necessary. This would seem to be a conflict avoidance measure[434] so as to enable the MTO to ensure that he is not penalised for failure to issue a document compliant with provisions applicable in other conventions such as in the original Warsaw Convention.

3.105 The Convention provides rules as to delivery of the goods in Articles 6 and 7 and as to the evidentiary function of the MTD in Articles 9–12. The rules vary depending on whether the MTD is negotiable or non-negotiable. The specific recognition of the negotiable MTD as a document of control in a regime of liability whose provisions, once adopted by a Contracting State, would have the force of law might well be thought to be stronger than the commercial recognition currently given to combined transport documents. Although the detailed effects of the use of the document on rights to possession and title are not spelled out this recognition might enable the courts to accept that the document can have effect as a means of transferring constructive possession or as a statutory documentary of title for the purpose of title rules.[435] Certainly it will encapsulate a contractual duty to deliver

426. *Cf* Art. 5(2) of the Montreal Convention 1999.

427. The Montreal Convention requires this only when it is requested by the consignor. See further, Driscoll and Larsen, above, fn. 389, p. 223.

428. See below, 3.124.

429. See below, 3F.

430. The Rotterdam Rules do not require such a statement which, at least in that respect, puts it more in line with the Montreal Convention.

431. *Cf* Art. 28(4).

432. E.g. CMR, Art. 4.

433. Rather than in place of, *cf* Art. 18 of the Hamburg Rules.

434. See below, 3.121.

435. See above, 3.58. More detailed rules now appear in the Rotterdam Rules which are discussed at 3F.3.2.

against the document enforceable at least by the consignor. If it can be regarded as a bill of lading sufficient to bring it within the scope of the Carriage of Goods by Sea Act 1992 this will enable a transferee to enforce a contractual right to delivery along with other rights transferred by the contract. Similarly, a consignee would have rights of enforcement where the MTD is non-negotiable. It is noteworthy that unlike other Conventions based on non-negotiable consignment notes[436] there are no detailed rules about use of the document to control transit and delivery. Article 7 would seem to be more in line with the use of waybills in shipping than the use of consignment notes in other modes which would reinforce the argument that it can fall within the scope of COGSA 1992. If it falls outside the general scope of this legislation it is capable of falling within the general scope of the Contracts (Rights of Third Parties) Act 1999. With a non-negotiable document the designation of a consignee would seem to be sufficient for this purpose. With a negotiable document it is much less certain that a transferee could fall within the scope of the Act, it being unlikely that the intention of the legislation was to support free transferability of contracts.

3D.4 LIABILITY OF THE MTO

3.106 Multimodal Transport Convention, Articles 14–21

Article 14. Period of responsibility

1. The responsibility of the multimodal transport operator for the goods under this Convention covers the period from the time he takes the goods in his charge to the time of their delivery.
2. For the purposes of this article, the multimodal transport operator is deemed to be in charge of the goods:
   (a) From the time he has taken over the goods from:
      (i) The consignor or a person acting on his behalf; or
      (ii) An authority or other third party to whom, pursuant to law or regulations applicable at the place of taking in charge, the goods must be handed over for transport;
   (b) Until the time he has delivered the goods:
      (i) By handing over the goods to the consignee; or
      (ii) In cases where the consignee does not receive the goods from the multimodal transport operator, by placing them at the disposal of the consignee in accordance with the multimodal transport contract or with the law or with the usage of the particular trade applicable at the place of delivery; or
      (iii) By handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the place of delivery, the goods must be handed over.[437]

436. And now the Rotterdam Rules containing such detailed rules for both negotiable and non-negotiable documents, see below, 3.156.

437. *Cf* Art. 4 of the Hamburg Rules. As with these rules Art. 14(b)(ii) may grant considerable scope to the MTO to use contractual provisions to restrict his liability at the point of delivery, where delivery is taken from a terminal or depot not under the direct control of the MTO. See further C.W. O'Hare, "The Duration of the Sea Carrier's Liability" [1978] ABLR 65 at p. 69. Comparison can be made also with Art. 12 of the Rotterdam Rules. This is in similar terms in respect of receipt of the goods by an authority or third party under law or regulations. A more specific rule deals with the parties' agreement in respect of the time and location of receipt and delivery in Art. 12(3).

3. In paragraphs 1 and 2 of this article, reference to the multimodal transport operator shall include his servants or agents or any other person of whose services he makes use for the performance of the multimodal transport contract, and reference to the consignor or consignee shall include their servants or agents.

Article 15. The liability of the multimodal transport operator for his servants, agents and other persons

Subject to article 21, the multimodal transport operator shall be liable for the acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the multimodal transport contract, when such person is acting in the performance of the contract, as if such acts and omissions were his own.

Article 16. Basis of liability

1. The multimodal transport operator shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined by article 14, unless the multimodal transport operator proves that he, his servants or agents or any other person referred to in article 15 took all measures that could reasonably be required to avoid the occurrence and its consequences.
2. Delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent multimodal transport operator, having regard to the circumstances of the case.
3. If the goods have not been delivered within 90 consecutive days following the date of delivery determined according to paragraph 2 of this article, the claimant may treat the goods as lost.

Article 17. Concurrent causes

Where fault or neglect on the part of the multimodal transport operator, his servants or agents or any other person referred to in article 15 combines with another cause to produce loss, damage or delay in delivery, the multimodal transport operator shall be liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the multimodal transport operator proves the part of the loss, damage or delay in delivery not attributable thereto.[438]

Article 18. Limitation of liability

1. When the multimodal transport operator is liable for loss resulting from loss of or damage to the goods according to article 16, his liability shall be limited to an amount not exceeding 920 units of account[439] per package or other shipping unit or 2.75 units of account per kilogram of gross weight of the goods lost or damaged,[440] whichever is the higher.
2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 of this article, the following rules apply:

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438. *Cf* Art. 5(7) of the Hamburg Rules and Art. 17(6) of the Rotterdam Rules.

439. This refers to the Special Drawing Right (SDR) as defined by the International Monetary Fund which is referred to in Art. 31. By Art. 31(1) the amounts referred to are to be converted into the national currency of a State according to the value of such currency on the date of the judgment or award or the date agreed upon by the parties, *cf* Art. 26(1) of the Hamburg Rules. The alternative for States not members of the IMF is provided by Art. 31(2).

440. *Cf Serena Navigation Ltd* v *Dera Commercial Establishment (The Limnos)* [2008] EWHC 1036 (Comm), [2008] 2 Lloyd's Rep 166, see 2.292 fn. 1181.

(a) Where a container, pallet or similar article of transport is used to consolidate[441] goods, the packages or other shipping units enumerated in the multimodal transport document as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, the goods in such article of transport are deemed one shipping unit.

(b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the multimodal transport operator, is considered one separate shipping unit.

3. Notwithstanding the provisions of paragraphs 1 and 2 of this article, if the international multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the multimodal transport operator shall be limited to an amount not exceeding 8.33 units of account per kilogram of gross weight of the goods lost or damaged.

4. The liability of the multimodal transport operator for loss resulting from delay in delivery according to the provisions of article 16 shall be limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the multimodal transport contract.

5. The aggregate liability of the multimodal transport operator, under paragraphs 1 and 4 or paragraphs 3 and 4 of this article, shall not exceed the limit of liability for total loss of the goods as determined by paragraph 1 or 3 of this article.

6. By agreement between the multimodal transport operator and the consignor, limits of liability exceeding those provided for in paragraphs 1, 3 and 4 of this article may be fixed in the multimodal transport document.

7. "Unit of account" means the unit of account mentioned in article 31.[442]

Article 19. Localised damage

When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law provides a higher limit of liability than the limit that would follow from application of paragraphs 1 to 3 of article 18, then the limit of the multimodal transport operator's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.

Article 20. Non-contractual liability

1. The defences and limits of liability provided for in this Convention shall apply in any action against the multimodal transport operator in respect of loss resulting from loss of or damage to the goods, as well as from delay in delivery, whether the action be founded in contract, in tort or otherwise.[443]

2. If an action in respect of loss resulting from loss of or damage to the goods or from delay in delivery is brought against the servant or agent of the multimodal transport operator, if such servant or agent proves that he acted within the scope of his employment, or against any other person of whose services he makes use for the performance of the multimodal transport contract, if such other person proves that he acted within the performance of the contract, the servant or agent of such other person shall be entitled to avail himself of the defences and limits of liability which the multimodal transport operator is entitled to invoke under this Convention.[444]

3. Except as provided in article 21, the aggregate of the amounts recoverable from the multimodal transport operator and from a servant or agent or any other person of whose

441. See below, 4.148.

442. See above, fn. 439.

443. *Cf* Art. 7(1) of the Hamburg Rules and Art. 4 of the Rotterdam Rules. *Cf* also *The Captain Gregos* [1990] 1 Lloyd's Rep 310.

444. *Cf* Art. 7(2) of the Hamburg Rules and Art. 4 of the Rotterdam Rules.

services he makes use for the performance of the multimodal transport contract shall not exceed the limits of liability provided for in this Convention.[445]

Article 21. Loss of the right to limit liability

1. The multimodal transport operator is not entitled to the benefit of the limitation of liability provided for in this Convention if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the multimodal transport operator done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.
2. Notwithstanding paragraph 2 of article 20, a servant or agent of the multimodal transport operator or other person of whose services he makes use for the performance of the multimodal transport contract is not entitled to the benefit of the limitation of liability provided for in this Convention if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant, agent or other person, done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

3D.4.1 Modified uniform system

3.107 The core of any transport Convention is the part which addresses the liability of the operator. The issues over which the divergent interests argued during the preparatory process naturally focused around the basic choice between the network and uniform approach which has always and continues to underscore the debate about an appropriate regime. The TCM solution adopted the network approach, which enables a rough correspondence between the liability of the operator and underlying unimodal operators, thus maintaining his recourse position or established liability where the operator performs part of a movement himself. A particular point of importance was to ensure that a multimodal carrier's recourse against a Hague Rules shipowner was not prejudiced by imposing a liability which failed to recognise Hague Rules defences. The alternative was based on a uniform system the objective of which was to get away from the complexities of a network system. A network system is too complex, gives the cargo interest too little notice of what rules will in fact govern the carriage, and provides too much scope for litigation, particularly in respect of the points of demarcation between modes. The provisions of the Convention represent a compromise based on adoption of a modified uniform system. Consequently liability is uniform but a limited network system applies to limitation of liability. As with the Hamburg Rules,[446] Article 16 provides a liability for fault with a reversed burden of proof.

3.108 The system of limitation involves some complexity. Article 18 lays down two basic rules applicable in the alternative depending upon whether or not transport by sea is involved. This is subject to any agreement to increase the limits, see Article 18(6). The standard rule is that the MTO is liable for 920 SDRs[447] per package or shipping unit or 2.75 SDRs per kilo whichever is the higher. This makes it about ten per cent

445. *Cf* Art. 7(3) of the Hamburg Rules and Art. 20 of the Rotterdam Rules which appears to be confined to the aggregate liability of the carrier and maritime performing parties.
446. Article 5.
447. See above, fn. 439.

higher than the Hamburg Rules[448] which are about 20 per cent higher than the Hague-Visby Rules.[449] Presumably the prescription of a higher limit than the Hamburg Rules reflects the possibility that damage might occur during a non-sea stage. The Rotterdam Rules are almost back to the Hamburg Rules level.[450] There is also, in Article 18(2) the standard container formula.[451] This is a marked change from the TCM solution which only applies a package limit when the Hague Rules apply.[452] As with the Hamburg Rules there is failure to include a provision to determine the value of the goods.[453]

3.109 A different limit applies under Article 18(3) if the transport does not, according to the contract, include carriage of goods by sea or by inland waterways. In this case the limit is 8.33 SDRs. This is the same as the CMR limit as compared with the high limits applied in air and rail carriage.[454] Quite when this rule is to apply could be a matter of difficulty. The reference to the contract suggests that it matters not that there is in fact carriage by sea as long as this is not "according to the contract". However, must the contract exclude carriage by sea, or specify modes other than sea? Or will a contract which leaves the modes open, or permits sea carriage under a liberty clause albeit contemplating other modes, come within the standard limit or the exceptional limit? It can be suggested that the rule will apply either when the proper interpretation of the contract shows that carriage by sea is not permitted or where it is permitted but has not taken place. Where it has taken place, whether because of express provision or contemplation or otherwise permissively under the contract, the applicable rule will be the standard limit under Article 18(1) subject to the localised damage rule in Article 19. Where it has not taken place either because it is expressly or impliedly excluded or simply has not occurred the exceptional limit applies as also to the case where it has occurred in breach of contract.

3.110 As just noted, apart from these rules there is yet a further possible limit provided by Article 19. When the loss or damage occurred during one particular stage and an international convention or mandatory national law provides a higher limit than in Article 18(1)–(3) then the higher limit is to be applied. Thus there is a uniform floor limit combined with a network limit applicable where the limit exceeds the floor limit. After the objections to a network approach it is strange to find it adopted in this rule. Presumably the idea is that it will only rarely be the case that a claimant will need to seek to apply the higher limit since the basic limits are already quite high. Determining the correct application of this rule is problematic. It refers to the loss or damage occurring during *one* particular stage. Presumably this means that if there are a series of losses over a number of stages then there cannot be localisation of the limit. What is meant by a particular stage for this purpose? A stage of transport can be determined by reference to the facts or by reference to the

448. 835 or 2.5 SDRs (Art. 6).
449. 666.67 or 2 SDRs (Art. IV, r. 5(a), as amended).
450. 835 or 3 SDRs (Art. 59(1)).
451. *Cf* Hague-Visby Rules, Art. IV, r. 5(c), Hamburg Rules, Art. 6(2) and Rotterdam Rules, Art. 59(2).
452. See above, 3.61.
453. *Cf* Art. IV, r. 5(b), of the Hague-Visby Rules and Art. 22(1) of the Rotterdam Rules.
454. I.e. 17 SDRs.

underlying contracts made by the MTO and with or without reference to the actual mandatory rules applicable to that contract. Thus a period of road carriage involving a ferry crossing includes the physical "stages" of road and sea, and may involve the participation of a road carrier and a sea carrier under different regimes of liability. Presumably a court would wish to have regard to the way in which the underlying transport is organised in the light of the potentially applicable Conventions.

3.111 A court may still have to determine the precise demarcation points between Conventions especially where a Convention covers terminal periods.[455] Furthermore it will need to be determined whether the relevant international Convention to be applied is:

(i) the Convention or mandatory national law which in fact applies to the relations between the MTO and the performing carrier; or
(ii) the Convention which would have applied if the consignor had made a contract directly with the sub-carrier i.e. the CMR solution. This could mean that a Convention applies if it is potentially applicable to the stage whether or not it would have applied to the actual carriage; or
(iii) would have applied if the consignor had made a contract with the MTO for that particular stage.[456]

This latter solution is the TCM approach, which might produce the same result, i.e. application of a potential Convention regardless of the actual contract which would have been made.

3.112 One further point is the fact that Article 19 contrasts an applicable international Convention with a mandatory national law. A proposed alternative[457] would have made reference to the compulsory nature of any international Convention as with rule 13(a) of the ICC Uniform Rules.[458] Presumably the intention is that an international Convention may be applicable even where it does not have compulsory application, i.e. where the Convention itself contemplates optional rather than compulsory application. Furthermore where a Convention has a sphere of compulsory application, but may be extended in its scope of application by an appropriate provision in a contract of carriage, this might also be drawn into Article 19 as an "applicable" Convention. Since a carrier is unlikely to agree to incorporate a regime of liability which imposes a higher limit of liability than the Convention, the point is academic. It does present a more substantial difficulty in respect of rule 6.4 of the UNCTAD/ICC Rules.[459]

3.113 Delay is outside the scope of Article 19 and a single limit is imposed by Article 18(4) which is the same as under the Hamburg Rules.[460] Delay occurs when the goods have not been delivered within the time expressly agreed upon or after the time reasonably required of a diligent MTO, Article 16(4). By Article 16(5) if the

455. See e.g. the Montreal Convention, Art. 18(3) and 18(4). See further, 3.90.
456. And on the basis of which law, the law applicable as between the MTO and consignor or the law most appropriately applicable to the particular stage? Presumably the former, *cf* Van Beelen, "Multimodal Transport" in Kiantou-Pampouki, pp. 159–173, at p. 164.
457. See Fitzgerald, fn. 389, at p. 261.
458. See above, 3.61.
459. See 3.132.
460. Article 6(1)(b). *Cf* also Art. 60 of the Rotterdam Rules.

goods are not delivered within 90 days of this time the claimant can treat them as lost.[461] No further provision is made in respect of consequential loss.

3.114 By Article 18(6) the limits of liability can be raised by agreement. Non-contractual liability and liability of servants etc, is covered by Article 20.[462] By Article 21 the right to limit is lost by the MTO by his intentional or reckless acts and the right of servants etc, to limit is lost by their intentional or reckless acts.[463] In this respect, and like the Hamburg Rules (Article 8), the Convention is more lenient than equivalent rules in other modal Conventions.[464]

3D.5 LIABILITY OF THE CONSIGNOR

3.115 **Multimodal Transport Convention, Articles 22 and 23**[465]

Article 22. General rule

The consignor shall be liable for loss sustained by the multimodal transport operator if such loss is caused by the fault or neglect of the consignor, or his servants or agents when such servants or agents are acting within the scope of their employment. Any servant or agent of the consignor shall be liable for such loss if the loss is caused by fault or neglect on his part.

Article 23. Special rules on dangerous goods[466]

1. The consignor shall mark or label in a suitable manner dangerous goods[467] as dangerous.
2. Where the consignor hands over dangerous goods to the multimodal transport operator or any person acting on his behalf, the consignor shall inform him of the dangerous character of the goods and, if necessary, the precautions to be taken. If the consignor fails to do so and the multimodal transport operator does not otherwise have knowledge of their dangerous character:

(a) The consignor shall be liable to the multimodal transport operator for all loss resulting from the shipment of such goods; and

461. *Cf* 60 days under the Hamburg Rules, Art. 5(3). No equivalent appears in the Rotterdam Rules.

462. See above, fnn 443, 444.

463. As with the ICC Rules and the UNCTAD/ICC Rules and in line with the conventional position prevailing to date in carriage by sea (see e.g. the Rotterdam Rules, Art. 61) the ability of the MTO to limit liability is not affected by the misconduct of his servants of agents. For the likely interpretation of the application of this rule to both the standard limit expressed in Art. 18(i) and the increased limit provided for by Art. 18(6) see *Antwerp United Diamond B.V.B.A.* v. *Air Europe (a firm)* [1995] 3 All ER 424. See further below, fn. 546 (UNCTAD rules)

464. *Cf* e.g. Arts 29 and 32(1) of the CMR Convention.

465. These provisions are in addition to the liability provided for by Art. 12, see above, para. 3.102.

466. *Cf* Art. 13 of the Hamburg Rules and Art. 32 of the Rotterdam Rules.

467. *Cf Effort Shipping Co Ltd* v. *Linden Management SA (The Giannis NK)* [1998] 2 WLR 206, [1998] 1 All ER 495 which held that for the purposes of Art. IV, r. 6 of the Hague-Visby Rules "goods of a dangerous nature" mean goods that are physically dangerous directly or indirectly in the sense of being liable to give rise to physical damage to the ship or to loss of other cargo shipped on the same vessel. The House of Lords rejected the argument that such goods were confined to those causing direct physical damage to other goods. See further *Carver on Bills of Lading*, 9–288, and *Bunge SA* v. *ADM DO Brasil LTDA (The Darya Radhe)* [2009] EWHC 845 (Comm), [2009] 2 Lloyd's Rep 175.

(b) The goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

3. The provisions of paragraph 2 of this article may not be invoked by any person if during the multimodal transport he has taken the goods in his charge with knowledge of their dangerous character.

4. If, in cases where the provisions of paragraph 2(b) of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the multimodal transport operator is liable in accordance with the provisions of article 16.

3D.6 CLAIMS AND ACTIONS

Multimodal Transport Convention, Articles 24–27 *3.116*

Article 24. Notice of loss, damage or delay

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the multimodal transport operator not later than the working day after the day when the goods were handed over to the consignee, such handing over is *prima facie* evidence of the delivery by the multimodal transport operator of the goods as described in the multimodal transport document.[468]

2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply correspondingly if notice in writing is not given within six consecutive days after the day when the goods were handed over to the consignee.[469]

3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties or their authorized representatives at the place of delivery, notice in writing need not be given of loss or damage ascertained during such survey or inspection.[470]

4. In the case of any actual or apprehended loss or damage the multimodal transport operator and the consignee shall give all reasonable facilities to each other for inspecting and tallying the goods.[471]

5. No compensation shall be payable for loss resulting from delay in delivery unless notice has been given in writing to the multimodal transport operator within 60 consecutive days after the day when the goods were delivered by handing over to the consignee or when the consignee has been notified that the goods have been delivered in accordance with paragraph 2(b)(ii) or (iii) of article 14.[472]

6. Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the multimodal transport operator to the consignor not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2(b) of article 14, whichever is the later, the failure to give such

468. *Cf* the Hamburg Rules, Art. 19(1). Article 23 of the Rotterdam Rules provides for notice to be given on or before the day of delivery for apparent loss or damage.

469. Fifteen days under the Hamburg Rules, see Art. 19(2); seven days under the Rotterdam Rules, see Art. 23.

470. *Cf* the Hamburg Rules, Art. 19(3) and the Rotterdam Rules, Art. 23(3).

471. *Cf* the Hamburg Rules, Art. 19(4) and the Rotterdam Rules, Art. 23(6).

472. *Cf* the Hamburg Rules, Art. 19(5) and the Rotterdam Rules, Art. 23(4) (21 days).

notice is *prima facie* evidence that the multimodal transport operator has sustained no loss or damage due to the fault or neglect of the consignor, his servants or agents.[473]
7. If any of the notice periods provided for in paragraphs 2, 5 and 6 of this article terminates on a day which is not a working day at the place of delivery, such period shall be extended until the next working day.[474]
8. For the purpose of this article, notice given to a person acting on the multimodal transport operator's behalf, including any person of whose services he makes use at the place of delivery, or to a person acting on the consignor's behalf, shall be deemed to have been given to the multimodal transport operator, or to the consignor, respectively.[475]

Article 25. Limitation of actions

1. Any action relating to international multimodal transport under this Convention shall be time-barred if judicial or arbitral proceeding have not been instituted within a period of two years.[476] However, if notification in writing, stating the nature and main particulars of the claim, has not been given within six months after the day when the goods were delivered or, where the goods have not been delivered, after the day on which they should have been delivered, the action shall be time-barred at the expiry of this period.[477]
2. The limitation period commences on the day after the day on which the multimodal transport operator has delivered the goods or part thereof or, where the goods have not been delivered, on the day after the last day on which the goods should have been delivered.[478]
3. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.[479]
4. Provided that the provisions of another applicable international convention are not to the contrary, a recourse action for indemnity by a person held liable under this Convention may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted; however, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.[480]

Article 26. Jurisdiction[481]

1. In judicial proceedings relating to international multimodal transport under this Convention, the plaintiff, at his option, may institute an action in a court which, according to the law

473. *Cf* the Hamburg Rules, Art. 19(7). No equivalent appears in the Rotterdam Rules.
474. This provision does not appear in the Hamburg Rules or the Rotterdam Rules.
475. *Cf* the Hamburg Rules, Art. 19(8). See also Art. 19(6). *Cf* further, Art. 23(5) of the Rotterdam Rules.
476. *Cf* the Hamburg Rules, Art. 20 (1) and the Rotterdam Rules, Art. 62(1). As with the Hamburg Rules and the Rotterdam Rules the time limit applies to claims by the MTO as well as claims against him unlike the position under the Hague-Visby Rules, Art. III, r. 6.
477. This is said to be to enable the MTO to put in train recourse measures to preserve them against any time bar potentially applicable to such recourse: Driscoll and Larsen, above, fn. 389, at p. 239. The provision does not, however, appear to be limited to claims against carriers although that may well be the sense of it.
478. *Cf* the combined effect of Art. 20(2) and (3) of the Hamburg Rules, and *cf* further Art. 62(2) of the Rotterdam Rules.
479. *Cf* the Hamburg Rules, Art. 20(4) and the Rotterdam Rules, Art. 63.
480. *Cf* the Hamburg Rules, Art. 20(5) and the Rotterdam Rules, Art. 64.
481. *Cf* the Hamburg Rules, Art. 21 and the Rotterdam Rules, Art. 66. The Rotterdam Rules in Art. 67 also make provision for exclusive jurisdiction agreements in volume contracts.

of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) The principal place of business or, in the absence thereof, the habitual residence of the defendant; or

(b) The place where the multimodal transport contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(c) The place of taking the goods in charge for international multimodal transport of the place of delivery; or

(d) Any other place designated for that purpose in the multimodal transport contract and evidenced in the multimodal transport document.

2. No judicial proceeding relating to international multimodal transport under this Convention may be instituted in a place not specified in paragraph 1 of this article. The provisions of this article do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.

3. Notwithstanding the preceding provisions of this article, an agreement made by the parties after a claim has arisen, which designates the place where the plaintiff may institute an action, shall be effective.

4. (a) Where an action has been instituted in accordance with the provisions of this article or where judgement in such an action has been delivered, no new action shall be instituted between the same parties on the same grounds unless the judgement in the first action is not enforceable in the country in which the new proceedings are instituted;

(b) For the purposes of this article neither the institution of measures to obtain enforcement of a judgement nor the removal of an action to a different court within the same country shall be considered as the starting of a new action.

Article 27. Arbitration[482]

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to international multimodal transport under this Convention shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

(a) A place in a State within whose territory is situated:

(i) The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

(ii) The place where the multimodal transport contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(iii) The place of taking the goods in charge for international multimodal transport or the place of delivery; or

(b) Any other place designated for that purpose in the arbitration clause or agreement.

3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4. The provisions of paragraphs 2 and 3 of this article shall be deemed to be part of every arbitration clause or agreement and any term of such clause or agreement which is inconsistent therewith shall be null and void.

5. Nothing in this article shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the international multimodal transport has arisen.

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482. *Cf* the Hamburg Rules, Art. 22 and the Rotterdam Rules Art. 75 (and in respect of volume contracts note Art. 75(3).

3D.7 CONTRACTUAL STIPULATIONS

3.117 Multimodal Transport Convention, Article 28[483]

1. Any stipulation in a multimodal transport contract or multimodal transport document shall be null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation shall not affect the validity of other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the multimodal transport operator or any similar clause shall be null and void.
2. Notwithstanding the provisions of paragraph 1 of this article, the multimodal transport operator may, with the agreement of the consignor, increase his responsibilities and obligations under this Convention.[484]
3. The multimodal transport document shall contain a statement that the international multimodal transport is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the consignor or the consignee.
4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 3 of this article, the multimodal transport operator must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The multimodal transport operator must, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.

3D.8 SAVING PROVISIONS

3.118 Multimodal Transport Convention, Articles 29, 30 and 38

Article 29. General average[485]

1. Nothing in this Convention shall prevent the application of provisions in the multimodal transport contract or national law regarding the adjustment of general average, if and to the extent applicable.
2. With the exception of article 25, the provisions of this Convention relating to the liability of the multimodal transport operator for loss of or damage to the goods shall also determine whether the consignee may refuse contribution in general average and the liability of the multimodal transport operator to indemnify the consignee in respect of any such contribution made or any salvage paid.

Article 30. Other conventions

1. This Convention does not modify the rights or duties provided for in the Brussels International Convention for the unification of certain rules relating to the limitation of the

483. *Cf* Art. 23 of the Hamburg Rules which is in substantially the same terms. See further Art. 79 of the Rotterdam Rules which prevents the obligations under the Rules, of the carrier and maritime performing party, from being excluded or limited and also prevents such obligations of the shipper etc., from being excluded, limited or increased. No requirement is made under these Rules for a statement to appear in the carriage document of the transport being subject to the Convention. Note further the special provisions in relation to volume contracts in Art. 80.

484. The general right granted here must be reconciled with Art. 18(6) which indicates that an increase in the limit of liability is to be fixed in the multimodal transport document.

485. *Cf* the Hamburg Rules, Art. 24 and the Rotterdam Rules, Art. 84.

liability of owners of sea-going vessels of 25 August 1924; in the Brussels International Convention relating to the limitation of the liability of owners of sea-going ships of 10 October 1957; in the London Convention on limitation of liability for maritime claims of 19 November 1976; and in the Geneva Convention relating to the limitation of the liability of owners of inland navigation vessels (CLN) of 1 March 1973, including amendments to these Conventions, or national law relating to the limitation of liability of owners of sea-going ships and inland navigation vessels.[486]

2. The provisions of articles 26 and 27 of this Convention do not prevent the application of the mandatory provisions of any other international convention relating to matters dealt with in the said articles, provided that the dispute arises exclusively between parties having their principal place of business in States parties to such other convention. However, this paragraph does not affect the application of paragraph 3 of article 27 of this Convention.[487]

3. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:[488]

(a) Under the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or amendments thereto; or

(b) By virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

4. Carriage of goods such as carriage of goods in accordance with the Geneva Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road in article 2, or the Berne Convention of 7 February 1970 concerning the Carriage of Goods by Rail, article 2, shall not for States Parties[489] to Conventions governing such carriage be considered as international multimodal transport within the meaning of article 1, paragraph 1, of this Convention, in so far as such States are bound to apply the provisions of such Conventions to such carriage of goods.[490]

Article 38. Rights and obligations under existing conventions[491]

If, according to articles 26 or 27, judicial or arbitral proceedings are brought in a Contracting State in a case relating to international multimodal transport subject to this Convention which takes place between two States of which only one is a Contracting State, and if both of these States are at the time of entry into force of this Convention equally bound by another international convention, the court or tribunal may, in accordance with the obligations under such convention, give effect to the provisions thereof.

3D.8.1 Conflict of Conventions

Several provisions in the Convention are designed to reconcile the Convention with other rules. Article 29 is a saving provision in respect of general average and Article 30 contains specific saving provisions in respect of limitation Conventions, nuclear damage, arbitration and jurisdiction Conventions. Of special importance are the provisions which deal with conflict with modal Conventions. These arose as a *3.119*

486. *Cf* Art. 25(1) of the Hamburg Rules and Art. 83 of the Rotterdam Rules.

487. *Cf* the Hamburg Rules, Art. 25(2).

488. *Cf* Art. 25(3) of the Hamburg Rules and Art. 86 of the Rotterdam Rules.

489. The suggestion that there may need to be some connection between the parties to the contract and the States, see Diamond, above fn. 408, at C7 would appear to be incorrect since the law applicable to the contract draws the necessary connection, see De Wit, p. 193.

490. See below, 3.121. *Cf* Art. 82 of the Rotterdam Rules discussed at 3.173.

491. See below, 3.121.

resolution of conflicting positions taken during the preparation of the Convention as to whether conflict with such Conventions was a real issue. The argument on one side was that the multimodal contract is a contract *sui generis* which is not made up of a series of unimodal contracts.[492] The MTO contracts for multimodal transport, and by definition does not contract for the particular parts of the carriage. This argument continues to apply even if the MTO performs part of the carriage himself since he should still be viewed as performing the unimodal operation as an MTO and not as a unimodal carrier. The argument must both see the multimodal contract as different from a unimodal contract and mutually exclusive since any overlap would reintroduce a potential conflict of conventions.

3.120 What is not precisely explained is the basis for the *sui generis* argument. It may be based on the simple idea that unimodal contracts are confined to where a single mode is employed and that once there is a combination of modes the contract is no longer capable of being identified with any of the single modes of which is it is made up. Consequently there can be no overlap with a unimodal convention. Whilst this can fit with the interpretation given to the CMR Convention in some jurisdictions[493] it cannot fit with every unimodal convention some of which contemplate the possibility of application to a contract for combined transport.[494] If based on the more conceptual idea that a multimodal transport contract is for transport in general[495] rather than for specific modes, it may be difficult to determine when one is faced with such a contract given that particular modes may well be specified or contemplated. To exclude specified or contemplated transport from the definition could be thought too narrow and would seem to contradict the wording adopted in Article 1(1). Part of the difficulty lies in determining what it means to "undertake" to perform or procure international multimodal transport. Furthermore, it may be difficult to view even a widely framed contract as necessarily beyond the scope of a unimodal convention,[496] as also, the mere fact that there is a combination of modes. It is possible that this view of the distinct nature of multimodal transport rests on a conceptually restrictive view of the application of unimodal regimes. These may be thought to apply only when the specific mode is contracted for in the sense of being specified or clearly contemplated,[497] and the essence of multimodal transport may well be that the evidence displays an intent to provide transport which is inevitably multimodal but which is unspecified. As has been noted, however, the difficulty

492. See Selvig, above fn. 414, at A17, Jackson, "The Conflict of Conventions", Southampton Seminar, at G2, and UNCTAD Report, TB/B/AC.15/53, 16.1.79.

493. See the cases at 3.85.

494. Article 1(6) of the Hamburg Rules and Art. 38 of the Montreal Convention.

495. See above, fn. 339.

496. See above, fn. 356.

497. This may underlie the discussion by Jackson, above, fn. 492, at G4 in reference to Art. 1(6) of the Hamburg Rules which defines a contract of carriage by sea as a contract to carry goods by sea from one port to another, but goes on to state that "a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea". Article 1(1) of these Rules defines a carrier by sea as a person who concludes a contract of carriage by sea with a shipper. Jackson argues that the deeming of the sea leg of a multimodal contract to be a contract of carriage by sea does not mean that an MTO is deemed to be a carrier, otherwise the definition of carrier in Art. 1(1) would have been widened to match it. Possibly what is meant is that the definition of a carrier by sea is confined to where a person contracts specifically for it.

currently, at least for some jurisdictions, is that it may be sufficient that a mode of transport, actually performed, falls within the permissive scope of a contract for the contract to be regarded as one for carriage by that mode, at least for some conventions.[498]

3.121 It was felt nevertheless that the Convention should deal with the possibility of conflict. This is not simply because such conventions exist internationally but because a court applying the law of a State needs criteria to determine which to apply when that State has incorporated overlapping conventions into its law particularly as application of one might put it in breach of its obligations to other Contracting States in respect of the other convention. It must be realised that this is not just a potential conflict of liability but also involves a conflict in respect of documentation rules, especially where penalties are imposed in respect of failure to comply, and jurisdiction rules etc. Two types of provisions are catered for. Some carriage conventions contain rules which specifically apply to combined transport such as CMR and CIM. Thus provision is made in Article 30(4) whereby carriage within the terms of the combined transport provisions of those conventions is specifically excluded from the Convention when states are bound to apply their provisions. No precise reference is made to the possibility of revision of these conventions and since the adoption of the MMTC there has been revision of CIM.[499] Possibly the words "such as" contain sufficient flexibility to take account or this and arguably, it would not be a breach of the Convention for national legislation adopting it, to bring it up to date. Other regimes contain provisions which make reference to multimodal transport such as Article 1(6) of the Hamburg Rules and Article 38 of the Montreal Convention.[500] Article 38 deals with this type of provision.[501] It is, however, an odd provision in so far as it appears to give discretion to a court without guidance as to how to exercise it.[502] It would be far better to make provision in national legislation to deal with potential conflict and state clearly which convention applies, since it will be impossible to predict how a court will exercise its discretion.

3E MULTIDOC—THE UNCTAD/ICC RULES

3E.1 INTRODUCTION

3.122 Since adoption of the MMTC, UNCTAD monitored its progress and by 1986 had become concerned that only four States had become party to it. Since the

498. See above, 3.84. But possibly not in respect of the Hamburg Rules, see previous footnote.

499. Currently the CIM Rules of the COTIF Convention 1980 and shortly the new regime based on the Protocol of Vilnius.

500. Article 31 in the older Warsaw regimes.

501. It could not be left simply to be determined by the Vienna Convention on Treaties since not all negotiating states wished to become parties to the Vienna Convention and, since it depends on there being a conflict, would only be applied if a conflict was considered to exist, see Jackson, fn. 492, at G7 and de Wit, p. 202 n. 1313. De Wit notes further the difficulty that Art. 38 does not deal with the possibility that the conflicting conventions might enter into force later than the MMTC.

502. Unless "may" means "must," see further Diamond, above fn. 408 at C14. *Cf*, however, De Wit, p. 202.

Convention had not provided for any model form document the UNCTAD secretariat was set to work on producing one which might encourage commercial adoption of the Convention. This resulted in a draft "Multidoc" based directly on the Convention. This was submitted to a group of experts of the Economic Commission for Europe who recommended that it was not sufficiently in tune with commercial needs. To accomplish a more commercially acceptable document based on current realities a joint UNCTAD/ICC working group was established. The fruits of their labour were the UNCTAD/ICC Rules for Multimodal Transport Documents adopted in 1991 and brought into effect on 1 January 1992. Publication No. 481 containing the Rules includes useful explanatory notes.[503]

3.123 Thirteen rules are provided and as with the earlier ICC Uniform Rules[504] they are meant to provide a basis for multimodal transport contracts which would need to be supplemented by further conditions. The Rules were intended to be compatible with the latest revision at that time of the ICC Uniform Customs and Practice for Documentary Credits 1993 (No. 500). Unlike the ICC Uniform Rules there is direct recognition of the possibility that the Rules take effect as contract terms which may be displaced by the operation of mandatory law. Accordingly Rule 13 provides that the Rules take effect only to the extent that they are not contrary to the mandatory provisions of international Conventions or national law applicable to the contract. FBL 92 is expressed to be issued subject to the UNCTAD/ICC Rules as is Multidoc 95. Note also the Indian Multimodal Transportation of Goods Act 1993 which seems to have been modelled, in part, on these Rules.[505] It has been said that the Rules have been widely accepted across the trade.[506]

3E.2 DEFINITIONS AND APPLICATIONS OF THE UNCTAD/ICC RULES

3.124 **UNCTAD/ICC RULES, Rules 1 and 2**

1. Applicability

1.1 These Rules apply when they are incorporated, however this is made, in writing, orally or otherwise, into a contract of carriage by reference to the "UNCTAD/ICC Rules for multimodal transport documents", irrespective of whether there is a unimodal or a multimodal transport contract involving one or several modes of transport or whether a document has been issued or not.
1.2 Whenever such a reference is made, the parties agree that these Rules shall supersede any additional terms of the multimodal transport contract which are in conflict with these Rules,

503. See also (1991) 26 ETL 620, and De Wit, paras 2.264 *et seq.*, and J. Ramberg, *The Law of Freight Forwarding*, FIATA 1993, also, "The UNCTAD/ICC Rules for Multimodal Transport Documents-Genesis and Contents" in *Essays in honour of Hugo Tiberg*, Stockholm, 1996, pp. 513–523.

504. See 3C.2.

505. See Carr, "International multimodal transportation of goods: the Indian response", [2000] ITLQ 16.

506. C. Hancock, in Thomas, ch. 2 at p. 36, citing the UNCITRAL Secretariat "Relation with Other Conventions" A/CN.9/W.G.III/WP.78, citing in particular the opinion of the International Group of P&I Clubs (Report of the eleventh session para. 232). A perusal of the terms and conditions used by major operators such as by Maersk Line suggest that there remains strong reliance on older versions of combined transport terms.

except insofar as they increase the responsibility or obligations of the multimodal transport operator.

2. Definitions

2.1 **Multimodal transport contract** (MTC) means a single contract for the carriage of goods by at least two different modes of transport.
2.2 **Multimodal transport operator** (MTO) means any person who concludes a multimodal transport contract and assumes responsibility for the performance thereof as a carrier.[507]
2.3 **Carrier** means the person who actually performs or undertakes to perform the carriage, or part thereof, whether he is identical with the multimodal transport operator or not.[508]
2.4 **Consignor** means the person who concludes the multimodal transport contract with the multimodal transport operator.
2.5 **Consignee** means the person entitled to receive the goods from the multimodal transport operator.
2.6 **Multimodal transport document** (MT document) means a document evidencing a multimodal transport contract and which can be replaced by electronic data interchange messages insofar as permitted by applicable law and be:
(a) issued in a negotiable form; or
(b) issued in a non-negotiable form indicating a named consignee.
2.7 **Taken in charge** means that the goods have been handed over to and accepted for carriage by the MTO.[509]
2.8 **Delivery** means:[510]
(a) the handing over of the goods to the consignee; or
(b) the placing of the goods at the disposal of the consignee in accordance with the multimodal transport contract or with the law or usage of the particular trade applicable at the place of delivery; or

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507. The definition of "freight forwarder" in FBL 92 follows the definition of MTO in Rule 2.2 and identifies this person as the one who issues the document and is named on the face of it. Given this it is unfortunate that Art. 30 of the ICC Uniform Customs and Practice for Documentary Credits 1993 (No. 500) requires a document issued by a freight forwarder both to indicate on its face the name of the freight forwarder as a carrier or MTO and to have been signed or otherwise authenticated by the freight forwarder as carrier or MTO. The latter requirement appears to be superfluous in respect of an FBL since the object of the issue of the document is the assumption of carrier responsibility by the freight forwarder on his sole signature (FIATA News in *Cargo World* No. 24, 24 June 1993). *Cf* Multidoc 95 which, similarly, refers to the person named on the face but on the face of the document indicates that the person signing is signing for the MTO as carrier.

508. This Rule adds a definition of "carrier" to introduce the concept of performing carrier which is not contained in the MMTC (included in cl. 2 of Multidoc 95 but not FBL 92). This ties in with r. 5.4 below.

509. Rule 2.7 keeps the definition of taking in charge simple (FBL 92, however, adds the words "at the place of receipt evidenced in this FBL) and eschews the more complex provision in Art. 14 of the Convention, above, 3.106. Use of the words "accepted for carriage" suggests that receipt of the goods for another purpose, such as warehousing until instructions are received for carriage, excludes such storage from the rules until instructions to carry are received, see J. Ramberg, p. 49. The admittedly more problematic concept of delivery is kept more in line with the Convention by r. 2.8.

510. *Cf* MMTC, Art. 14, above, 3.106. Multidoc 95 is in the same terms. Clause 12 of FBL 92 refers, not just to the place of delivery, but also "to such other place at which the freight forwarder is entitled to call upon the merchant to take delivery. This is a reference forward to sub-cl. 12.3 which deals with hindrances to the carriage and entitles the forwarder to abandon the carriage where it is or is likely to be affected by any hindrance or risk of any kind not arising from any fault or neglect of the Freight Forwarder or others for whom he is responsible. A similar clause dealing with hindrances is provided by cl. 9 of Multidoc 95. Such clauses are unlikely to be viewed as inconsistent with the Rules (see r. 1.2) as they are dealing with matters affecting the performance of the contract and apply only to situations where the MTO is not at fault, *cf G.H. Renton & Co Ltd* v. *Palmyra Trading Corp of Panama* [1957] AC 149.

(c) the handing over of the goods to an authority or other third party to whom, pursuant to the law or regulations applicable at the place of delivery, the goods must be handed over.

2.9 **Special Drawing Right** (SDR) means the unit of account as defined by the International Monetary Fund.[511]

2.10 **Goods** means any property including live animals as well as containers, pallets or similar articles of transport or packaging not supplied by the MTO, irrespective of whether such property is to be or is carried on or under deck.[512]

3E.2.1 Object and application of the Rules

3.125 The approach taken by the Rules is to simplify matters as far as possible and to reconcile the MMTC with the Hague Rules. From Rule 1.1 it is clear that they apply when they are incorporated and whether or not the contract is for unimodal or multimodal transport.[513] No definition of multimodal transport is given but there is a definition of a multimodal transport contract in Rule 2.1. This compares with the ICC Uniform Rules[514] which attempted to define combined transport, albeit in the same terms, but also contained a reference to carriage between different countries. It is difficult to see how Rule 1.1 is to be reconciled with Rule 2.1, and the remaining rules, which assume that there is a multimodal transport contract. As with the ICC Uniform Rules the intention appears to be to enable the rules to be applied even if, in fact, a contract is performed unimodally. Clause 1 of FBL 92 retains the clarification that the conditions apply even if only one mode of transport is used, as did Clause 1 of the previous version which reflected Rule 1(a) of the Uniform Rules. Clause 1 of Multidoc 95 keeps more closely to the formula used in Rule 1.1. A definition of a multimodal transport document is given to link in with other rules relating to documentation.[515] Nevertheless unlike the ICC Uniform Rules the application of the Rules is not dependent on the issue of a document but rather on their incorporation into the contract.[516] Furthermore it is contemplated that such a document may be replaced by electronic data interchange messages. This contrasts with the formulation in Article 5(4) of the Convention which refers to the mechanical preservation of a record and requires a document to be issued.[517] It should be noted that there is no requirement for a signature.[518] The Rules therefore seek to accommodate the increasing interest in computer replacement of documentary systems and especially the moves towards the creation of electronic bills of lading.[519]

511. See 3.63.
512. This definition of goods is somewhat wider than that adopted by Art. 1(7) of the Convention (see above, 3.97).
513. See above, fn. 222.
514. See 3.48.
515. See 3.48.
516. *Cf* r. 1(a) of the ICC Uniform Rules, above, 3.48.
517. See above, 3.102.
518. *Cf* MMTC Art. 5(2), see above, 3.102.
519. See 1.27, and note the CMI Rules for electronic bills of lading 1990.

3E.3 DOCUMENTATION AND RESPONSIBILITIES OF THE MTO

UNCTAD/ICC Rules, Rules 3 and 4 3.126

3. The information in the *MT document* shall be *prima facie* evidence of the taking in charge by the MTO of the goods as described by such information unless a contrary indication, such as "shipper's weight, load and count", "shipper-packed container" or similar expressions, has been made in the printed text or superimposed on the document.[520]

Proof to the contrary shall not be admissible when the *MT document* has been transferred, or the equivalent electronic data interchange message has been transmitted to and acknowledged by the consignee who in good faith has relied and acted thereon.[521]

4.1 Period of responsibility

The responsibility of the MTO for the goods under these Rules covers the period from the time the MTO has taken the goods in his charge to the time of their delivery.[522]

4.2 The liability of the MTO for his servants, agents and other persons

The multimodal transport operator shall be responsible for the acts and omissions of his servants or agents, when any such person or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the contract, as if such acts and omissions were his own.[523]

4.3 Delivery of the goods to the consignee

The MTO undertakes to perform or procure the performance of all acts necessary to ensure delivery of the goods:

(a) when the *MT document* has been issued in a negotiable form "to bearer", to the person surrendering one original of the document; or

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520. There is a greatly simplified version of the rule governing the evidentiary effect of the MT document in r. 3 which (unlike r. 9 of the ICC Uniform Rules, see above, 3.55, does not require any particular information to be included. Rule 3 seems to permit the MTO to negate the evidentiary effect of the document by general reservations put on it whether or not justified. Article 9 of the Convention, above, 3.102, at least requires these to be justified. See further the discussion of the Rotterdam Rules at 3F.3.

521. This Rule makes unreserved statements conclusive in favour of a transferee whether or not strictly speaking a third party to the contract of carriage, unlike Art. 10(b) of the Convention, above, 3F.3, and Art. 16(3)(b) of the Hamburg Rules as well as Art. III, r. 4, of the Hague-Visby Rules and Art. 41(b)(i) of the Rotterdam Rules (but see also the special position of a consignee in Art. 41(b)(ii), see further 3.163). As with the Hamburg Rules, Art. 16(3)(b), and the Convention, Art. 10(b) (in contrast with Art. III, r. 4, of the Hague-Visby Rules and the Rotterdam Rules, Art. 41(b)), the conclusive effect of the statements depends on reliance (as it does under the Rotterdam Rules in respect of non-negotiable documents in relation to statements falling within Art. 41(c)). Although in contrast with Art. 10(b) of the Convention, the rule does not indicate that the document has to be in negotiable form to have conclusive effect (see also cl. 3.2 of FBL 92, *cf* cl. 3.2 of the previous version, see also cl. 16 of Multidoc 95) it does have to be transferred and presumably only a document in negotiable form will be transferred (*cf* r. 4.3 below). There is also recognition of the conclusive effect of an electronic data interchange message to the consignee. Presumably the intention is for such message to provide *prima facie* proof where not transmitted to a consignee, if storage of the data is sufficient, see above. The evidential effect of electronic messages is assisted by changes to English law made by the Civil Evidence Act 1995 and the Electronic Communications Act 2000. Compare further the provisions in the Rotterdam Rules, see 3F.3.

522. Compare the more complex provision in Art. 14 of the Convention, see 3.106.

523. This corresponds to Art. 15 of the Convention, see above, 3.106. In connection with this it can be noted that by r. 12 the Rules are made applicable to the servants, agents and other persons who are referred to in r. 4.2. The aggregate liability of the MTO and such servants, etc., is not to exceed the limits in r. 6, see below, 3.123. *Cf* Art. 20(2) and (3) of the Convention, above, 3.106.

(b) when the *MT document* has been issued in a negotiable form "to order", to the person surrendering one original of the document duly endorsed; or
(c) when the *MT document* has been issued in a negotiable form to a named person, to that person upon proof of his identity and surrender of one original document; if such document has been transferred "to order" or in blank the provisions of (b) above apply; or
(d) when the *MT document* has been issued in a non-negotiable form, to the person named as consignee in the document upon proof of his identity; or
(e) when no document has been issued, to a person as instructed by the consignor or by a person who has acquired the consignor's or the consignee's rights under the multimodal transport contract to give such instructions.[524]

3E.3.1 The multimodal transport document and the responsibilities of the MTO

3.127 As noted above the application of the Rules does not depend upon the issue of a document. The issue of a document is contemplated, however, or its replacement by electronic data interchange messages and by Rule 3 the link is drawn with its evidentiary effect and by Rule 4 with the undertaking to deliver dependent upon the form the document takes. As with the earlier ICC Rules and the MMTC the Rules envisage a basic distinction between a negotiable and non-negotiable form of the document. Rule 4.3 is in roughly the same terms as Article 6 and 7 of the Convention. Rule 4.3, however, provides a more detailed link between the form of the document and the responsibility of the MTO to deliver against an original of the document. In particular paragraph (c) of Rule 4.3 recognises the further possibility of the document being straight consigned like a straight bill of lading with delivery made to a named person but only against an original of the document. As with the earlier Rules and the Convention the responsibility of the MTO is to perform or procure performance. Rule 4.3 expresses this in terms of all acts necessary to ensure delivery of the goods rather than the performance of multimodal transport.[525] Nevertheless Rule 2.2 makes clear that the MTO assumes responsibility as a carrier so there is little doubt that, although simplified, the Rules are intended to confirm the liability of the MTO in the same way as the earlier Rules and the MMTC. As has been noted this has already received some judicial recognition in the context of the FBL.[526]

3E.4 LIABILITY OF THE MTO

3.128 **UNCTAD/ICC Rules, Rule 5.1–5.4**

5.1 Basis of liability

Subject to the defences set forth in Rule 5.4 and Rule 6, the MTO shall be liable for loss of or damage to the goods, as well as for delay in delivery, if the occurrence which caused the

524. In contrast with Art. 7(2) of the Convention sub-paragraph (e) refers to the alternative possibilities of an instruction from the consignor or by other persons. It might be possible to imply these alternatives into Art. 7(2) of the Convention since it does not specify who may give the instructions. Unlike the Convention there is no reference to the instructions being in writing.
525. *Cf* MMTC Art. 1.3.
526. In *James N Kirby Pty Ltd* v. *Norfolk Southern Railway Co,* see 3.60.

loss, damage or delay in delivery took place while the goods were in his charge as defined in Rule 4.1., unless the MTO proves that no fault or neglect of his own, his servants or agents or any other person referred to in Rule 4 has caused or contributed to the loss, damage or delay in delivery. However, the MTO shall not be liable for loss following from delay in delivery unless the consignor has made a declaration of interest in timely delivery which has been accepted by the MTO.

5.2 Delay in delivery

Delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent MTO, having regard to the circumstances of the case.[527]

5.3 Conversion of delay into final loss

If the goods have not been delivered within ninety consecutive days following the date of delivery determined according to Rule 5.2., the claimant may, in the absence of evidence to the contrary, treat the goods as lost.[528]

5.4 Defences for carriage by sea or inland waterways

Notwithstanding the provisions of Rule 5.1. the MTO shall not be responsible for loss, damage or delay in delivery with respect to goods carried by sea or inland waterways when such loss, damage or delay during such carriage has been caused by:

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;

fire, unless caused by the actual fault or privity of the carrier;

however, always provided that whenever loss or damage has resulted from unseaworthiness of the ship, the MTO can prove that due diligence has been exercised to make the ship seaworthy at the commencement of the voyage.

3E.4.1 Liability for loss, damage or delay

3.129 In light of Rule 13[529] there is recognition that the rules should deal with liability as simply as possible and escape from the complexities of the TCM solution. The basic liability expressed in Rule 5.1 does not involve any distinction between concealed or localised loss and, in essence, follows Article 16(1) of the Convention.[530] Rule 5.4, however, provides that if the goods are carried by sea or inland waterways the MTO can rely on the special Hague Rules defences of act, neglect or default in the navigation or management of the ship and fire without actual fault or privity[531] unless there has been failure to exercise due diligence to make the ship seaworthy. This brings liability more or less into line with the Hague Rules and is seen as a simplification of these rules. Unlike Rule 6.3,[532] the application of these special

527. *Cf* Art. 16(2) of the Convention, above, 3.106

528. *Cf* Art. 16(3) of the Convention, above, 3.106.

529. See above 3.102.

530. See above, 3.106. It has been said to retain the network liability system (Ramberg, p. 34). This is true mainly in respect of limitation of liability (see below) and whilst, in that respect, it is a more extensive system than under the Convention, it would still seem apt to call it a modified uniform system.

531. I.e. Hague Rules, Art. IV, r. 2(a) and (b).

532. See 3.132.

defences does not appear to depend upon whether or not carriage by sea is in accordance with the contract. Nevertheless, it is unlikely that they could be applied were the goods to be carried by sea in breach of contract.

3.130 A further point of interpretation arises from the absence of the word "delay" in the proviso to Rule 5.4. It has been suggested that on a literal interpretation, this omission suggests that, in respect of delay, the MTO does not have to establish the due diligence of the shipowner to make the ship seaworthy in order to take advantage of the exception for the crew's negligence.[533] In respect of delay, Rule 5.1 qualifies liability by making it dependent on a declaration of interest being made[534] Nevertheless, a definition of delay is provided in Rule 5.2, as well as the possibility of conversion into loss, by Rule 5.3.[535]

3.131 FBL 92 contains equivalent provisions in clauses 6.2–6.4. Note that clause 6.2 goes further than Rule 5.1 by requiring the declaration of interest to be stated in the FBL as well as being accepted by the freight forwarder. Furthermore clause 6.3 makes it clear that arrival times are not guaranteed by the freight forwarder. Clause 10 of Multidoc 95 requires the acceptance of the MTO of the written declaration of interest in timely delivery to be accepted in writing by the MTO. Clause 6.2 of FBL 92 reflects the primary liability provided for by Rule 5.1 and clause 6.6 the special defences of Rules 5.4. In addition, however, clause 6.5 also includes a list of causes in similar terms to causes (a)–(e) listed in Rule 12 of the Uniform Rules.[536] The purpose of this is to give the freight forwarder the benefit of a presumption where he establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more of these causes. Clause 6.5 extends the benefit of this presumption to all the listed causes and not just causes (b) to (d) as in Rule 12 of the Uniform Rules and clause 6A(3) of the previous version of FBL. In so far as this weakens the burden of proof that would otherwise be imposed on the forwarder this would seem to fall foul of Rule 1.2.[537] Furthermore, clause 7.2 applies the Hague or the Hague-Visby Rules as enacted in the country of shipment to all carriage of goods by sea or inland waterway whether the goods are carried on deck or under deck and clause 7.3 applies US COGSA to carriage by sea whether on deck or under deck where it is compulsory applicable or would be but for the goods being carried on deck. These provisions are in addition to the recognition of potentially applicable mandatory laws in clause 7.1 which reflects Rule 13 of the Rules. Clause 11 of Multidoc 95 adds to the defences in Rule 5.4 by reference to the causes listed in the Hague-Visby Rules, Article 4.2(c)–(p). The effect of this would seem simply to give the MTO the option of proving either the general lack of fault as indicated in Rule 5.1,[538] or the more specific causes additionally indicated which are anyway consistent with the absence of fault. By clause 25 special provision is made for US trades whereby, if the MT Bill of Lading is subject to US COGSA, then the

533. Kindred and Brooks, p. 98.
534. *Cf* Art. 16(1) of the Convention, above, 3.106.
535. As with r. 15 of the ICC Uniform Rules, see above, 3.61.
536. See above, 3.61.
537. Ramberg (p. 35) suggests that an operator issuing a document which lists the Hague-Visby Rules defences would not be acting contrary to the UNCTAD/ICC Rules.
538. See cl. 10.

provisions of this Act govern before loading and after discharge and throughout the entire time the goods are in the carrier's custody.[539]

3E.5 COMPENSATION AND LIMITATION OF LIABILITY

UNCTAD/ICC Rules, Rules 5.5, 6 and 7 *3.132*

5.5 Assessment of compensation

5.5.1 Assessment of compensation for loss of or damage to the goods shall be made by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with the multimodal transport contract, they should have been so delivered.[540]
5.5.2 The value of the goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or, if there is no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.[541]

6. Limitation of liability of the multimodal transport operator

6.1 Unless the nature and value of the goods have been declared by the consignor before the goods have been taken in charge by the MTO and inserted in the *MT document*,[542] the MTO shall in no event be or become liable for any loss of or damage to the goods in an amount exceeding the equivalent of 666.67 SDR[543] per package or unit or 2 SDR per kilogramme of gross weight of goods lost or damaged,[544] whichever is the higher.
6.2 Where a container, pallet or similar article of transport is loaded with more than one package or unit, the packages or other shipping units enumerated in the *MT document* as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, such article of transport shall be considered the package or unit.
6.3 Notwithstanding the above-mentioned provisions, if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the MTO shall be limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.
6.4 When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the MTO's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.
6.5 If the MTO is liable in respect of loss following from delay in delivery, or consequential loss or damage other than loss of or damage to the goods, the liability of the MTO shall be

539. See further above, 3.15.
540. Unlike the Convention, r. 5.5.1 supplies the omission of a date for the determination of the value of the goods for the purposes of compensation. *Cf* r. 11(a) of the ICC Uniform Rules, above, 3.61, and Art. IV, r. 5(b), of the Hague-Visby Rules. See FBL 92, cl. 8.1 and Multidoc 95, cl. 13(a).
541. This provision is not reproduced in the Convention. *Cf* the Hague-Visby Rules, Art. IV, r. 5(b).
542. This reflects more the rule in Art. IV, r. 5(a), of the Hague-Visby Rules than Art. 18(6) of the Convention, above, 3.106.
543. See r. 2.9, above, 3.124.
544. *Cf Serena Navigation Ltd* v. *Dera Commercial Establishment (The Limnos)* [2008] EWHC 1036 (Comm), [2008] 2 Lloyd's Rep 166, see 2.290 fn. 1180.

limited to an amount not exceeding the equivalent of the freight under the multimodal transport contract for the multimodal transport.
6.6 The aggregate liability of the MTO shall not exceed the limits of liability for total loss of the goods.[545]

7. Loss of the right of the multimodal transport operator to limit liability

The MTO is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery resulted from a personal act or omission of the MTO done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.[546]

3E.5.1 Limitation of liability

3.133 Further correspondence with the Hague-Visby Rules is evident in respect of limitation of liability. Thus, the Hague-Visby Rules limits are stipulated in Rule 6. A date for determining the value of the goods is provided by Rule 5. Rule 6.2 stipulates a container formula which, unlike the ICC Uniform Rules is not confined to where the Hague-Visby Rules are mandatorily applicable or can be made applicable. Unlike Article 18(2)(b) of the Convention,[547] the formula does not provide for the container to constitute a separate shipping unit, which is also the case under Article IV, rule 5(c) of the Hague-Visby Rules. Furthermore, unlike Article 18(2)(b) of the Convention, the formula does not make reference to the use of the container to consolidate the goods. More in line with the Convention[548] is Rule 6.3, which applies where the multimodal transport does not, according to the contract, include carriage of goods by sea or inland waterways. Here the Convention limit of 8.33 SDRs is stipulated.

3.134 There is also a localised damage provision in Rule 6.4 which, although similar to Article 19 of the Convention,[549] is not confined to where the limit of liability in an applicable Convention etc is higher than the floor limit. As with the Convention, there is a reference to an "applicable" international convention or mandatory national law. The view taken above,[550] might also be applied to this provision. Thus it may be possible for a lower limit to be introduced by reference to a convention which could have been applied to the relevant stage by an appropriate contractual provision. There would need to be, however, no competing mandatory convention. If this is the case then the Rules will produce a similar effect to the ICC Uniform

545. *Cf* Art. 18(5) of the Convention, above, 3.106. See also FBL 92, cl. 8.8. Kindred and Brooks, p. 122, suggest that total loss for the purpose of r. 6.6. tracks the limits of liability where applicable under r. 6.5.

546. This applies the same rule as in Art. 21(1) of the Convention in respect of loss of the right of the MTO to limit his liability. As is common in carriage by sea (*cf* the Hamburg Rules, Art. 8 and the Hague-Visby Rules, Art. IV, r. 5(e)), the misconduct of the carrier affects limitation of liability but not the application of the time limit (*cf* Art. 32(1) of the CMR Convention). Furthermore the misconduct of the MTO's servants etc. does not affect the MTO's rights of limitation (*cf* the CMR Convention, Art. 29 and the Warsaw Convention, Art. 25). See also FBL 92, cl. 8.9 and Multidoc 95, cl. 12(g). For the meaning of a limit of liability in respect of a misconduct provision see *Antwerp United Diamond B.V.B.A.* v. *Air Europe (a firm)* [1995] 3 All ER 424.

547. Above, 3.106.

548. See Art. 18(3), see above, 3.106.

549. Above, 3.106.

550. At 3.112.

Rules since these rules permit[551] the application of a convention limit which is restrictive of the carrier's liability, provided that there is no applicable mandatory rule.[552] If this is not the correct interpretation of Rule 6.4, then the absence of a compulsory regime will force the carrier back to the limit in Rule 6.1. Rule 6.4 also refers to where an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract had been made for that particular stage of transport. At least here, unlike Article 19 of the Convention,[553] there is a reference to a separate contract, although it is not clear whether this means a contract which would have been made by the consignor with the MTO or with the actual carrier. Note that mandatory laws normally permit a carrier to increase his liability. A lower limit expressed in such laws might be taken to have been increased by application of Rule 6.1 or 6.3. An appropriate clause to avoid this may be advisable.[554] No such clause appears in FBL 92 which, in clause 8.3–8.6 contains equivalent provisions to Rule 6.1 to 6.4.[555] There is, however, the addition of clause 8.6(b) which provides a limit of $500 per package or customary freight unit where COGSA is applicable.[556] It is unclear whether the applicability of COGSA is to be determined by clause 8.6(a) or clause 7.3[557] or whenever either of these clauses can be applied.

3.135 The limit in respect of delay provided by Rule 6.5 is more restrictive than the equivalent provision in the Convention.[558] There is also a restriction on recovery in respect of consequential loss which is thus removed from the application of the general limit in Rule 6.1. Clause 8.7 of FBL 92 provides for a limit of twice the freight.

3E.6 LIABILTY OF THE CONSIGNOR

UNCTAD/ICC RULES, Rule 8 *3.136*

8.1 The consignor shall be deemed to have guaranteed to the MTO the accuracy, at the time the goods were taken in charge by the MTO, of all particulars relating to the general nature of the goods, their marks, number, weight, volume and quantity and, if applicable, to the dangerous character of the goods, as furnished by him or on his behalf for insertion in the *MT document*.
8.2 The consignor shall indemnify the MTO against any loss resulting from inaccuracies in or inadequacies of the particulars referred to above.
8.3 The consignor shall remain liable even if the *MT document* has been transferred by him.
8.4 The right of the MTO to such indemnity shall in no way limit his liability under the multimodal transport contract to any person other than the consignor.

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551. See r. 13(b), above, 3.61.
552. e.g. cl. 7(2) of the Maersk Line Multimodal Transport Bill of Lading.
553. See above, 3.106.
554. E.g. BIFA, cl. 2(B), see 2.24.
555. *Cf* Multidoc 95, cl. 12(a)–(g).
556. See also cl. 12(a)(i) of Multidoc 95.
557. See above, 3.131.
558. See Art. 18(4), above, 3.106.

3E.6.1 Comparison of provisions

3.137 This provision is more limited than the equivalent provisions in the Convention[559] and the ICC Uniform Rules.[560] Unlike the Convention a general liability for fault is not provided. Further, unlike the Convention and the Uniform Rules, no rights are specifically granted to the MTO to destroy dangerous goods. Given the importance of this right to a carrier, its inclusion in a contract of carriage would not, presumably, be considered to amount to a breach of the Rules at least if in the same terms as Article 23 of the Convention. Such rights are provided by clause 4 of FBL 92 and clause 19 of Multidoc 95. Provisions in line with Rule 8 are contained in clause 5.1 and clause 17 of Multidoc 95. Clause 5.2 of FBL 92 provides protection from defective or insufficient packing, as well as inadequate loading or packing within containers etc, by means of an indemnity in addition to an exception. Clause 20 of Multidoc 95 concerns itself with the situation where a container, etc, has not been filled, packed or stowed by the MTO and does not deal with defective packing of the goods.

3E.7 CLAIMS AND ACTIONS

3.138 **UNCTAD/ICC RULES, Rules 9 and 10**

9. Notice of loss of or damage to the goods

9.1 Unless notice of loss of or damage to the goods, specifying the general nature of such loss or damage, is given in writing by the consignee to the MTO when the goods are handed over to the consignee, such handing over is *prima facie* evidence of the delivery by the MTO of the goods as described in the *MT document*.
9.2 Where the loss or damage is not apparent, the same *prima facie* effect shall apply if notice in writing is not given within 6 consecutive days after the day when goods were handed over [*sic*] the consignee.[561]

10. Time-bar

The MTO shall, unless otherwise expressly agreed, be discharged of all liability under these Rules unless suit is brought within 9 months after the delivery of the goods, or the date when the goods should have been delivered, or the date when in accordance with Rule 5.3, failure to deliver the goods would give the consignee the right to treat the goods as lost.[562]

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559. Articles 12, 22 and 23, see above, paras 3.102 and 3.115.
560. Rules 7 and 8, see above, 3.91.
561. As with r. 10 of the ICC Uniform Rules, above, 3.92, this rule provides for notice of loss or damage to be given at the time of delivery in the case of apparent damage. This compares with Art. 24(1) of the Convention, above 3.116, which refers to the working day after the day the goods were delivered to the consignee. In the case of non-apparent damage, the requirement of six days' notice is in line with Art. 24(2) of the Convention but compares with the seven days granted by the ICC Uniform Rules. See cl. 16 of FBL 92 and cl. 14 of Multidoc 95.
562. As with the ICC Uniform Rules, above, 3.92, this rule provides for a time-bar of nine months which applies only in respect of claims against the MTO. This compares with the two-year time bar, applicable to all claims, in Art. 25(1) of the Convention, see above, 3.116. Furthermore, unlike the Convention, there is no special requirement for six months' notice of a claim. See cl. 17 of FBL 92 and cl. 4 of Multidoc 95.

3E.8 NON-CONTRACTUAL CLAIMS

UNCTAD/ICC RULES, Rules 11 and 12 *3.139*

11. Applicability of the rules to actions in tort

These Rules apply to all claims against the MTO relating to the performance of the multimodal transport contract, whether the claim be founded in contract or in tort.[563]

12. Applicability of the rules to the multimodal transport operator's servants, agents and other persons employed by him

These Rules apply whenever claims relating to the performance of the multimodal transport contract are made against any servant, agent or other person whose services the MTO has used in order to perform the multimodal contract, whether such claims are founded in contract or tort, and the aggregate liability of the MTO and such servants, agents or other persons shall not exceed the limits in Rule 6.

3E.8.1 Himalaya protection

3.140 Rule 12 is a simplification of the equivalent rule in Article 20(2) of the Convention,[564] This compares with the formulation used in Rule 18 of the ICC Uniform Rules[565] which refers to the use of provisions in the document to provide this protection. Such a formulation may be more realistic in light of the technical requirements normally required of such clauses which, at common law, would not appear to be satisfied by the incorporation of Rule 12 alone.[566] Clause 10.2 of FBL 92 adds the necessary words of agency to enable the clause to satisfy the requirements of a Himalaya clause at common law as does clause 15(c) of Multidoc 95. This is an improvement on Clause 11 of the previous version of FBL.[567] Since the passing of the Contracts (Rights of Third Parties) Act 1999 it is strictly unnecessary in English law for the carrier to act as agent for the persons protected, provided that the intention that they should benefit from the protective provisions in the contract is clearly expressed. A difficulty that might arise from the continued use of words of agency in such clauses is that their inclusion might lead a court to interpret the clause as requiring agency to be found as a condition of the application of the clause.

3.141 A further difficulty of interpretation stems from the nature of terms which adopt a network approach to liability and limitation. The MTO's liability varies depending upon factors such as the stage where loss occurred or whether carriage by sea was adopted as one of the modes of transport. It is not entirely clear how these provisions are meant to apply to an operator engaged for a particular stage such as

563. *Cf* r. 16 of the ICC Uniform Rules, above, 3.61, and Art. 20(1) of the Convention, above, 3.106. See cl. 9 of FBL 92 and cl. 15(a) of Multidoc 95.
564. See above, 3.106.
565. See above, 3.61.
566. See now, however, the Contracts (Rights of Third Parties) Act 1999.
567. See above, fn. 269.

rail or road transport. The problem is illustrated by the US Court of Appeals' decision in *James N Kirby, Pty Ltd* v. *Norfolk Southern Railway Co.*[568] The court held that the Himalaya clause did not enable a railway company, to whom the ocean carrier, engaged by a freight forwarder, had subcontracted the inland transportation of the goods to destination, to rely on the limitation in COGSA in an FBL issued by the freight forwarder to the shipper. The court considered the language used in the clause to be insufficiently clear to extend the benefits of COGSA to an inland carrier. It reinforced its view by reference to the "network" approach taken by the drafters of the FBL.[569] It concluded that because the FBL was drafted with this "network" liability system in mind, its Himalaya clause was not designed to extend the liability regime for sea carriers, i.e. COGSA, to inland carriers.[570] Instead, they would be covered by the different liability scheme applicable to rail carriers. The FBL's Himalaya clause is only meant to extend the carrier's protections to parties who are between liability regimes, at the fringes of the sea regime, i.e. stevedores, terminal operators etc. The court did not clarify what limit, if any, might have been relevant under a "different liability scheme". Its conclusion was that the railway could not limit on the basis of the bill of lading. It focused on the paramount clause incorporating COGSA.[571] This clearly makes reference to carriage by sea. Oddly, the court did not consider the possibility of applying the limits in either clause 8.3 or 8.5. These might be considered appropriate to apply, in the absence of an international convention or mandatory national law, since they reflect a uniform rather than a network based limit. Even so, a court might still consider that it is not entirely appropriate to apply clause 8.3 which is, in effect, a sea-based limit to an inland carrier's liability, just because the transit happens to have included a period of carriage by sea. The Supreme Court reversed the Court of Appeals' decision[572] taking the view that the railway was an intended beneficiary of the Himalaya clause. In doing so the court acknowledged that the clause produced a higher limit for the land section than under COGSA.

3.142 Clause 15(b) of Multidoc 95 also includes a promise not to sue any servant, agent or other person whose services the MTO has used to perform the contract. The restriction on such protective provisions in rule 18 of the ICC Uniform Rules does not appear but may be implied. Those documents, such as FBL 92, which follow the new Rules would, as previously,[573] restrict the scope of the principle of bailment on terms to those terms which are compatible with the Rules and such other terms not within the scope of the Rules to those within the known and contemplated form.

568. 2002 AMC 2113 (USCA, 11th Cir.).
569. Citing Ramberg in *The Law of Freight Forwarding*, pp. 25, 30–35, 37, 41–42, 65.
570. See further 3.19.
571. Presumably cl. 7.3.
572. *Sub nom Norfolk Southern Railway Co* v. *James N Kirby Pty Ltd* 543 US 14, [2004] AMC 2705.
573. See fn. 269.

3F UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA—THE ROTTERDAM RULES

3F.1 INTRODUCTION

3.143 The background to the development of the Convention is briefly explained in Chapter One. The starting point was the 29th session of UNCITRAL in 1996 at which the Commission considered a proposal to include in its work programme a review of current practices and laws in the area of international carriage of goods by sea.[574] This arose from work on electronic commerce which demonstrated that there were gaps in the law of carriage by sea in respect of issues concerning the functioning of bills of lading and sea waybills and other matters concerning the relations between sellers and buyers and thought to produce obstacles in the way of international trade. There was debate about what should be included and UNCITRAL sought to act as focal point for gathering information from a wide range of bodies including the CMI. The CMI then took the lead and established a steering committee to develop the issues and identify topics. This work passed to a working group which having analysed responses to a questionnaire sent to the National Associations, further refined the topics for consideration by the International Sub-Committee on Issues of Transport Law established in 1999.

3.144 The topics considered by the steering committee did not include liability. Doubts about whether to include consideration of a fresh regime of liability had been expressed in UNCITRAL since, especially given the slow process in the adoption of the Hamburg Rules, it was unlikely that adding a new treaty to the existing ones would lead to greater harmony of laws. Nevertheless work within CMI on liability was being undertaken by the Sub-Committee on the Uniformity of the Law of the Carriage of Goods by Sea chaired by Professor Berlingieri. Further discussion demonstrated a strong desire to include issues of liability. These were included in the work of the International Sub-Committee and duly noted by UNCITRAL at its 33rd session in 2000. In the context of this session a transport law colloquium, organized jointly by the UNCITRAL secretariat and CMI was held in New York on 6 July 2000. At this meeting there was consensus that with the changes wrought by multimodalism and the use of electronic commerce, there was need to regulate all transport contracts, whether applying to one or more modes or whether made electronically or in writing.

3.145 At the 33rd session the Commission welcomed the cooperation between the Secretariat and CMI and requested a report identifying issues in transport law on which the Commission might undertake future work. It was also noted that the CMI International Sub-Committee had met four times during 2000 to consider the

574. For a detailed review of the history see Beare, "Liability regimes: where we are, how we got there and where we are going", [2002] LMCLQ 306, and UNCITRAL, Note by the Secretariat, A/CN.9/WG.III/WP.21 pp. 3–8. The main elements of these reviews are summarised here. A brief review of the CMI work appears in a commentary by Tetley, "Let's have a two track approach" at tetley.law.mcgill.ca/maritime/uncitralcomment.htm, (as at 30 September 02), and (2003) 28 Tul Mar LJ 1–44.

scope and possible substantive solutions for a future instrument on transport law. The principal issues were debated at the CMI's 37th Conference in Singapore in February 2001 and ultimately a draft instrument was approved, in December 2001, for submission to UNCITRAL. Meanwhile at the 34th session of the Commission in 2001, a report of the Secretary-General[575] was put before it summarising the position arising from the work of the Sub-Committee, although at that stage the draft instrument was not ready for submission. The Commission set up a Working Group on Transport Law to consider the project. It was envisaged that the Secretariat would prepare for the Working Group a preliminary working document containing drafts of possible solutions for a future legislative instrument, with alternatives and comments, which was under preparation by CMI. This was to include issues of liability and whilst the considerations of the Working Group should initially cover port-to-port operations, it would be free to study the desirability and feasibility of dealing also with door-to-door operations. It was also agreed that the work should be carried out in close cooperation with interested intergovernmental organisations such as UNCTAD and UNECE as well as international non-governmental organisations.[576]

3.146 Consequently the preliminary draft instrument on the carriage of goods by sea[577] as presented to the Working Group for its deliberation at its 9th session in New York in April 2002 included provisions appropriate to an instrument covering carriage preceding or subsequent to carriage by sea.[578] The need to study both a maritime regime and a regime covering door-to-door transport was confirmed at this session,[579] and was endorsed as a working assumption by the Commission at the 35th session. It was agreed at this session that the Working Group should seek participation from international organisations such as the International Road Transport Union (IRU) and the Intergovernmental Organisation for International

575. A/CN.9/497.

576. Both UNCTAD and UNECE have continued work in the area. UNECE has conducted meetings of experts to address issues of multimodal transport, see *Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport* from the Working Party on Combined Transport, 34th session, 4–6 September 2000, TRANS/WP.24/2000/3, which reflects differing views from varying parts of the industry. In 2001 UNCTAD produced its report *Implementation of Multimodal Transport Rules* (UNCTAD/SDTE/TLB/2 and Add.1). Following this the Secretariat conducted a study on the feasibility of establishing a new international instrument on multimodal transport and ascertained views by means of a questionnaire. A report analysing the responses was completed (*Multimodal Transport: The Feasibility of an International Legal Instrument*, UNCTAD/SDTE/TLB/2003/1) and fed into the work of UNCITRAL (see A/CN.9/WG.III/WP.30). It is perhaps noteworthy that overall, with the exception of the maritime transport industry, the responses indicated only limited support for the approach adopted in the Draft Instrument.

577. See for discussion of the draft instrument at various stage of its development: Clarke, "A Conflict of Conventions: The UNCITRAL/CMI draft transport instrument on your doorstep" JIML 2003, 9(1), 28 and by the same author "Multimodal Transport in the New millennium" [2002] *WMU Journal of Maritime Affairs* 71, Berlingieri, "A New Convention on the Carriage of Goods by Sea : Port-to-Port or Door-to Door" [2003] ULR 265. See further Alcántara, "The new regime and multimodal transport" [2002] LMCLQ 399, Røsaeg, "The applicability of Conventions for the carriage of goods and for multimodal transport" [2002] LMCLQ 316, Asariotis, "Draft instrument on Transport law: an update on proceedings at the UNCITRAL working group" (2003) JIML 9(4), 400–402.

578. In particular Arts 1.1, 1.5 and 4.2.1. See Annex to Note by the Secretariat, above fn. 574. The working group had before it comments on the draft instrument prepared by the ECE and UNCTAD which were included in annexes to the note by the secretariat, A/CN.9/WG.III/WP.21/Add.1.

579. A/CN.9/510 especially at paras 26–32.

Carriage by Rail (OTIF). The Working Group was invited to consider the dangers of extension of a maritime instrument into land transportation and whilst it was agreed that appropriate mechanisms be included to avoid conflicts with other conventions it was important to have acceptable rules ensuring early adoption of the final product. A further suggestion was to explore the possibility of providing separate yet interoperable sets of rules (some of which might be optional) for maritime and road transport. These ideas received further expression in the 36th session in July 2003.[580] Ultimately a "package" was, in effect, settled upon which in essence consisted of door to door liability with a limited network system, along with liability for performing parties limited to maritime performing parties.[581] By 2005 the Draft Instrument had become a Draft Convention[582] and after a substantial process of discussion and revision involving further drafts,[583] a final version was approved for submission by the working group to the Commission,[584] which after a few further amendments presented this to the General Assembly which gave its approval on 11 December 2008 and authorised a ceremony for the opening for signature on 23 September 2009. The Convention requires adoption by 20 States to come into force and at the time of writing, whilst 24 States have signed the convention only two have ratified it.

3F.2 THE CONVENTION AND MULTIMODAL TRANSPORT—APPLICATION, PARTIES AND DOCUMENTS

Article 1.1, 1.5, 1.6, 1.7, 1.10, 1.12–27 and Articles 5, 8, 9 *3.147*

Article 1. Definitions

For the purposes of this Convention:
1. "Contract of carriage" means a contract under which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.
5. "Carrier" means a person that enters into a contract of carriage with a shipper.
6.(a) "Performing party" means a person other than the carrier that performs (or undertakes to perform) any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that that person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

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

580. A/58/17, para. 207.
581. US proposals reported in UNCITRAL, Doc (7 August 2003), A/CN.9/WG.III/WP.34, regarded several key issues as interrelated, *cf* A/CN.9/526, [226]. The proposals can be regarded as a package reflecting a compromise position which then formed the basis for the continuing work of the working group, A/CN.9/544, [21]–[23], [27].
582. See A/CN.9/WG.III/WP.56.
583. See A/CN.9/WG.III/WP.81, A/CN.9/WG.III/WP.101.
584. A/CN.9/645.

7. "Maritime performing party" means a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.
10. "Holder" means:
(*a*) A person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or
(*b*) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.
12. "Right of control" of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.
13. "Controlling party" means the person that pursuant to article 51 is entitled to exercise the right of control.
14. "Transport document" means a document issued under a contract of carriage by the carrier that:
(*a*) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and
(*b*) Evidences or contains a contract of carriage.
15. "Negotiable transport document" means a transport document that indicates, by wording such as "to order" or "negotiable" or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being "nonnegotiable" or "not negotiable".
16. "Non-negotiable transport document" means a transport document that is not a negotiable transport document.
17. "Electronic communication" means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.
18. "Electronic transport record" means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that:
(*a*) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and
(*b*) Evidences or contains a contract of carriage.
19. "Negotiable electronic transport record" means an electronic transport record:
(*a*) That indicates, by wording such as "to order", or "negotiable", or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being "non-negotiable" or "not negotiable"; and
(*b*) The use of which meets the requirements of article 9, paragraph 1.
20."Non-negotiable electronic transport record" means an electronic transport record that is not a negotiable electronic transport record.
21. The "issuance" of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.
22. The "transfer" of a negotiable electronic transport record means the transfer of exclusive control over the record.
23. "Contract particulars" means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.

24. "Goods" means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.
25. "Ship" means any vessel used to carry goods by sea.
26. "Container" means any type of container, transportable tank or flat, swap body, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.
27. "Vehicle" means a road or railroad cargo vehicle.

Article 5. General scope of application

1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:
(*a*) The place of receipt;
(*b*) The port of loading;
(*c*) The place of delivery; or
(*d*) The port of discharge
2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

Article 8. Use and effect of electronic transport records

Subject to the requirements set out in this Convention:
(*a*) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and
(*b*) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

Article 9. Procedures for use of negotiable electronic transport records

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:
(*a*) The method for the issuance and the transfer of that record to an intended holder;
(*b*) An assurance that the negotiable electronic transport record retains its integrity;
(*c*) The manner in which the holder is able to demonstrate that it is the holder; and
(*d*) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1 (*a*) (ii) and (*c*), the electronic transport record has ceased to have any effect or validity.
2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.

3F.2.1 Application to contracts and operators, exclusion and derogation

3.148 The Rotterdam Rules reflect a "maritime plus" idea.[585] Whilst essentially concerned with carriage of goods by sea it is intended to extend to any door-to-door

585. An expression which emerged in the course of the process, see e.g. UNCITRAL "Report of Working Group III (Transport Law) on the work of its twelfth session" (Vienna, 6–17 October 2003), A/CN.9/544, [17]. See also M. Sturley, "Scope of coverage under the UNCITRAL Draft Instrument" (2004) 10 JIML 138, 146.

operations included within the contract of carriage. The reasons for this extended liability regime are a recognition of the reality that containerised traffic in the liner trade is usually structured on a door-to-door basis[586] and the artificiality of restricting the legislative treatment of containers to carriage from port to port given that they are likely to be checked at an interior point.[587] Consequently, unlike previous efforts to provide a complete solution to the problems of multimodal transport, the new Convention deals with it only partially where a combination of transport includes a sea stage. Other combinations of transport modes are left to other rules and developments. Whilst this might seem to be a retrograde step it reflects the current reality of logistics at a global level since much of the global pattern of trade can be distinguished between sea-based logistics and air-based logistics.[588]

3.149 Use of the word mode in Article 1.1 links back to the previous use of this word in previous efforts to provide rules for combined and multimodal transport but its role is minimal other than as a signifier that the Convention can apply beyond carriage by sea. Once international carriage by sea is involved, any additional contractual performance which can be counted as "carriage" falls within the Rules. Furthermore, no limiting criteria are indicated as to the nature and extent of such additional carriage; whether it is for land or air or whether it is confined to pick up and delivery,[589] or is more extensive crossing international borders.

3.150 The extent of the Convention's application to a transport including carriage by sea is also relevant to a question as to the room available for further efforts to create special rules for multimodal transport. The greater the Convention's extent the less room remains for a harmonisation based on combinations of any mode. If the Convention can apply to any sea carriage within the geographical indicators, as long as it falls within the permitted scope of the contract of carriage, then there is no room for any other convention, with the intention of controlling multimodal contracts, capable of controlling carriage by sea which is performed within the framework of a multimodal transport contract. Even regarding multimodal contracts as *sui generis* would not prevent these Rules from conflicting with a convention which assumed this. Article 1 requires that the contract "provide" for the carriage of goods by sea which seems to make the contract terms determinative of the application of the Convention and, at the very least, ensures that the simple fact of

586. *Cf* Heaver (*supra*, 1.23, fn. 73), 385.

587. UNCITRAL, "Report of the Working Group on Transport Law on the work of its Ninth Session, New York, 15–26 April 2002" (7 May 2002) A/CN.9/510 (A/CN.9/510) at [30].

588. See e.g., K. Miyachita, "International Logistics and Modal Choice", ch. 37 of Grammenos (see end of this footnote), 863–876, at 874 in the context of Japanese export trade. They are more likely to operate in competition than in combination-capacity and cost has tended towards air supplying a niche market in high value or perishable goods, R. Abeyratne, "Emerging Trends in the International Carriage of Air Freight" (2001) XXVI Annals of Air and Space Law 1–43, at 2. Recent demand for time-definite shipment options has increased competition especially in respect of high quality manufactured goods and to which air and truck-air combinations can have a competitive edge, M.R. Brooks, "International Trade in Manufactured Goods", ch. 5 of C.T. Grammenos (ed.), *The Handbook of Maritime Economics and Business* (London, 2002) 90–104, at 97–98. For a more recent perspective, see also, by the same author, in ch. 4 of Grammenos (2nd edn, 2010).

589. Contrast Art. 1 of the MMTC, see above, 3.97.

carriage by sea is not, in itself, sufficient.[590] It is not entirely clear how far beyond a contract which expressly provides for carriage by sea and permitting no exception for the relevant part can constitute a provision for such carriage.[591] Possibly a contract which specifies carriage by sea but still gives an option as to other means could still provide for carriage by sea. However, there must still, arguably, be some distinction between provide and permit, so that a contract which leaves the modes of carriage open might fall outside the Convention's scope. In that case a sui generis argument based upon such a contract type might yet be the basis for a somewhat refined and highly limited generalised regulation of multimodal transport as such.

3.151 Returning to the basic parameters of the Rules' scope, the place of receipt and destination must be in different States as must the ports of loading and discharge so that the transit is sufficiently international. Only one of these places needs to be located, according to the contract of carriage, in a Contracting State.[592] This goes considerably further than the Hague Rules in applying not only to inward as well as outward carriage to a port in a Contracting State but also to carriage to and from inland points in Contracting States regardless of whether either port is in a Contracting State.

3.152 The Convention contains some familiar exclusions from its scope.[593] Similarly to the Hague and Hamburg Rules the exclusion of charterparties will continue but within a complex framework designed to take account of similar contracts where there is likely to be an equal negotiating balance between the contracting parties. For this purpose a distinction is made between liner and non-liner trades:

(a) For liner trades, charterparties and other contracts for the use of a ship or any space thereon are excluded.[594] The latter phrase should make clear that slot-hire contracts are excluded although this might not be true of all types.[595]

(b) For non-liner trades, where the use of voyage charters is likely to be prevalent, there is a complete exclusion of any contract of carriage, so that the Convention will not apply, unless:
   (i) there is no charterparty or contract for the use or hire of a ship; and
   (ii) a transport document or electronic transport record is issued (Art. 6(2)).

Consequently, whereas unlike the Hague Rules the Convention does not make its application depend on any general requirement for the issue of a bill of lading, there is a limited documentary requirement to enable contracts in non-liner trades to be caught by its provisions. However, even where an excluded contract is involved, the regime will still apply to a consignee, controlling party or holder that is not a party

590. Diamond, RR, p. 452.
591. See the permutations considered by Diamond, *loc cit*, and those above at 3.84 which can be applied by analogy.
592. Article 5(1).
593. In respect of live animals and special agreements see Art. 81.
594. Article 6(1).
595. Diamond, RR, p. 460.

to the excluded agreement,[596] thus continuing the application of the rules to those not involved in the contractual negotiations.

3.153 A further limitation on the full application of the regime applies in respect of volume contracts. These are contracts for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time.[597] An inspiration for this provision was the United States delegation's desire to limit the operation of the Convention in relation to ocean liner shipping agreements. Although the Rules apply, the strict operation of the anti-derogation provision in Article 79 is lessened so that parties to such contracts are free to derogate from provisions other than those relating to seaworthiness and reckless misconduct and the more important obligations of the shipper provided that:

(a) the contract contains a prominent statement that it derogates;
(b) it is individually negotiated or prominently specifies the sections of the contract containing the derogations;
(c) the shipper is given the opportunity and notice of the opportunity to conclude a contract without the derogations; and
(d) the derogation is not incorporated by reference from another document or included in a contract of adhesion not subject to negotiation (Art. 80).

Notwithstanding these safeguards this freedom to derogate may well prove a temptation to carriers to package services in terms of connected trips of small quantities, there being no minimum criteria in the Convention.[598] Such packaging of services may allow carriers the freedom, for example, to impose lower limits of liability. Furthermore, third parties can also be subject to the derogations provided that:

(a) they receive information that prominently states that the contract derogates from the Convention,
(b) they consent to it; and
(c) such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.[599]

Thus a printed statement of consent in a bill of lading is not sufficient. More is required of the carrier to bind, for example, a third party holder of a bill of lading to the derogations.[600]

3.154 Some further aspects relevant to the overall scope of application of the Convention can be briefly noted. Article 12 naturally indicates that the carrier's responsibility lasts from the receipt of the goods by the carrier until delivery. However, as with the Hamburg Rules, the concern that carriers may be forced by port regulations to take the goods from or deliver to port authorities before final delivery to the consignee, without being able to obtain adequate recourse should such authorities lose or damage the goods, is met by reducing the scope of the carrier's responsibility

596. Article 7. Such third party would need to be identifiable as having rights under the Convention as such consignee, controlling party or holder.
597. Article 1(2).
598. See Diamond, RR, p. 488.
599. Article 80(5).
600. The indeterminate nature of the protection, however, may still operate to the detriment of third parties, in particular, such notices could appear in the contract between a seller (party to the agreement with the carrier) and the buyer, Diamond, RR, p. 488 n. 86 citing Lorenzon, RRAPA, 80.10.

while the goods are in the possession of such authorities.[601] In general, since the Convention does not seek to control the contractual scope of the carriage, the parties are free to determine the point at which the takeover of the goods or the delivery of the goods occurs. Consequently the extent of the carrier's responsibility will depend on the actual carriage agreed whether it be door to door, depot to depot, terminal to terminal or port to port or any combination thereof. However, any clause which seeks to indicate that receipt takes place after the beginning of initial loading or that delivery takes place before the completion of final unloading is void.[602] It has been said that the intention is to allow the carrier and shipper to make so called tackle to tackle contracts.[603] It is not entirely clear whether this means that the carrier can be a simple bailee up to the point of the tackle (as in port to port bills of lading) or must actually take over the goods at that point. It would also seem to cover FIOS clauses in the sense that loading or discharge by the cargo interest would still be covered by the Rules but subject to a defence for the carrier should loss or damage be due to the fault of the shipper or receiver in respect of these operations.

3.155 Finally, consideration can also be given to the provisions relevant to the use made by the carrier of other persons in respect of the performance of the carriage and the extent to which such persons are affected by or may avail themselves of the Rules. In common with other carriage conventions they naturally make provision for the carrier to be responsible for the actions of employees and other persons used for the performance of the carriage.[604] A more limited provision applies to give the carrier and certain other persons the benefit of defences and limits whether sued in contract or tort.[605] Beyond the carrier this is extended to the maritime performing carrier, the master and crew and any other person performing services on board the ship, and the employees of the carrier and maritime performing party. A maritime performing party is defined in Article 1(7) as a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations 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. The special significance of this is that such parties, as opposed to other types of performing party, are drawn directly by Article 19 into the scheme of liability applicable to the carrier. This applies where such a party received or delivered the goods in a Contracting State or performed its activities in respect of the goods in a port in a Contracting State and the occurrence took place during the period between the arrival of the goods at the port of loading and their departure from the port of discharge, while the party had custody or was otherwise participating in the performance of the relevant activities. Consequently, it will be possible for shipowners (but not the Master and crew and other employees or inland carriers who operate only partially in the port), terminal operators and stevedores,

601. For criticism see Diamond, RR, p. 466.
602. Article 12(3).
603. J. Chuah, ch. 15, Thomas RR, 15.31, citing the CMI's Q&As on the Rotterdam Rules (10 October 2009), question 4.
604. Article 18.
605. Article 4(1). See further, generally, Nikaki "The statutory Himalaya-type protection under the Rotterdam Rules: capable of filling the gaps?" [2009] JBL 1.

additionally to the carrier, to be made liable under the Convention notwithstanding that they are not parties to the original contact of carriage.

3F.2.2 New documentation in a virtual world

3.156 The changes made by the Rotterdam Rules to accommodate new practices are particularly evident in the provisions dealing with transport documents. Not only is there no requirement, unlike the Hague Rules, for a bill of lading to trigger the application of the Rules, no reference is made to bills of lading at all. However, as with the Hamburg Rules the use of transport documents is envisaged and provisions are included which regulate the effect of statements on them and attach rights and liabilities to their use particularly as means of enabling third parties to acquire rights to delivery and rights of control and suit. Unlike the Hamburg Rules more neutral terminology is now used. There is recognition of three types of paper document and two types of electronic alternatives. A basic distinction is made between non-negotiable transport documents and negotiable transport documents. These are matched by electronic equivalents referred to respectively as a non-negotiable electronic transport record and a negotiable electronic transport record. A further distinction is made for paper documents between a non-negotiable transport document as such (i.e. a sea waybill) and a non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods (i.e. a straight bill of lading).[606]

3.157 The shipper or, with his consent, the documentary shipper is entitled to receive the transport document or record of his choice unless it is agreed not to use one, or it is the custom, practice or usage of the trade not to use one, or it is agreed or is the custom, practice or usage of the trade not to use a negotiable document or record.[607] Electronic transport records[608] are treated as functionally equivalent to their paper counterparts.[609] The main requirement is that the issue and use of them is with the consent of the carrier and shipper. However, with negotiable electronic transport records it is required that a procedure is in place that provides for the method for the issuance and the transfer of the record to an intended holder, an assurance that it retains its integrity, the manner by which the holder is able to demonstrate that it is the holder and the manner of confirming that delivery to the holder has taken place or that the record has otherwise expired.[610] The procedures must be referred to in the contract particulars and be readily ascertainable.

3.158 No procedural requirements are laid down in respect of non-negotiable electronic transport records so that it is left to the courts to determine how far the record

606. This is recognised as a form of non-negotiable transport document and appears in provisions concerned with statements on or with the use of the document. No equivalent appears to be recognised for electronic records. See e.g., Art. 41(b)(ii) which makes reference to such a document but not to an equivalent electronic transport record (*cf* Art. 41(b)(i). The operation of a system such as Bolero makes the relevant distinction, in effect, between order bills and straight bills (see e.g. Rule 3.6 in the Bolero Rulebook in respect of surrender of the Bolero Bill of Lading).

607. Article 35.

608. Defined in Art. 1(18).

609. Article 8.

610. Article 9.

provides a satisfactory substitute for its paper equivalent. However, the Convention also recognises that various other notices and communications are envisaged by its rules and makes provision that these also can be made electronically provided that the information is accessible so as to be usable for subsequent reference and with the consent of the parties to the communication.[611]

3F.3 USE OF DOCUMENTS

Chapter 8 Transport documents and electronic transport records *3.159*

Article 35. Issuance of the transport document or the electronic transport record

Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option:

(*a*) A non-negotiable transport document or, subject to article 8, subparagraph (*a*), a non-negotiable electronic transport record; or

(*b*) An appropriate negotiable transport document or, subject to article 8, subparagraph (*a*), a negotiable electronic transport record, unless the shipper and the carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage or practice of the trade not to use one.

Article 36. Contract particulars

1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper:

(*a*) A description of the goods as appropriate for the transport;

(*b*) The leading marks necessary for identification of the goods;

(*c*) The number of packages or pieces, or the quantity of goods; and

(*d*) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include:

(*a*) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;

(*b*) The name and address of the carrier;

(*c*) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and

(*d*) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.

3. The contract particulars in the transport document or electronic transport record referred to in article 35 shall further include:

(*a*) The name and address of the consignee, if named by the shipper;

(*b*) The name of a ship, if specified in the contract of carriage;

(*c*) The place of receipt and, if known to the carrier, the place of delivery; and

(*d*) The port of loading and the port of discharge, if specified in the contract of carriage.

611. Article 1(17) and Art. 3.

4. For the purposes of this article, the phrase "apparent order and condition of the goods" in subparagraph 2 (*a*) of this article refers to the order and condition of the goods based on:

(*a*) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and

(*b*) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or electronic transport record.

3F.3.1 Particulars in and evidential effect of documentation.

3.160 The particulars required to be displayed on the transport document are mostly those familiarly seen in bills of lading and other documents used in the carriage of goods by sea. The Convention leans more to the Hamburg Rules rather than the Hague Rules in the number of particulars required.[612] An addition[613] is the name of a ship is to be included if specified in the contract of carriage. Multimodal bills may refer to an intended ship. Presumably there is no requirement to be more specific either at the time the document is issued or at any later time.

3.161 Unlike the Hague Rules and the Hamburg Rules there is no requirement to convert a "received for shipment" document into a "shipped" one.[614] However, where a date appears on the transport document but its significance is not indicated this is taken to be the date of loading if the goods have been loaded or the date of receipt if not[615] so that the possibility arises that the document can effectively indicate shipment, which would seem to be more likely to occur in a port-to-port shipment where the document is issued shortly after loading. The statement of apparent condition now relates to the point of receipt rather than shipment[616] although it will also be taken to refer to any additional inspection which takes place before the issue of the document,[617] which again enables the document to reflect the condition of the goods on shipment.

3.162 Transport documents must be signed by the carrier or authorised person and e-transport records must have an electronic signature which identifies the signatory and indicates the carrier's authorisation of the record.[618] Clearly the absence of a signature would go to the heart of the effectiveness of the document but absence of or irregularity in respect of the particulars required by Article 36 does not.[619] Unlike the Hamburg Rules and the MMTC there is no requirement that a transport document contain a statement that the carriage is subject to the provisions of the Convention. At least in this respect the Rules follow the position in the Montreal Convention. This means that no penalty or additional compensation would become payable by reason of the absence of a paramount clause.

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612. And away from the simplification of documentation as appears in the Montreal Convention.

613. One omission is the place of issue of the transport document which was required under the Hamburg Rules and no longer necessary since the place of issue is, under the Rotterdam Rules, not relevant to their application. However, this requirement is contained in the MMTC, Art. 8(1)(j).

614. See Art. III, r. 7 of the Hague Rules and Art. 15(2) of the Hamburg Rules.

615. Article 39(2).

616. Article 36(4)(a).

617. Article 36(4)(b).

618. Article 38.

619. Article 39(1).

3.163 A brief review of the evidential effect of the Rules in respect of the particulars inserted onto the transport document is given here although further discussion is to be found in Chapter 4. Standard provision is made for the legal effect of such particulars so that they provide *prima facie* evidence in favour of the shipper and, where the document or record is negotiable, conclusive evidence in favour of a third party transferee acting in good faith.[620] The Rules go further in protecting the consignee of a non-negotiable document. Where it is a document that requires surrender for delivery of the goods the particulars are conclusive in favour of the consignee acting in good faith to whom it is transferred.[621] In other non-negotiable documents or records particulars which have been furnished by the carrier as well as the number, type and identifying numbers of the containers are also conclusive in favour of a consignee who has in good faith relied on them.[622] Where the contract particulars indicate "freight prepaid" protection is also provided for holders or consignees (but not if they are also shippers) since the carrier will not be able to assert against them that the freight has not been paid.[623]

3.164 The rules permit the carrier to negative the effect of the contract particulars by qualifying them which it should do if it knows them to be false or has reasonable grounds for suspicion.[624] The carrier may do so where it is unable to check or has reasonable suspicion of inaccuracy but must indicate the information it was unable to check or state what it considers to be accurate.[625] This effort to clarify what was obscurely presented in the Hague-Visby Rules and to bring it up to date is extended by separating out the position where a closed container is delivered to the carrier. If the carrier actually inspects the goods then the rules just stated apply. Otherwise there is no requirement on the carrier to check a container's contents but, if not checked, the carrier can qualify the statements supplied by the shipper unless there is actual knowledge of the contents. However, in respect of the weight of the container this is only if the shipper and carrier agreed that it would not be weighed or there was no physically practicable or commercially reasonable means of checking its weight.[626]

3F.3.2 Use of documents

3.165 A crucial element in the Rotterdam Rules is that they go beyond simply regulating the evidential effect of the documents but also deal with issues relating to the use of documents and notices to control the delivery of the goods and even rights in respect of them. For negotiable transport documents and transport records the right to control of delivery is vested in the holder.[627] A negotiable paper document should be produced or surrendered as appropriate in order to exercise these rights but the Convention provides rules to deal with the situation where the document is

620. Article 41.
621. Article 41(b)(ii).
622. Article 41(c).
623. Article 42.
624. Article 40(1).
625. Article 40(2) and (3).
626. Article 40(4).
627. Articles 47 and 51(3).

unavailable at the time of delivery.[628] In the previous draft these would have permitted the carrier to deliver without surrender of the document acting on the instructions of the shipper. Fortunately this is now confined to a situation where the document or record expressly states that the goods may be delivered without surrender but even this will go some way to undermine the effectiveness of bills of lading where carriers take advantage of such a statement. It would have been better to treat this in the same way as the further rules which deal with where there is a failure to take delivery entitling the carrier to store and ultimately sell the goods holding the proceeds for the person entitled to them.[629]

3.166 The transfer of the negotiable document or record transfers the rights incorporated in them[630] expanding the effectiveness of these documents beyond that currently provided by the Carriage of Goods by Sea Act 1992. As with this Act a transferee holder does not acquire liabilities unless it exercises a right under the contract of carriage but the shipper always retains its liabilities.[631]

3.167 The rules are not so explicit about the source of rights of consignees. The consignee is defined as a person entitled to delivery under a contract of carriage or transport document or e-transport record.[632] The consignee that demands delivery under the contract of carriage is obliged to accept delivery[633] and delivery is to be made to the properly identified consignee.[634] The Rules do not say at any point that the consignee is entitled to demand delivery. If a document requiring surrender is issued this must also be surrendered by a properly identified consignee.[635] Any rights of the consignee are, however, subject to the possibility that a person with a right of control can change the consignee[636] up to the time of delivery where no negotiable document/record or document requiring surrender has been issued. The controlling party is the shipper unless a different person, which may be the consignee, is designated.[637]

3.168 The recognition to be given by the Rules to the ability of documents and electronic records to control delivery and enable rights of control and suit to be transferred should, in the those countries adopting the Rules, render superfluous doubts about the effectiveness, as transferable documents, of multimodal transport documents falling within the scope of the Rules. The generation of rights in favour of those possessing rights of control should be sufficient to enable them to be seen as being in constructive possession of the goods and enabled thereby to benefit from national rules recognising or employing this concept.

3.169 Even more radical, however, is the possibility of transferring this right of control which can be done by notice to the carrier (Art. 51(1)(b)) and includes a notice given electronically. Recognition of such a right of transfer may well spell the end of

628. Article 47(2).
629. Article 48.
630. Article 57.
631. Article 58.
632. Article 1(11).
633. Article 43.
634. Article 45.
635. Article 46.
636. See Art. 50.
637. Article 51(1).

any need for a negotiable document and spur the final demise of the bill of lading.

3F.4 THE CONVENTION AND MULTIMODAL TRANSPORT—LIABILITY AND CONFLICTS IN A MULTIMODAL CONTEXT

Articles 12, 26, 82 *3.170*

Article 12. Period of responsibility of the carrier

1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.
2. (*a*) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.

(*b*) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.
3. For the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:

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

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

Article 26. Carriage preceding or subsequent to sea carriage

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(*a*) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(*b*) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and

(*c*) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

Article 82. International conventions governing the carriage of goods by other modes of transport

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

(*a*) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;

(*b*) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;
(*c*) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or
(*d*) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

3F.4.1 Towards a new network system?

3.171 The fact that the Rules extend their scope beyond the sea and the confines of a port naturally required some account to be taken of the fact that such an extension would conflict with other rules whose purport was other than carriage by sea. Two provisions are designed to deal with this[638] although they are limited in effect. The first is a limited rule[639] provided by Article 26 which allows the Convention to give way to an international instrument where the loss, damage or delay occurs solely[640] in the period before loading onto the ship or after discharge. This will only be in respect of the Convention's rules governing liability, limitation of liability and time for suit which are displaced by those specified in the relevant international instrument. Unlike the network rule in the ICC Rules or the limited network provision in respect of limitation of liability in the MMTC there is no reference to national law. Whether such laws are mandatory or not they are expected to give way to the Rotterdam Rules. The Convention does give way to mandatory international instruments, i.e. an international convention or regulation issued by a regional economic integration organisation.[641] That is, provided that the international instrument would have applied if a separate contract had been made between the carrier and the shipper in respect of the relevant stage and cannot be departed from by contract either at all or to the detriment of the shipper. As with ICC Rules a hypothetical contract is contemplated. A previous draft of the Convention would have applied these Rules if according to their terms they applied.[642] This would have produced the difficulty that they would not apply if the correct interpretation of them is that they cannot apply to a multimodal contract.[643] The use of a

638. Apart from the more general saving provisions dealing with global limitation rules, general average, passengers and luggage and rules governing nuclear incidents, see Arts 83–86.

639. Professor De Wit argues that given the restricted circumstances in which this network provision is likely to operate it is better to regard the system created as a uniform one, see Thomas RR, ch. 5, 5.11.

640. This restriction in the operation of the rule appears also in the MMTC Art. 19 and the UNCTAD/ICC Rules r. 6.4 where there is reference to when the loss or damage occurred during one particular stage. Such a rule further prevents the potential for conflict with other conventions by giving preference to the Rotterdam Rules where loss or damage is traceable to more than one modal stage of the transport.

641. But not where an International Instrument is applied to internal transport by national law, De Wit, *op cit*, 5.45.

642. A/CN.9/WG.III/WP.56.

643. Hoeks, p. 337. For further difficulties see Glass, "Meddling in the Multimodal Muddle" [2006] LMCLQ 307. See also Nikaki, "Conflicting Laws in 'Wet' Multimodal Carriage of Goods: The UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]" (2006) 37(4) JMLC 521.

hypothetical formula removes this difficulty. However, it reintroduces the difficulty of determining the content of such a contract.[644] Fortunately, with the displacement of the Hague Rules and the removal of the older CIM Rules whose application could depend upon the issue of certain documents or positioning of the goods thereby creating a difficulty as to what choice might be made by the relevant parties,[645] it should be, at least in respect of the major uniform regimes, a fairly straightforward matter to apply Article 26 based on the objective facts of the relevant transit. A further simplification is that, unlike true multimodal carriage regimes providing for a network rule, there is no need to refer to a relevant "stage" of transport, rather the reference is to those periods of carriage apart from the carriage by sea.

3.172 Under a previous draft of the Convention, a further network rule was proposed to enable the limit of liability in a different convention to be applied if the carrier could not prove that the damage occurred at sea. This does not appear in the final draft. Presumably, the burden will be on whoever benefits from the application of Article 26 to bring their case within it. If they cannot the Rules of the Convention will be applied.[646]

3.173 A second provision is included to provide a more direct reduction of potential conflict between conventions. Article 82 provides for the Convention to give way to air road, rail and inland waterway conventions in certain circumstances. These must be in force at the time the Convention enters into force so no subsequent replacement conventions can be taken into account.[647] In respect of air the Convention is to give way to an air regime to the extent that the air regime covers any part of a contract of carriage. In that case all the provisions of the other convention are to apply. As is most likely today, this means that the Convention must give way to the Montreal Convention. This will be true also of where it is not possible to prove at what stage the loss or damage occurred since Article 18.4 of the Montreal Convention which provides for a presumption in favour of the air rules where non-air carriage occurs outside of an airport and is for the purpose of loading, delivery or transhipment. Article 38.1 which deals more generally with combined transport is made subject to Article 18.4. A feature of Article 38.2 of the Montreal Convention is that it permits the parties to insert in the document of air carriage provisions relating to other modes of carriage, provided that the provisions of the Montreal Convention are observed regarding carriage by air. Consequently it might be possible to produce documents which comply with the Rotterdam Rules in order to obtain the benefits of the Rules particularly in respect of the transfer of rights. In respect of road, rail and inland waterway the underlying aim seems to be to cover those situations where such conventions apply to an entire combined transport, for example, road and sea where the goods remain on the road vehicle throughout as under Art. 2 of the CMR Convention. However, as has been well

644. See further De Wit, ch. 5 in Thomas RR.
645. See Glass, Art. 2 of the CMR Conventions, A Reappraisal, (2000) JBL 562.
646. Hancock, ch. 2 in Thomas, pp. 43–4.
647. And, presumably any subsequent amendments, Diamond RR, p. 453.

noted,[648] the wording used, in respect of road carriage, is[649] unfortunate as it seems to confine the operation of the other Convention only to the period of sea carriage leaving apparent conflict to remain in respect of the other parts of the transit. An expansive reading of this provision will be needed to ensure that the words "to the extent that" are treated as a reference to the type of provision in the other Convention which expands its operation beyond its normal confines rather than as a literal reference only to such provision's effect in respect of the carriage of goods by sea.

3.174 Savings are also made in respect of global limitation rules, general average, passengers and their luggage, and rules governing nuclear incidents.[650]

3.175 Where the Rules do apply to the loss or damage or delay and no other conventional rule takes precedence, then regardless of the mode of carriage involved at the time such loss, damage or delay occurs, the same regime of liability will apply which consists of a system of presumed fault liability with features reminiscent of the Hague and Hamburg Rules. That is apart from the special obligation in respect of seaworthiness in Article 14 which relates only to the sea carriage and the rights and defences in Article 16 (sacrifice of the goods during the voyage at sea) and Article 17(3)(b) (perils of the sea), (f) (fire on the ship), (l) (saving or attempting to save life at sea) and (m) reasonable measures to save or attempt to save property at sea which relate specifically to the period of carriage by sea. Article 59 provides for a limit of liability for breach of the carrier's obligations of 875 units of account per package or other shipping unit or three units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher based by Article 22 on the value of the goods at the place and time of delivery. These limits are about one-third higher than the Hague-Visby Rules and slightly higher than the Hamburg Rules but lower than the package limit provided in MMTC. The limit can be increased by a declaration of value included in the contract particulars or by an agreement for a higher amount. A different limit for economic loss caused by delay applies: this limit is set by Article 60 at 2.5 times the freight without exceeding the limit for total loss. Given that there is nothing to prevent an increase in the carrier's liability[651] a further agreement to deal with consequential loss arising from loss or damage should be permissible. As with the Hague-Visby Rules and the Hamburg Rules, Article 59(2) provides a container clause so that the packages or units enumerated in the container, pallet or other article of transport, rather than the container itself, are used to determine the limit. There is now, however, the clarification that this extends to goods in vehicles which are defined as road or railroad cargo vehicles. The Convention also retains the possibility of loss of the right to limit by the carrier or those persons for whom the carrier is responsible, if the loss was attributable to the personal act or omission of the person seeking to limit done with intent to cause such loss or recklessly and with knowledge that such loss would probably result.[652]

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648. Diamond RR, p. 454; De Wit, ch. 5 in Thomas RR, 5.59 *et seq*.
649. See principally Art. 82(b).
650. Articles 83–86.
651. See Arts 79–80 dealing with the validity of contractual terms.
652. Article 61(1).

3.176 A time limit of two years for action is now imposed on both parties by Article 62 commencing from the day after delivery or after the last day on which the goods should have been delivered. Unlike the Hague Rules[653] it refers to an inability to bring proceedings rather than to a discharge of liability.[654] Article 62(3) also indicates that on expiry of time a party can still rely on its claim as a defence or for the purpose of set-off. It is arguable that the rule against deduction from freight confirmed in *The Aries* is not affected by this although the wording suggests that any claim can be used as a set-off thus perhaps overriding the English rule. As at present additional time is given for recourse indemnity claims[655] but a new provision in Article 65 extends the time available against a bareboat charterer or other person identified as carrier under Article 37(2), a provision designed to assist in identifying the carrier when the contract particulars fail to identify the carrier by name. Requirements as to notice of loss, damage or delay are placed alongside the rules governing liability. Failure to give notice of loss or damage on delivery, or if not apparent, within seven days involves a presumption of satisfactory delivery rather than loss of any right to sue.[656] However, failure to give 21 days' notice in respect of delay means loss of the right to compensation.[657] Finally, note should be taken of the rules governing jurisdiction and arbitration in chapters 14 and 15 of the Convention.[658]

653. Article III, r. 6, *cf* the Hamburg Rules, Art. 20(1) which refers to a claim being "time-barred".
654. *Cf The Aries* [1977] 1 WLR 185.
655. Article 64.
656. Article 23(1) and (2).
657. Article 23(4).
658. Articles 66–78.

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CHAPTER 4

CONDITIONS RELEVANT TO UNIT-LOADS

4A INTRODUCTION

4.1 In carriage by rail within or to and from the UK, operators dedicated to the provision of transport services focused directly on the carriage of containers, swap bodies and trailers are to be found. The opportunity is taken here to provide a complete review of standard trading conditions used by some of the main operators. This enables certain contracts dedicated to this provision to be examined virtually in their totality and in so far as they include terms relevant to issues of liability for combined transport these are also included here. In carriage by sea container bills of lading and many waybills can be said to reflect contracts dedicated essentially to the carriage of containers etc. These are not examined to the same extent but certain conditions of distinct relevance to the carriage of the container, etc, are examined here. Terms of distinct relevance to combined transport in these forms have been absorbed into the previous chapter. In other areas of transport, such as road, one is less likely to come across a complete set of terms dedicated solely to container operations. Rather there will be a few terms included to take the possibility of such terms into account. An example of such a term taken from the RHA Conditions of Carriage is examined.

4B CARRIAGE BY RAIL—FREIGHTLINER CONDITIONS

4.2 In respect of carriage by rail the leading supplier in the UK at present of such carriage of goods in containers domestically is Freightliner Limited. Previously Freightliner operations were incorporated within the structure of the Railfreight Distribution Division (RfD) of the British Railways Board. Carriage undertaken by this division was covered by the Railfreight Distribution Standard Conditions of Carriage 1992 which replaced the former Freightliner conditions of 1976.[1] RfD operations then became directed at the supply of complete train loads via the Channel Tunnel to a variety of continental destinations on a round trip basis

1. See further Booker, p. 60.

supplied as part of the operation of EWS Railway[2] which took over the main freight business of British Rail. Since then this and other operations of EWS have been taken over by DB Schenker Rail (UK) Ltd. Whilst within British Rail, these operations were supplied on the basis of the Conditions of Carriage for International Transport, Conditions of Sale which, in turn, linked with the application of the COTIF Convention 1980.[3] Freightliner operations are conducted on the basis of the Standard Conditions of Carriage which replaced the previous conditions of 1995 but which were initially substantially in the same terms as those in the RfD 1992 Conditions. The latest conditions of 2011 still retain a similar format but have introduced further changes especially in respect of liability.[4] Carriage of goods by rail otherwise than by container might still be governed by conditions based upon the former British Railways Board General Conditions of Carriage of Goods 1986 but for much rail freight carriage today the 2009 General Conditions of Carriage of DB Schenker Rail (UK) Ltd are likely to apply. Apart from a few additional clauses[5] these are in the same terms as the previous EWS Conditions 2007.[6]

4.3 Freightliner operate block trains for container carriage and will either supply a container for stuffing by the sender using its own or subcontracted haulage, or will collect or receive a full container from the sender. Whilst these services may be supplied to a customer who is interested in the goods, much of the supply is to shipping lines and other transport operators so that Freightliner will frequently be in the position of subcontractor to the customer of the operator.

4.4 In some respects the conditions adopted by Freightliner appear to have been derived initially from the former British Railway Board's General Conditions of Carriage,[7] and comparison with these conditions will be noted from time to time. Comparison can also be made with the conditions used by DB Schenker. There are 28 conditions in all. By clause 20 the conditions are subject to any byelaws and regulations of statutory force affecting directly or indirectly carriage or storage by Freightliner.[8] It should be noted that by clause 23 no servant or agent of Freightliner has any authority to vary or waive the conditions or any part thereof.[9] By clause 25 the contract is stated to be governed by English law and United Kingdom courts alone have jurisdiction.[10] In addition to the non-waiver clause (clause 26) and severance clause (clause 27),[11] note also clause 28 which excludes liability arising out of or in connection with the use of Freightliner's assets by any rail operator or other third party (which for the purposes of the clause excludes a carrier) and provides that such rail operator or other third party shall indemnify Freightliner against all claims, demands etc suffered or incurred by Freightliner

2. As EWS International.
3. See further below, 4B.11.1, and generally Clarke & Yates, Part 2.
4. For Freightliner 2002 and 2005 see Clarke & Yates, para. 2.603 *et seq*.
5. See cll. 6.9 and 6.10.
6. See Clarke & Yates, paras 2.695 *et seq*.
7. See Part 4 of *Contracts*.
8. See *Contracts*, para. 4.2.2.18.
9. See 2.14.
10. See 2C.25.
11. See 2.280, fn. 1119, and 2C.2.

arising out of or in connection with the use of Freightliner's assets by the rail operator or other third party.

4B.1 DEFINITIONS

Freightliner Conditions, clause 1 *4.5*

1. "Assets" means the track, sidings, terminals, equipment, infrastructure and all other similar property owned or operated by Freightliner.
"Carrier(s)" (whether in regard to carriage or storage or otherwise) means Freightliner, its Subcontractor and their respective servants and agents and any of them.
"Consignment" means each of a Container and/or goods whether in a Container or not (thus a loaded container comprises two consignments) when in the control of the Carriers for the purpose of carriage or storage or in respect of which Freightliner agrees to perform any services.[12]
"Container" means the container,[13] flat rack, platform, insulated/refrigerated container, tank container (or other transportable tank) and any similar unit or device used to carry or consolidate goods, including any Gensets or other equipment attached to a container or similar unit or device, (whether owned, operated or provided by the Trader or by Freightliner) and whether or not any contents including goods are contained therein.
"Contract" means the contract between Freightliner and the Sender for the carriage and/or storage of the Consignment.[14]
"Dangerous Consignment" means a consignment subject to the (i) Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations (current edition) as supplemented by the Dangerous Goods—Rail Conditions of Acceptance (GO/RT3421) issued by the Rail Safety & Standards Board and any superceding authoritive [sic] document(s).[15]
"Freightliner" means Freightliner Limited.
"Private Siding" means a railway or siding under the control of the Trader.[16]
"Sender" means any person who directly or indirectly through his agent or as an agent contracts for the services of Freightliner.[17]

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12. Compare DB Schenker GCOC, cl. 1 which necessarily takes a wider focus.

13. No further definition of a container is given so that presumably the intention is to adopt the wide definition used by the ISO, see 1.12.

14. See fn. 12.

15. See cl. 9, below, 4.18.

16. See further cl. 11 which deals with transit and in particular cl. 11(C)(iii), below, 4.21. Compare cll. 1 and 10 of the General Conditions in Part 4 of Contracts. For DB Schenker GCOC see cl. 1 and cl. 16 in respect of private sidings. For transit note the use of the concepts of "Departure Point" and "Arrival Point" in cl. 1 and the connection to the period of liability in cl. 8 and post transit storage and sale in cl. 12 (see further Clarke & Yates, para. 2.638).

17. Some of the terms are addressed to the sender (with whom the contract is made) and some to the trader. The definition of a trader may well be wide enough to include the hirer of a container from Freightliner when the container is to be redelivered to Freightliner for the purpose of a carriage of goods: *cf Gillespie Brothers and Co Ltd* v. *Roy Bowles Transport Ltd Rennie Hogg Ltd* (*Third Party*) [1973] 1 QB 400 at p. 418, [1973] 1 Lloyd's Rep 10 at p. 19. Compare the definition of "merchant" in container bills: see below, 4.93. The reference to the Trader is useful to attach responsibility to the Sender for acts and omissions of the Trader (see e.g. cl. 2(g)) as well as to impose additional duties on the Sender. This dual purpose can create difficulties of interpretation as illustrated by cl. 15(c), see below, 4.10.

"Subcontractor" means any person whose services Freightliner engages or makes use of to perform the whole or any part of the services which are the subject of this Contract.
"Trader" includes the Sender, and unless the context otherwise requires, the Owner/Receiver/Consignee of the Container and/or goods and the holder of the consignment note and their respective servants and agents.[18]

4B.1.1 The containers and/or goods as a consignment

4.6 The definitions of "consignment" and "container" would seem to make clear, for the purposes, for example, of the limitation conditions,[19] that a consignment can consist of the container alone[20] or the container plus its load. Problems have arisen with other conditions, used in the context of container transport, as to whether an empty container can amount to a consignment.[21] A difficulty here is whether a loaded container amounts to one consignment or two. Where both the container and its contents are consigned to a single destination there would seem little doubt that both the container and the load consists of the "whole consignment".[22] The limitation provision in clause 17,[23] for example, in respect of "any one consignment" expressly separates the position of the container and its contents. Where the contents of the container are off-loaded and the container itself is on-carried to a final destination, the decision in *Acme Transport Ltd* v. *Betts*[24] suggests that the empty container thereby becomes the "whole consignment". Arguably this could support a view that at the earlier stage the whole consignment consisted of the container and the goods. It might be argued, on the other hand, that clause 17 suggests that the on-carriage of the empty container is a continuation of part of the original consignment. That is, unless the reference to any one consignment is treated as naturally applicable only to where goods are consigned in a container. Note that in *Acme Transport*, Cumming-Bruce LJ[25] seemed to prefer a test of commercial efficacy rather than strict application of the *contra proferentem* principle, and that the word "container" did not have to be expressly referred to in every clause dealing with the consignment to be included within it. The answer to this issue is especially important for determining the date of the end of transit for the purposes of, for example, the time limit for claims within clause 18[26] of the 2002 edition of the Conditions. The simplification introduced by the current clause removes the difficulty.

18. See previous footnote.
19. See below, 4.23.
20. Where the container is not owned or supplied by Freightliner.
21. As in *Acme Transport Ltd* v. *Betts* [1981] 1 Lloyd's Rep 131 in respect of the RHA Conditions. See below, 4.86.
22. See cl. 18(a), below, 4.23. *Cf Gillespie Brothers & Co Ltd* v. *Roy Bowles Transport Ltd, Rennie Hogg Ltd (Third Party)* [1973] 1 QB 400 at p. 419, [1973] 1 Lloyd's Rep 10 at p. 19.
23. Below, 4.23.
24. Above, fn. 21.
25. Above, fn. 21 at p. 134.
26. Below, 4.23.

4B.2 BASIS FOR PROVIDING CONTAINERS

Freightliner Conditions, clause 2 4.7

2. (a) When Freightliner agrees at the Sender's request to provide a Container, the same is provided on the basis that throughout the period from the initial receipt until final re-delivery after conclusion of the transit the Sender shall be responsible for the Container in all respects as if he were the owner thereof.[27]

(b) The Trader shall give Freightliner a receipt when taking the Container into his possession. Such receipt if unqualified shall be prima facie evidence of the good condition of the Container.[28]

(c) Freightliner may refuse to permit the Trader to take possession of the Container if in its opinion the vehicle on which the Container is intended to be conveyed is unsuitable for such a purpose.

(d) The Trader shall not cause or permit the Container to be removed from any road vehicle by which it is being conveyed, whether before or after conveyance by the Carriers, without the consent of a duly authorised officer or servant of the Carriers.

(e) The Container is not to be loaded in excess of the loading capacity marked thereon.[29]

(f) In the case of goods consigned to more than one Consignee, the Container is to be loaded in such a way as to facilitate delivery in the appropriate order.

(g) The Trader shall use the Container solely in connection with the services provided by Freightliner.[30]

(h) The Trader shall without prejudice to Condition 16.1 redeliver the Container internally clean and in like good order and condition as upon initial receipt, fair wear and tear excepted. The Container shall be redelivered on the road vehicle of the Carriers on which it is conveyed.[31]

4B.2.1 Container safety regulations

It seems likely that at least one possible object of clause 2(a) is to transfer to the trader the responsibilities imposed on an owner of a container by the International 4.8

27. This appears to impose a responsibility onto the trader in respect of the container even whilst the container is in the possession of Freightliner. It may, however, be linked in part to responsibilities under container safety regulations noted at 4.8.

28. This reinforces the evidentiary value, in particular, of any interchange receipt which might be issued at the point of receipt of the container.

29. Overloading of the container is likely to lead to a breach of strict liability regulations, at least during periods of carriage by road and sea. There would also be potential breaches of the duties contained in the Health and Safety at Work Act 1974. Notwithstanding this potential illegality, the courts may still enforce the contract of carriage if there is no express or implied prohibition to be derived from the criminal law. The cases have often involved breach of the criminal law by the carrier and the courts have not normally prevented the goods owner from suing the carrier for breach of the contract of carriage: *St. Johns Shipping Corp* v. *Joseph Rank* [1957] 1 QB 267, *Archbolds (Freightage)* v. *S. Spanglett* [1961] 1 QB 267. See also *Howard* v. *Shirlstar Container Transport* [1990] 3 All ER 366. Where, however, the goods owner knows or should know of the illegality he may not be permitted to recover as in *Ashmore, Benson, Pease & Co* v. *A.V. Dawson* [1975] 1 WLR 828, where the goods owner was held unable to recover for damage to his goods caused by the overturning of a lorry overloaded in breach of the law: see *per* Denning MR at p. 833.

30. As with sub-cl. (b) above, sub-cll (f) and (g) impose obligations on the trader. Further obligations are imposed specifically on the trader by cl. 7 which requires the trader to comply with regulations of government, customs, port and other authorities, and cl. 6(c) in respect of goods consigned under Freightliner's IT operating system, see below, 4.16. Clause 14 grants a right of lien against the trader, see below, 4.22.

31. See previous footnote.

Convention on Safe Containers as implemented by the Freight Containers (Safety Convention) Regulations 1984.[32] By Regulation 4(1) duties are imposed on an owner and whilst some of the duties of an owner are imposed on other persons the Regulations do not indicate that a person who by way of contract is to be treated as an owner should be subject to all the duties of an owner. It is hard to see how they can be so imposed except by satisfying Regulation 4(5) which provides a defence to an owner if it is an express term of a bailment or lease that the bailee or lessee should be responsible for ensuring that the container is maintained or examined in accordance with the regulations. This clause would not seem to provide clearly for such an express term. The trader would certainly be a person using or permitting the use of a container and so would be subject to the duties contained in Regulation 4(2).

4B.3 WARRANTIES AND OBLIGATIONS OF THE SENDER

4.9 **Freightliner Conditions, clauses 3, 8 and 15(c)**

3. The Sender warrants that he has and is exercising the authority of all persons owning or interested in the Consignment and each part thereof into the Contract and to bind them as well as himself by these Conditions.

8. (a) The Sender warrants the suitability of the following for transit or storage:

(i) Container (except where provided by Freightliner);

(ii) contents of the Container;

(iii) manner of packing, stowage and securing within the Container.

(b) The Sender warrants that the Consignment is free from infestation by vermin, and insect pest of any description and from contamination from any cause whatever.

(c) The Carriers shall be entitled to open any Consignment and inspect any part thereof. If the Carriers are of the opinion that the Consignment or any part thereof cannot be safely or properly carried or stored the Carriers shall be empowered to take such remedial steps as they think fit provided that where practicable Freightliner will seek instructions regarding such steps from the Trader.

(d) Freightliner shall be entitled to recover from the Sender the cost of any remedial steps taken to enable safe and proper carriage or storage (including steps to remedy infestation or contamination).

(e) The Sender undertakes to provide Freightliner, prior to the commencement of transit, with all details, information and documents that Freightliner may require to enable it to perform the services under the Contract, including without limitation, all details, information and documents required by any Government agency or authority, ports, Carriers, shipping lines or other third parties.

(f) The Sender warrants that the description and particulars of the Consignment or any other information and documents (including without limitation the weight of the Consignment) furnished by or on behalf of the Sender are full and accurate.

(g) The Sender warrants that it shall notify and provide full details to Freightliner of any Consignment that is in any way unstable or has a high centre of gravity or is stowed in an asymmetrical manner.

15. (c) The Sender hereby expressly undertakes to be responsible for and to indemnify Freightliner against all claims, demands, liabilities (whether arising in contract, tort or otherwise), damages, losses (including direct, indirect or consequential losses), costs and

32. SI 1984/1890.

expenses (including legal costs and expenses on an indemnity basis) arising out of or in connection with any non compliance by the Trader with any of these Conditions.

4.10 The warranties in clauses 3 and 8(a) and (b) are designed particularly to ensure that they cover the container as well as its contents. This is achieved by the reference to the consignment in clause 3.[33] The warranty of suitability in clause 8(a) is clear in including the container except where provided by Freightliner.[34] Similar clauses are used in container bills of lading which also include the right of the carrier to open and inspect the container as given in this clause 8(c).[35] Additional obligations in sub-paras (e)–(g) have been added by the current conditions, imposing new duties in respect of information to be provided by the Sender and associated warranties. Apart from the specific right of recovery from the sender granted by sub-clause (d) further rights against the sender are granted elsewhere by the conditions. A more general right is granted by clause 15(c) which requires the sender to indemnify Freightliner in respect of non-compliance by the trader with any of these conditions. Since the trader includes the sender this presumably will base an indemnity against the sender in respect of breach by the sender himself.[36] A further general indemnity is provided by clause 15(a) and (b).[37] Further obligations are imposed on the sender in respect of dangerous goods by clause 9,[38] and in respect of loading and unloading by clause 10.[39] In respect of Freightliner's charges see clause 13.[40] Finally an indemnity is granted by clause 22 in respect of customs and excise claims for goods in bond.[41]

4B.4 PARTIES AND SUBCONTRACTING

Freightliner Conditions, clauses 4 and 15(a) and (b) *4.11*

4. (a) Freightliner enters into this Contract on behalf of itself and its servants and agents, to the intent that, in addition to Freightliner, Freightliner's servants and agents concerned in the implementation of the Contract shall also be entitled to the benefit of these Conditions, and shall be under no liability greater than or in addition to that of Freightliner under the Contract.

(b) Freightliner is hereby authorised by the Sender to engage or make use of the services of Subcontractors to perform the whole or any part of the services which are the subject of the Contract on terms that the Subcontractors and each of their servants and agents shall have the benefit of these Conditions as against the Trader and anyone claiming through him and shall be under no liability to the Trader and anyone claiming through him in respect of any Consignment or part thereof greater than or in addition to that of Freightliner under the Contract. Further, in so far as any Subcontractor has without objecting to this clause,

33. *Cf* cl. 4(3) of the General Conditions of Carriage. See *Contracts*, Part 4, para. 4.2.2.5. *Cf* generally, DB Schenker GCOC, condition 4.
34. *Cf* the General Conditions of Carriage, cl. 4(1).
35. See below 4.122.
36. See, however, *Shell Chemicals* v. *P&O* [1993] 1 Lloyd's Rep 114 (affirmed by the Court of Appeal, [1995] 1 Lloyd's Rep 297).
37. See below and cl. 4, at 4.11.
38. See 4.18.
39. See 4.20.
40. See 4.22.
41. *Cf* cll. 18 and 19 of the General Conditions, see Contracts, Part 4.

received notice of these Conditions the authority conferred hereby shall be taken to have been exercised in relation to each and every such engagement or use of the services of any such Subcontractor.

(c) The Sender agrees with Freightliner that neither the Trader nor anyone claiming through him in respect of the Consignment or any part thereof will seek to enforce by legal proceedings or otherwise any claim against the Carriers greater than or in addition to the liability of Freightliner under the Contract.

(d) Freightliner holds the benefit of clause (c) above and of Condition 14 hereof on trust for the Carriers.

(e) In the event of the sender being a Carrier or bailee of the Consignment, he shall (without prejudice to Condition 3 hereof) hold to the benefit of Freightliner any like Conditions to those in clauses (a) to (d) above and in Condition 15 hereof which obtain in his own Contract with his own sender or bailor. Without prejudice to the foregoing in case of the Sender (being a Carrier or bailee as aforesaid) contracting on behalf of Freightliner for the benefit of like conditions for Freightliner, Freightliner hereby ratifies his act in making such Contract if Freightliner has not authorised such act.

15. (a) The Sender shall save harmless and keep Freightliner indemnified from and against all claims, demands, liabilities (whether arising in contract, tort or otherwise) damages, losses (including direct, indirect or consequential losses), costs and expenses (including legal costs and expenses on an indemnity basis) by whomsoever they are made, greater than or in addition to the liability of Freightliner under these conditions.

(b) Without limiting the foregoing the Sender shall indemnify Freightliner against all claims, demands, liabilities (whether arising in contract, tort or otherwise) damages, losses (including direct, indirect and consequential losses), costs and expenses (including legal costs and expenses on an indemnity basis) (the "Demands") made by any Subcontractor, or by any servant or agent of Freightliner or of any Subcontractor, or by any other person whatsoever at any time concerned with any Consignment or Container or with the services the subject of the Contract, whether or not the Demand shall arise out of any claim made directly or indirectly by the Trader against any such Subcontractor, servant, agent or other person.

4B.4.1 Indirect protective clauses

4.12 Grouped here are terms which make use of the range of techniques available to maintain the effectiveness of the conditions in the face of claims which rely on a lack of privity of contract to evade them.[42] Clause 4(e) reflects the fact that Freightliner will commonly be in the position of a subcontractor and imposes a more specific obligation than the more usual general warranty of authority provided in clause 3. It does not appear, however, to impose an obligation on the contractor to include such like provisions. The strict legal position is that the ratification can only be effective if the existence of Freightliner has been disclosed to the customer of the contractor. Such ratification may now be unnecessary in the light of the Contracts (Rights of Third Parties) Act 1999. This Act would seem clearly to apply to enable clause 4(a) to be enforceable by Freightliner's servants and agents.[43]

42. Compare the somewhat simpler provisions in cll. 2 and 4 of the General Conditions, see Contracts, Part 4, paras 4.2.2.3 and 4.2.2.5. See further the discussion of these kinds of clauses in the BIFA Conditions at 2C.19.1.

43. Some trading conditions have begun including references to the Act. E.g. DB Schenker GCOC, in condition 10.9 extends exclusions and limitations in the conditions to members of the DB Schenker Group and its employees, agents and subcontractors and states that the Act applies to them. This removes any difficulty that might arise from continuing to make reference to the agency of the contactor in extending this benefit. Conversely, conditions 19.9 and 19.10 of DB Schenker GCOC bind the customer not to subcontract without prior written consent and not to assign or transfer any of its rights

4.13 The provision in clause 4(b) gives authority to subcontract and purports to extend the benefit of the conditions to such persons. A clause in earlier conditions which purported to give subcontractors a further power to subcontract has been deleted. It is noticeable that the intended beneficiaries extend no further than a subcontractors' servant and agents.[44] The last sentence appears to make the authority to subcontract dependent on the subcontractor having notice of the conditions which seems odd given that the authority derives from the sender. Since it does not expressly refer to Freightliner acting as agent for the subcontractor it may not satisfy the technical requirements for the sort of protective provision recognised in *New Zealand Shipping Co Ltd* v. *Satterthwaite & Co Ltd (The Eurymedon)*.[45] This technicality is removed by the Contracts (Rights of Third Parties) Act 1999, and the reference to subcontractors and their servants and agents would appear to be a sufficient express reference to a class of persons to fall within section 1 of that Act. The sub-clause also would seem to provide the authority necessary for a bailment on terms which is exercised by Freightliner giving notice of the conditions to the subcontractor. The authority is to create a bailment on the same terms as the conditions rather than the terms employed by the subcontractor. Consequently it falls within the type exemplified by *Elder Dempster* v. *Paterson Zochonis*[46] rather than *Morris* v. *Martin*.[47] A consequence of the clause is that it will not be possible for a subcontractor to claim that there was authority on the part of Freightliner to contract on the subcontractor's own terms (at least if more onerous) or any apparent authority, on having received notice of the conditions at the time of contracting with Freightliner.

4.14 Clause 4(c) provides an undertaking that claims will not be made.[48] It is framed somewhat cryptically but suggests a wide scope. Firstly it appears to encompass claims made by the sender himself since he is included in the definition of trader as well as claims made by others. It is not entirely clear what is meant by the word "carriers". The word is not a clear reference back to the definition of carrier in clause 1 and might suggest an intention to cover only carrying subcontractors used by Freightliner. However, the clause refers to claims greater than or in addition to the liability of Freightliner. It is not entirely clear what this alternative is designed to achieve. It might mean that if the claim is made against Freightliner there should be no claim in excess of the liability but if made against a subcontractor there should be no liability whatsoever. Alternatively it might mean that a subcontractor cannot be liable beyond the liability of Freightliner but that if Freightliner have already been made liable there can be no further liability in addition. The clause links with the indemnities given in clause 15. The trust expressed in clause 4(d) may well be intended to ensure that Freightliner have sufficient title to recover substantial damages for the breach of contract that a claim entails as well as interest to maintain

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or obligations or re-sell or seek to re-sell services and excludes any rights of any person to enforce the terms of the contract pursuant to the Act save as expressly set out in condition 10.9.

44. See the discussion at 3.17.
45. [1975] AC 154.
46. [1924] AC 522.
47. [1966] 1 QB 716, see *The Mahkutai* [1996] 2 Lloyd's Rep 1, [1996] AC 650 (PC).
48. See the discussion of this type of clause at 2C.19.1.

a stay of any action against a subcontract carrier if they are sued by the customer.

4.15 Clause 15(a) of the 2002 Conditions made clear that it covered claims arising from negligence which does not appear in the current clause. It may be that the new wording making reference to arising in tort or otherwise is thought to be sufficient. In isolation the clause might not be sufficient to provide a complete circular indemnity in light of the decision in *Davis (Chas) (Metal Brokers) Ltd* v. *Gilyott & Scott Ltd and Pickering Road Haulage Ltd.*[49] This appears to be the object of the wording in clause 15(b) which refers to claims made against subcontractors etc. The clause also has a wider scope in covering other claims made by subcontractors. Presumably this is intended to cover claims based on some failure of the trader which puts the carrier in breach of its contract with the subcontractor. The sub-clause is, however, expressed in wide terms, the only connection required being that the subcontractor is concerned with the service provided by Freightliner.

4B.5 MARKS AND CONSIGNMENT NOTES

4.16 **Freightliner Conditions, clause 6**[50]

6. (a) Every Consignment shall be clearly marked and except when otherwise agreed be accompanied by a consignment note containing such particulars as Freightliner may reasonably require.

(b) Freightliner, shall, if so required, sign a document prepared by the Sender acknowledging receipt of the Consignment but no such document shall be evidence of the condition or correctness of the declared nature, quantity or weight of the Consignment at the time it is received by Freightliner, and the burden of proving the condition of the Consignment on receipt by Freightliner and that the Consignment was of the nature, quantity or weight declared in the relevant documents shall rest with the Sender.

(c) In the case of goods consigned by Freightliner's IT operating system, the Trader shall communicate to Freightliner, before the goods are accepted by Freightliner for conveyance a movement advice containing such particulars as Freightliner may reasonably require.

4.17 Unlike dangerous goods[51] it is possible that the goods may not be accompanied by a consignment note.[52] This reflects the fact that Freightliner utilise a computerised control system as indicated in sub-clause (c) which dispenses with the need for a consignment note. Sub-clause (b) is similar to clause 5 of the RHA Conditions 2009.[53] It will be caught by section 13 of UCTA and subjected to the test of reasonableness. The effect of statements concerning the condition and quantity of goods in documents such as consignment notes and bills of lading, in the context of container carriage, is discussed further at 4. It should be noted that even if sub-

49. [1975] 2 Lloyd's Rep 422, *cf Spectra International plc* v. *Hayesoak Ltd* [1997] 1 Lloyd's Rep 153. See further above, 2.264.

50. Compare cl. 3 of the General Conditions, see *Contracts*, Part 4, para. 4.2.2.4. See also condition 4.2 of DB Schenker GCOC.

51. See 4.18.

52. Unless a CMR or CIM movement is involved, as to which see 4B.11.1.

53. See Clarke & Yates, para. 1.276.

clause (b) is ineffective to remove the evidential value of the receipt any statements it may contain are likely only to provide *prima facie* evidence against the carrier.

4B.6 DANGEROUS CONSIGNMENTS

Freightliner Conditions, clause 9[54] 4.18

9. (a) The conditions of acceptance of Dangerous Consignments are subject to compliance with the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations (current edition) as supplemented by the Dangerous Goods—Rail Conditions of Acceptance (GO/RT3421) issued by the Rail Safety and Standards Board and any superceding authoritive [sic] document(s).

(b) The Sender shall notify Freightliner of the type and nature of any dangerous goods contained in a Consignment and the hazard presented by such goods prior to inviting Freightliner to quote for the carriage of such goods. Prior to the date of the Contract, the Sender shall agree with Freightliner any special conditions for the carriage and/or storage of such Dangerous Consignment, such arrangements to be at the cost of the Sender.[55]

(c) Where Freightliner accepts a Dangerous Consignment for transit or storage it does so subject to these Conditions and to the following special provisions:

(i) The consignment note accompanying the Dangerous Consignment shall specify the technical and (where appropriate) popular names of the dangerous goods comprised therein, and the nature of the danger presented by such goods;

(ii) Dangerous Consignments shall be labeled [sic], packed and stowed in accordance with any applicable statutory regulations and, unless otherwise agreed in writing, with the regulations for packing, labelling (sic), loading, and stowage of dangerous goods published by the competent authority;

(iii) Any additional conditions set out or referred to in the consignment note or otherwise agreed.

(d) In the event of failure by the Sender to comply with any of the provisions of clauses (a), (b) or (c) hereof, the Carriers shall be under no liability whatsoever in respect of the Dangerous Consignment, save in the case of wilful misconduct by the Carriers in which event liability shall be determined in accordance with these conditions.

(e) Further, without prejudice to any of the foregoing, Freightliner may, if it is of the opinion that it is necessary or advisable to do so, act in any of the following ways:

(i) Hold the Dangerous Consignment until the Sender gives adequate notice of the nature of and hazard presented by it;

(ii) Return at any time at the Sender's sole risk and expense the whole or any part of the Dangerous Consignment to the Trader (who shall receive it at once);

(iii) Destroy or otherwise dispose of the Dangerous Consignment.

(f) Where Freightliner is satisfied that it was not possible for the Sender to give notice pursuant to clause 9(b) above the Sender shall provide details of the nature of and hazard presented by any Dangerous Consignment as soon as is reasonably possible provided that if in the opinion of Freightliner, such details are not forthcoming within a reasonable time, then Freightliner may exercise any of the options in 9(e) above.

(g) The Sender shall notify Freightliner of the type and nature of any goods contained in a Consignment that may be classified as hazardous, dangerous or similar by any regulations or rules that may apply to any other mode of transport that may be used to carry or otherwise

54. Compare cl. 20 of the General Conditions, see *Contracts*, Part 4, para. 4.2.2.22. See also condition 5 of DB Schenker GCOC.

55. Sub-clause (b) involves a change from the 1992 Conditions to ensure that relevant information is given prior to the conclusion of the contract rather than, as previously, prior to tender of the goods. It also now makes clear that the cost of special arrangements is to be borne by the sender.

convey the goods prior to or following the termination of transit in accordance with clause 11 hereof. Prior to the date of the Contract, the Sender shall agree with Freightliner any special conditions for the carriage and/or storage of any such Consignment and such arrangements to be at the cost of the Sender. Sub-clauses (c) to (f) above shall apply to any such Consignment.

4B.6.1 Dangerous goods regulations

4.19 The RID regulations in Appendix C of the COTIF Convention will be of special relevance in respect of an international movement,[56] and also for domestic movements by virtue of the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009.[57] The regulations subject domestic carriage by rail to the RID regulations and carriage by road to ADR in accordance with the requirements of EU Directives.[58]

4B.7 LOADING AND UNLOADING

4.20 **Freightliner Conditions, clause 10**[59]

10. (a) On collection or delivery the Carriers shall be under no obligation to provide any plant, power or labour for loading or unloading.

(b) Any assistance given or knowledge acquired by a servant or agent of the Carriers in assisting the Trader, whether in connection with loading or unloading of goods into or out of any Container or otherwise, will be given or acquired on behalf of the Trader who shall be responsible for the acts and knowledge of such servant or agent as if he were the Trader's employee.

(c) Consignments requiring special appliances for loading onto or unloading a vehicle or Container are accepted for transit only on condition that the Sender undertakes that such appliances will be available at loading and unloading. Where special appliances are required for loading and unloading, but are not available, the Carriers shall nonetheless be at liberty (but not bound) to load or unload in such a manner as they may think fit, and in such case the Carriers shall be under no liability whatsoever to the Trader for any damage howsoever caused during the loading or unloading, whether or not by the negligence of the Carriers, and the Sender shall be responsible for and indemnify the Carriers against any loss, damage or

56. Brought in as part of the change to the 1980 Convention made by the Protocol of Vilnius 1999. Formerly, these rules were annexed to the CIM Rules. The object of this change was to ensure that RID applies regardless of whether there is a CIM contract of carriage. The current regulations are those of 2011.

57. SI 2009/1348 (as amended 2011/1885).

58. See e.g. Directive of the Parliament and Council on the Inland Transport of Dangerous Goods (the Dangerous Goods Directive) 2008/68/EC. In respect of carriage by sea, note the Merchant Shipping (Dangerous Goods and Marine Pollutants) Regulations 1997 (SI 1997/2367). For discussion of former regulations, see further Booker, ch. 10.

59. Compare cl. 4 of RHA Conditions 2009 and cl. 13 of the General Conditions (see *Contracts*, Part 4, para. 4.2.2.15) neither of which contains the equivalent of sub-clause (d) (see, however, condition 15 of the DB Schenker GCOC and more generally condition 3 (see Clarke & Yates, paras 2.781 and 2.719 respectively for the equivalent former EWS Conditions)). Clause 6 of the RHA Conditions, however, comes close to achieving the same object in respect of unloading since transit will end if there is no safe or adequate access or adequate unloading facilities at the delivery premises although this is only after one day's notice of the arrival of the consignment. Once transit has ended all liability is excluded by cl. 9(3). The consequences of the end of transit under the Freightliner Conditions are not so drastic unless the circumstances fall within cl. 12(c).

claim which the Carriers may suffer or incur in connection with such loading or unloading.

(d) The Sender shall be responsible for the suitability of the means of access to and egress from any premises at which the Carriers are instructed to collect or deliver a Consignment, including delivery or collection of empty Containers.

4B.8 TRANSIT AND STORAGE

Freightliner Conditions, clauses 11 and 12[60] *4.21*

11. (a) Transit begins when the Consignment is handed to or collected by the Carriers for carriage, and ends (unless otherwise previously determined) when the Consignment is delivered, or as provided in Condition 11(c) below.

(b) (i) Transit shall be suspended when at any time prior to the end of transit the Consignment is held by the Carriers at some place other than the destination at the request or for the convenience of the Trader (including detention for Customs purposes) or because the Trader has refused or has shown or stated that he is unable to take delivery at the destination.

(ii) If transit shall have ended under these Conditions, but Freightliner subsequently carries the Consignment for whatever reason, such subsequent carriage shall be treated as undertaken pursuant to a separate Contract for carriage subject to these Conditions.[61]

(c) Transit shall (unless otherwise previously determined) end,[62] notwithstanding that the Consignment has not been delivered:

(i) In the case of a Consignment to be delivered by the Carriers when it is tendered at the Consignee's premises within the customary cartage hours of the delivery district or at such other time or place as may be agreed between the Carrier and the Trader.

(ii) In the case of a Consignment to be collected by the Trader: (a) at the expiration of 11 hours[63] from the arrival of the Consignment at the rail or other terminal, depot or place to which it has been consigned, or (b) at the time at which the goods are loaded aboard a trailer, wagon, vehicle or other conveyance belonging to or operated by the Trader, his servants or agents; or (c) if the goods are already aboard a trailer or wagon, at the time the Trader, his servant or agents attach the tractor unit, engine or other mode of traction to such trailer or wagon; whichever be the earlier.[64] Unless otherwise agreed between the Trader and Freightliner, it is the duty of the Sender to advise the Consignee of the expected time of arrival of the Consignment.

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60. Compare the General Conditions cll. 9 and 10 (see *Contracts*, Part 4, paras 4.2.2.11 and 4.2.2.12 and RHA Conditions 2009, cll. 6 and 7 (see Clarke & Yates, paras 1.278–1.283).

61. It would seem to be likely that where goods in a container are to be delivered at one place but the container (not belonging to Freightliner) is to be dropped off elsewhere, the subsequent delivery of the container should not be considered to be a fresh consignment within this sub-clause, at least where arrangements for this have been made at the beginning of transit. This will be so whatever view is taken as to the meaning of consignment, see above, since even if at that point it becomes the "whole consignment" it does not constitute a fresh consignment.

62. If the goods are delivered separately from the container, transit may be considered to have ended, in respect of the goods, when they are delivered and, in respect of the container, when it is delivered. This would seem to be the most natural construction, rather than a view that transit ends, in respect of both goods and container, only when the container itself finally reaches the destination contemplated by the contract.

63. Under the 1992 Conditions 12 hours were given for collection before transit was deemed to end. This has now been reduced to 11.

64. Sub-para. (b) and (c) have been added since the 1995 Conditions.

(iii) In the case of a Consignment consigned to a Private Siding, where such delivery is hindered or prevented by circumstances beyond the Carriers' control, the Carriers may give notice[65] to the Sender or Consignee accordingly and transit shall end 11 hours thereafter.

12. Freightliner will store the Consignment after termination or during suspension of transit as defined in Condition 11 hereof (unless otherwise agreed) or if Freightliner accepts instructions for storage whether or not in connection with the carriage of any Consignment.[66] With the exceptions of Conditions 2, 5, 16 and 18, all storage shall be subject to the Conditions herein, and in addition to the following special provisions:

(a) The carriers may at their option store Consignments either outside or under cover. Consignments must be adequately protected by the Trader for outside storage.

(b) The carriers shall not be liable for any loss or mis-delivery or damage or delay of whatever nature or howsoever arising in the case of any consignment or part thereof:

(i) except upon proof that such loss or mis-delivery or damage or delay has been caused by the neglect or default of the Carriers;

(ii) caused either wholly or partially and either directly or indirectly by fire or flood, howsoever arising;

(iii) in respect of which the Carriers have given notice that no suitable accommodation for storage is available;

(iv) in respect of which the Carriers have given notice that the Consignment is or has become in their opinion unsuitable for storage;[67]

(v) unless a written claim is submitted to Freightliner within 14 days of the date upon which the Trader became or ought to have become aware of any event or occurrence alleged to give rise to such liability or claim, provided that the Trader shall have the benefit of a like proviso to that set out at Clause 18(b) hereof.

(vi) without prejudice to sub-clause (b)(v) above, Freightliner shall in any event be discharged of all liability whatsoever and howsoever arising in respect of the Consignment unless suit be brought and written notice thereof be given to Freightliner within 1 year of the date when transit commenced within the meaning of Clause 11(a) hereof, notwithstanding any subsequent suspension or termination of transit in accordance with Clause 11(a) to (c). Provided that in the event Freightliner accepts instructions for storage otherwise than in connection with the carriage of the Consignment, suit must be brought and written notice thereof be given to Freightliner within 1 year of the date when the storage commenced.

(c) (i) Freightliner may at any time require the Trader to remove the consignment and pay all charges thereon by giving him 48 hours notice[68] of such requirements.

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65. See *Contracts*, Part 4, para. 4.2.2.12.3, n. 7.

66. The ending or suspension of transit will trigger the operation of cl. 12 which substitutes a fault-based liability for the strict liability normally accepted in cl. 16, (see 4.23). See further, however, fn. 67, below.

67. Presumably the intention is that where the exceptions in sub-cl. (b)(ii) to (iv) apply, they may operate regardless of the negligence of the carriers. Clause 11 of the BRB General Conditions was somewhat clearer where the Board had given notice that it had no suitable accommodation (see Contracts, Part 4, para. 4.2.2.13) but despite the reversal of the burden of proof in sub-cl. (b)(i) the clause is not so extreme as cl. 9(3) of the RHA Conditions. Unlike cl. 16 (see 4.23) the exception of liability in cl. 12 expressly refers to the carriers, which makes it clearly available to both Freightliner and its subcontractors. Possibly the reason for this is because a subcontractor may have given a notice of the lack of suitable accommodation etc. and will wish to rely on the fact that they have done so. It may be necessary to make it clear that both Freightliner and its subcontractors can rely on these exceptions especially where e.g. Freightliner seeks to rely on a notice given by a subcontractor in order to deny its own liability. This perhaps reflects the difficulties that may arise from the fact that the conditions at times refer to Freightliner alone and at other times to the carriers. Thus sub-cl. (c) goes on to give Freightliner the right to require the trader to remove a consignment on 48 hours' notice but then gives a right of sale to the carriers to sell the consignment after giving a further 28 days' notice.

68. See fn. 65.

(ii) In the event of the whole or any part of the Consignment not being removed within 48 hours, the Carriers may after giving a further 28 days notice[69] of their intention so to do sell the whole or any part of such Consignment and the payment or tender of the proceeds of sale to the Sender after deducting the expenses of sale and all other charges due in respect of the Consignment shall (without prejudice to any outstanding claim which the Sender may have against Freightliner) discharge Freightliner from all liability whatsoever in respect of the Consignment. Provided that in the event the Consignment is liable to perish or deteriorate, Freightliner's right to sell the whole or any part of the Consignment shall arise immediately should the Consignment not be removed within the 48 hour period stated above.

(d) Upon the Sender or any person duly authorised by him giving adequate prior notice to Freightliner,[70] Freightliner will permit the Sender or authorised person to enter upon the premises where the Consignment is stored for the purpose of inspecting the same at any reasonable time during the normal hours of business.

4B.9 CHARGES AND LIEN

Freightliner Conditions, clauses 13 and 14 *4.22*

13. (a) Freightliner's charges for carriage and storage together with services incidental thereto including the provision of Containers shall be payable by the Sender without prejudice to Freightliner's rights against the consignee or any other person, provided that where Freightliner has accepted goods "carriage forward" the Sender shall only pay such charges if the consignee fails to pay on demand.[71]

(b) Freightliner's charges shall be paid when due without any reduction or deferment on account of any claim, counterclaim or set-off.[72]

(c) The Sender shall pay Freightliner's charges for:

(i) detaining beyond the time allowed for their use wagons, vehicles, Containers, coverings and other equipment provided by the Carriers:

(ii) use or occupation of any siding or other accommodation; where such detention use or occupation is at the Trader's request or for his convenience.[73]

(d) Subject to Condition 13(a) hereof charges shall be payable when the Consignment is received by Freightliner. Without prejudice to the foregoing, the Sender may pay periodically provided each and every invoice is paid within 28 days of the date thereon. In the case of late payment and in the case of all sums which are overdue as provided for in these conditions, Freightliner shall be entitled to interest on those sums calculated on a daily basis at 8% above the Base Rate for the London Clearing Banks prevailing at the date of Freightliner's invoice. Interest shall begin to run on the day after the last due date for payment.[74]

(e) Where the delivery of a Freightliner invoice is contingent upon some triggering activity of the Sender and where in Freightliner's opinion a reasonable period of time has expired and that triggering activity has not taken place, Freightliner will in any event be entitled to deliver an invoice and to collect against it in accord with these conditions.

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69. See fn. 65.

70. See fn. 65.

71. Compare cl. 8(1) of the General Conditions (see *Contracts*, Part 4, para. 4.2.2.10) on which this appears to be based with the addition of the reference to the supply of containers. Compare further, generally condition 6 of the DB Schenker GCOC (see Clarke & Yates, para. 2.728 for the former EWS equivalent).

72. Compare cl. 8(2) of the General Conditions, see *Contracts*, Part 4, para. 4.2.2.10. Compare also BIFA Conditions, cl. 21 and see *Contracts*, Part 7, para. 7.2.23.

73. Compare cl. 8(3) of the General Conditions, see *Contracts*, Part 4, para. 4.2.2.10.

74. No equivalent of this clause appears in the General Conditions. Compare however BIFA Conditions, cl. 21(B), see 2.266.

14. (a) The Consignment and each and every part thereof is accepted by Freightliner subject to:

(i) a lien upon such Consignment and any document relating to such Consignment for all monies, charges or expenses due to it in connection with the carriage or storage thereof;

(ii) a general lien upon such Consignment and any document relating to such Consignment for any other monies, charges or expenses due to it.

Storage charges shall accrue on any Consignment detained or otherwise held under lien.[75]

(b) In case all such monies, charges or expenses due are not paid in full within 28 days from the date upon which Freightliner first gives notice[76] of the exercise of its lien to the Trader, the said Consignment or any part thereof or any documents relating thereto may be sold and the proceeds of sale applied in or towards the satisfaction of such monies, charges or expenses and all costs incurred in relation to the exercise of Freightliner's lien and the sale and Freightliner shall account for any surplus.

(c) When the Consignment is liable to perish or deteriorate, Freightliner's right to sell the Consignment (or any documents relating thereto) shall arise immediately upon Freightliner giving notice of the exercise of its lien to the Trader, subject only to Freightliner taking reasonable steps to bring the Trader's attention to its intention to sell the Consignment before doing so.

(d) The liens provided by clause (a) hereof shall be exercisable against the Trader and all other persons interested in the Consignment or any part thereof or any documents relating to such Consignment, and are exercisable to recover monies, charges and expenses due from one or more of any such persons. Freightliner shall not incur any liability whatsoever to whomsoever arising out of or in connection with the exercise of a lien or the sale of any Consignment or documents relating thereto under sub-clauses (a), (b) and (c) hereof.[77]

4B.10 LIABILITY AND LIMITS

4.23 Freightliner Conditions, clauses 16–19

16.1. Subject to these Conditions Freightliner shall be liable for loss or mis-delivery of or damage or delay in respect of the Consignment or any part thereof occurring or caused, otherwise than during storage as defined by Condition 12 above, unless and except in so far as such loss or mis-delivery or damage or delay has arisen or resulted from:

(a) Act of God;

(b) Any consequence of war, invasion, act of foreign enemy, hostilities, civil war, rebellion, insurrection, military or usurped power or confiscation, requisition, destruction of or damage to property by or under the order of any Government or public or local authority, restraint of princes (including administrative or government action);

(c) Seizure, arrest or forfeiture under legal process;

(d) Error, act, omission, mis-statement or misrepresentation by the Trader or other owner of the Consignment or by servants or agents of either of them;

(e) Inherent liability to wastage in bulk or weight, latent defect or inherent defect, vice or natural deterioration of the Consignment or any part thereof;

(f) Insufficient or improper packing, stowage or securing;

(g) Insufficient or improper labelling or addressing;

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75. Compare condition 7.2 of DB Schenker GCOC (see Clarke & Yates, para. 2.733).

76. See *Contracts*, Part 4, para. 4.2.2.12.3.

77. Compare cl. 15 of the General Conditions, see *Contracts*, Part 4, para. 4.2.2.17. Unlike the General Conditions there is no reservation in favour of the vendor's right of stoppage in transit. Unlike cl. 8 of the BIFA Conditions (see 2.147) it expressly provides for both a particular and a general lien.

(h) Riot, civil commotion, strikes, lockouts, or other industrial action or trade union disputes, stoppage or restraint of labour from whatever cause;

(i) The consignee not taking or accepting delivery within a reasonable time;

(j) Delay otherwise than during the course of storage except upon proof that such delay has been caused by the neglect or default of the Carriers;

(k) Terrorist activity;

(l) Explosion, fire, flood or inclement weather;

(m) Acts, restrictions, regulations, by-laws, refusals to grant any licences or permissions, prohibitions or measures of any kind on the part of any Governmental authority or agency;

(n) The description or particulars of any Consignment or other information (including without limitation the weight of any Consignment) furnished by the Trader or other owner of the Consignment or by servants or agents of either of them;

(o) The Trader instructing, requiring or otherwise providing Freightliner with no alternative but to subcontract its obligations under the Contract in whole or in part to a third party, provided that the third party is responsible for any such loss, mis-delivery, damage or delay;

(p) Any other circumstances beyond the reasonable control of Freightliner.

16.2 (a) Freightliner shall not incur liability of any kind in respect of a Consignment where there has been fraud on the part of the Trader;

(b) Where under this Condition Freightliner is not under any liability in respect of some of the factors causing the loss or mis-delivery or damage or delay, it shall only be liable to the extent that those factors for which it is liable under this Condition have contributed to the said loss or mis-delivery or damage or delay.

16.3 Save as aforesaid Freightliner shall be under no liability whatsoever in connection with any Consignment or any instructions given to it.

17. (a) The liability (howsoever arising)[78] of Freightliner to pay compensation in respect of any one Consignment shall in any case be limited in so far as the loss or mis-delivery or damage or delay however sustained is in respect of:

(i) a Container to a sum calculated at a rate of £1,500 per tonne gross weight of the Container and in so far as it is in respect of the whole contents of a Container or the whole of goods not in a Container to a sum calculated at a rate of £1,500 per tonne of such contents or goods each calculation to be made separately.

(ii) part of the contents of a Container or part of goods not in a Container to the proportion of any sum ascertained separately in accordance with sub-clause (i) hereof for contents or goods which the value of the said part bears to the value of the whole of the contents or goods.

(b) Provided that:

(i) nothing in this Condition shall limit Freightliner's liability to a sum less than £10 in respect of any one Consignment;

(ii) Freightliner shall be entitled to documentary proof of the weight and value of the whole Consignment, as well as of any part thereof to which the claim relates;

(iii) nothing in these Conditions shall operate to limit Freightliner's liability in respect of any death or personal injury to any person resulting from Freightliner's negligence.

(c) Freightliner shall not in any case be liable for loss of use of or payment of hire on or demurrage on Containers and/or vehicles or for loss of a particular market whether held daily or at intervals or for loss of profit or increased losses or loss of business or for any indirect or consequential loss or damage of whatsoever kind.[79]

(d) If the Trader is permitted to leave any tractor unit, trailer, or other property of whatever nature (other than the Consignment) it is agreed that such property is left at the Trader's own risk. Freightliner accepts no responsibility for any loss or damage of whatsoever nature and howsoever caused to such goods.

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78. See *Travers & Sons Ltd* v. *Cooper* [1915] 1 KB 73.

79. Compare DB Schenker GCOC, condition 10.3.1.

(e) Unless otherwise agreed, the Carrier will effect restitution of Containers to an agreed delivery point no later than 14 days after the Consignment has been delivered. Freightliner's liability arising out of or in connection with the late restitution of Containers shall not exceed:

(i) the monetary loss suffered by the Trader as a direct result of any late restitution by the Carrier; or

(ii) the market value of the Container on the date when transit commenced within the meaning of Clause 11 hereof; or

(iii) A sum equivalent to £1,500 per tonne of the gross weight of the Container;

whichever is the lesser amount.

(f) Freightliner shall be entitled to documentary proof of the monetary loss, market value and gross weight, as referred to at sub-clauses (e) (i) to (iii) above.

18. (a)[80] Freightliner shall not be liable for loss, mis-delivery, damage or delay to the whole or any part of the Consignment or for any other claim whatsoever, unless a written claim is submitted to Freightliner within 14 days of the date upon which the Trader became or ought to have become aware of any event or occurrence alleged to give rise to such liability or claim.[81]

(b) Provided that if in any particular case the claimant proves that:[82]

(i) it was not reasonably possible to advise Freightliner or submit a claim in writing within the aforesaid times; and

(ii) such claim was submitted within a reasonable time; and

(iii) there has been no prejudice to Freightliner as a result of the delay:

Freightliner shall not have the benefit of sub-clause (a).

(c) Notwithstanding the provisions set out in sub-clauses (a) and (b) above, Freightliner shall in any event be discharged from all liability whatsoever and howsoever arising[83] in respect of the Consignment unless suit be brought and written notice thereof be given to Freightliner within 1 year of the date when transit commenced within the meaning of Clause 11 hereof.[84]

19.[85] In the computation of time where any period provided by these Conditions is 7 days or less, Saturdays, Sundays and Public Holidays shall not be included.

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80. *Cf* cl. 7 of the BRB General Conditions, see Contracts, Part 4, para. 4.2.2.9. Unlike the General Conditions a one-year time limit is imposed in favour of Freightliner. No time limit for suit appears in DB Schenker GCOC, which by condition 11 simply requires advice in writing of the loss, damage or delay within 7 days of the completion or termination of carriage.

81. The clause has changed substantially from its equivalent in the previous edition which distinguished damage and loss of the whole consignment and linked the running of time for notice to the end of transit rather than the time the Trader has become or ought to have become aware of the relevant event. It also introduces a requirement for a written claim rather than to be advised. An advice means a notification of the loss or damage so that the carrier can investigate the facts before they become obscure or evidence hard to find (see Clarke & Yates, para. 1.329). A written claim suggests something more substantial as well as requiring an indication of an intention to hold Freightliner accountable for the loss or damage.

82. This proviso is similar to that adopted in cl. 7 of the BRB General Conditions and in cl. 13 of the RHA Conditions 2009 but with an extra requirement of proof that Freightliner have not been prejudiced. It provides some softening of the otherwise harsh effect of the failure to give notice and makes it more likely that the requirement will pass the test of reasonableness likely to be imposed by the Unfair Contract Terms Act 1977. See also Condition 11 of the DB Schenker GCOC.

83. It is likely that this will be construed to cover all possible bases of claim, see 2.295 above.

84. The previous conditions stated also—(d) If not later than 5 days before the expiration of the said period or any agreed extension thereof the claimant requests an extension of the said one year period, the said time shall continue until Freightliner's reply. If the said request is refused the said time shall continue for a further 13 days after the day when the claimant has been advised of such refusal. The reference to 13 days in this sub-clause is a reduction by one day from the 1992 Conditions.

85. *Cf* cl. 14 of the BRB General Conditions, see Contracts, Part 4, para. 4.2.2.16.

4.24 Unlike the old BRB General Conditions there is no choice of liability system as there was between the Board's risk and owner's risk but a single system set out in clause 16 and covering loss, damage and delay.[86] Prior to the current conditions clause 16 provided for a strict liability system in much the same terms as the Board's risk provision in clause 5A of the BRB General Conditions,[87] and clause 9(2)(b) of the RHA Conditions 2009. The addition of the exception of any other circumstances beyond the reasonable control of Freightliner in clause 16.1(p) effectively converts this to a fault liability system. The basic system is applicable to all forms of carriage[88] except where the special circumstances of international carriage require a different approach.[89] Clause 24 also states that Freightliner is not a common carrier.[90] The listed exceptions are in more or less the same terms as set out in clause 5A of the BRB General Conditions but with the addition of further exceptions from (j) to (p). This is absent the additional requirement in clause 5A(1)(i) of the General Conditions on the Board to prove the absence of negligence as well as one of the exceptions to relieve itself of liability. This may not involve a major difference since it seems likely that the burden of proof will be on Freightliner to prove one of the exceptions especially as the burden of proof of negligence is reversed in respect of delay in exception (j). As with the General Conditions[91] and RHA Conditions 2009[92] there is an exception of fraud on the part of the trader. The system of liability under Freightliner and similar conditions with an older pedigree can be contrasted with the system adopted by DB Schenker GCOC derived from the former EWS Conditions. These introduced, in Condition 8, the concept of *force majeure* as a core exception to liability for loss or damage of goods. However, from the definition given to this in Condition 1 any difference with the Freightliner condition appears marginal as a similar list of events is included and prefaced by general words referring to any circumstance beyond the reasonable control of either party which similarly suggests a fault based rather than stricter liability.

4.25 There is no equivalent in the General Conditions to sub-clause 16.2(b). An interesting question is whether it alters the rule of common law that a carrier who seeks to rely on an exonerating cause, which has combined with another cause for which he is not responsible, should show how much damage was due to the cause on which he relies as an excuse.[93] This combines with the likelihood that at common law any apportionment of liability, even where one of the relevant factors is the fault

86. Delay being dealt with as an exception in (j). Compare cl. 5A(2) of the General Conditions under which the Board accepted liability for delay unless it could prove that it arose without negligence which compares with the reversed burden of proof in exception (j). DB Schenker GCOC treats delay separately from loss or damage and provides in condition 10 for liability for delay where arising from the negligence of DB Schenker (see further Clarke & Yates, para. 2.752).

87. See generally *Contracts*, Part 4, para. 4.2.2.6.

88. As opposed to storage, see cl. 12, above 4.21.

89. See 4B.11.1.

90. *Cf* s. 123 of the Railways Act 1993.

91. See cl. 5A(1)(ii).

92. Clause 10.

93. Expressed in a number of carriage by sea cases, see *Gosse Millard* v. *Canadian Government* [1929] AC 223, *per* Lord Sumner at p. 241, *Silver* v. *Ocean S.S. Co* [1930] 1 KB 416, *per* Scrutton LJ at p. 430, *cf* Greer LJ at p. 435.

of the claimant, is likely to be based on causation rather than on comparative fault.[94] The wording used, however, is virtually identical to Article 17(5) of the CMR Convention which has been interpreted as permitting degrees of fault to be included as relevant factors and where precise proof of damage caused by a particular factor may not be necessary. This might not be conclusive for the purposes of interpretation of the words of a contract. Nevertheless note can be taken of use of the words "contributed to the said loss" rather than the words "attributable to".[95]

4.26 The limit of liability of £1,500 involves an increase from the £800 in the 1986 Freightliner Conditions.[96] In respect of clause 17(c) it may be that the last words will qualify all the earlier words. If this construction were adopted, losses which arise as a natural result of the breach might not therefore be excluded although this interpretation of the clause may be confined to those cases where the loss arises as a natural consequence of physical loss or damage.[97] This seems unlikely in view of the fact that there is generally no separate treatment in the conditions of physical and non-physical losses. It is understood, however, that the intention is to exclude, inter alia, such economic loss as may be caused to, for example, the owner or lessee of a container, where there is a delay in returning (or failure to return) the container to him after its contents have been delivered. Given that the customer will have been charged for this service, the complete exclusion of responsibility for it, notwithstanding its inclusion as part of a package of limitation, would seem hard put to survive application of the test of reasonableness under the Unfair Contract Terms Act 1977.

4B.11 THE NATURE OF TRANSPORT AND ADDITIONAL CONDITIONS

4.27 **Freightliner Conditions, clause 5**

5. (a) A Consignment accepted by Freightliner for transit may be carried by such means of transport and by such route as Freightliner thinks fit and these Conditions shall apply to any such means and route.[98]

(b) In the case of international carriage within the meaning of the International Convention concerning the Carriage of Goods by Rail (referred to as the CIM Regulations) signed at Berne on 9th May, 1980 as amended[99] together with provisions accepted by the UK Freightliner will issue a CIM consignment note and the Consignment referred to therein will be carried in accordance with the said Regulations, provided that such Regulations are

94. *Cf* in respect of carriage by land *Higginbotham* v. *G.N. Ry* (1861) 2 F&F 796, 175 ER 1289, where the basis for the apportionment in that case is not entirely clear.

95. *Cf* Art. 5(7) of the Hamburg Rules.

96. Compare cl. 6 of the General Conditions as to which see generally *Contracts*, Part 4, para. 4.2.2.8. See further Condition 8.4 of DB Schenker GCOC, which applies a limit of £1,300 per tonne (and by Condition 10.4 a global limit of £5,000,000 for any claim or series of claims that arise from any one occurrence).

97. See further 2C.23.

98. This is the equivalent of cl. 12(1) of the General Conditions, see *Contracts*, Part 4, para. 4.2.2.14. It can be compared with similar liberties found in forwarding contracts, see 2.134 and contracts for combined or multimodal transport above, 3.47.

99. See below 4.29.

satisfied in all respects including as to the contracting parties and as to all parts of the route as well as the lines over which the Consignment is to travel.

(c) In the case of loss or mis-delivery or damage or delay occurring during carriage by sea, if Freightliner is not the owner or demise charterer of the vessel, the Trader shall have the same but no greater rights against Freightliner as Freightliner has in respect of the loss, mis-delivery, damage or delay under its contract of carriage pursuant to which the goods were shipped on the vessel.[100]

(d) In so far as Articles 1 to 40 of the Convention on the Contract for the International Carriage of Goods by Road (known as CMR) are compulsorily applicable to any carriage undertaken by the Carriers, such Articles shall apply and the provisions of these Conditions shall be treated as modified to such extent (if any) as may be necessary to give effect to such Articles in relation to such carriage, but no further.

4B.11.1 Application of the CIM Rules and the CMR Convention

4.28 The conditions are intended to apply to all carriage and all storage regardless of whether the carriage is domestic or international.[101] Previously Freightliner operations were incorporated within RfD and so would include both domestic and international operations. Freightliner has retained this clause notwithstanding that it is largely directed at international transport and Freightliner is a domestic operator. This clause is of more relevance to operators providing international services and potentially subject to the CIM Rules of the COTIF Convention or the CMR Convention.

4.29 The clause makes reference to CIM as amended. Since the 1980 Convention mentioned in the clause the Protocol of Vilnius 1999 has come into force and provided for a new Ground Convention and CIM Rules (URCIM). The former CIM Rules applied where the movement was by rail over the territories of at least two states[102] and exclusively over those railway lines and other services[103] registered for the purposes of COTIF.[104] By Article 2(2) of COTIF the additional services could be those in respect of road, sea and inland waterways. As a train operator Freightliner would have been subject to CIM. CIM envisaged that it applied to a transport under which a through consignment note was issued,[105] and that the contract was concluded when the railway accepted the goods accompanied by the consignment note.[106] If Freightliner refused to issue a consignment note at all it might thereby have been able to evade the application of CIM although this was unclear.[107]

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100. This application of the "network" principle can be compared with conditions applying a similar principle in combined transport documents discussed above, at 3.62 *et seq*. This sub-clause is equally subject to the possibility that the CIM Rules (as to which see Art. 48 of these Rules) or CMR may apply to govern the whole movement, or by the possibility that such rules may have been applied contractually to the whole movement in a way inconsistent with this provision.

101. Clause 23.

102. Article 1 CIM Rules.

103. E.g. the Harwich-Zeebrugge sea service.

104. See Art. 2(1) and (2) and Art. 3 of COTIF.

105. Article 1(1) of the CIM Rules.

106. Article 11(1).

107. Annex III of the former CIM contained the RICo Rules which were of relevance to Freightliner Conditions whenever CIM applied. These rules covered both goods which were dispatched in a railway-supplied container and also where the container was not so supplied. It appears that technical conditions are laid down by the International Union of Railways applicable to containers, see the sequence of UIC leaflets 592 and the conditions of approval to ensure compliance with these requirements which are set

4.30 The Protocol of Vilnius came into force on 1 July 2006.[108] The requirement for carriage over listed lines was largely swept away except that a list of services is maintained for supplementary sea and inland waterway services where these are to be drawn into CIM.[109] URCIM[110] apply to contracts for carriage of goods by rail for reward when the place of taking over of the goods and the place designated for delivery are situated in two different Member States.[111] By Article 4(1) of URCIM Member States may provide for agreements which derogate from the rules for carriage performed exclusively between two stations on either side of the frontier when there is no other station between them. England and France have such an agreement in respect of carriage by means of rail shuttle services carrying road vehicles and their passengers performed exclusively between the Channel Tunnel terminals at Cheriton in Kent and Coquelles in the Pas-de-Calais. Whilst the rules provide for the contract to be confirmed by a consignment note the absence, irregularity, or loss of the consignment note shall not affect the validity of the contract which shall remain subject to the Rules.[112] The duty previously imposed on railways to carry the goods and to lay down legally enforceable tariffs is removed.

4.31 Special provisions are incorporated into the new CIM Rules to deal with the carriage of vehicles as goods in respect of liability and payment of damages.[113] Further rules are in place to deal with contracts for the use of vehicles in international rail traffic[114] contracts for the use of infrastructure in international traffic,[115] rules relevant to the procedure for the technical admission of railway material used in international traffic,[116] and rules for the validation of technical standards and the adoption of uniform technical prescriptions.[117] Included among these last rules will be an annex[118] devoted to technical standards and uniform technical prescriptions relating to any other railway material which presumably

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out in UIC leaflet 593. Presumably these are easily satisfied by ISO containers constructed under certification e.g. by Lloyd's Register of Shipping. (Article 3 of the RICo rules was especially interesting as it stated that where the container load is collected from the sender and delivered to the receiver, the contract of carriage begins at the sender's premises and ends at the receiver's premises. It is arguable that the effect of this rule was to apply the CIM Rules to collection and delivery of the container to and from the railway terminal without such service having to be registered in the list of lines.

108. Given effect by the Railways (Convention on International Carriage by Rail) Regulations SI 2005/2092.

109. Article 1(4) the new CIM Rules.

110. UR CIM (Uniform Rules Concerning the Contract of International Carriage of Goods by Rail, Appendix B to the COTIF Convention). The new CIM Rules are reproduced in English in 3/2000 BTIF, pp. 217–234 and in Carr and Kidner, *Statutes and Conventions on International Trade Law* (4th edn, 2003), pp. 494–514. The provisions of the new ground convention can be found in English in 2/2000 BTIF, pp. 101–121.

111. Article 1(1).

112. Article 6(1).

113. Article 24.

114. UR CUV (Appendix D to the Convention). These rules and those indicated in the next three footnotes and the new RID Rules (Appendix C to the Convention) are reproduced in English in 4/2000 BTIF pp. 290–307.

115. UR CUI (Appendix E to the Convention).

116. UR ATMF(Appendix G to the Convention).

117. UR APTU (Appendix F to the Convention).

118. Annex 8.

means any railway material intended to be used in international traffic not being a railway vehicle.[119]

4.32 The International Rail Transport Committee (Comité international des transports ferroviaires) is a body which facilitates the commercial operation of CIM. It has as one of its aims the uniform application and practical implementation of COTIF with a membership that largely consists of railway undertakings and associations of such undertakings. It bridges old and new CIM and has an important role in the development of documents and contracts. A major contribution to uniformity is the General Terms and Conditions of Carriage for International Freight Traffic by Rail (GTC-CIM) which will be referred to below in comparison with other conditions. Specialised freight conditions used in European international carriage are likely to incorporate them.[120]

4.33 Where part of the movement is by road and international carriage is involved then the CMR Convention is likely to apply. Clause 5(d) seeks to encourage the possibility of severance of offending clauses[121] by stating that the conditions shall be treated as modified to such extent as may be necessary to give effect to the Convention but no further. The circumstances of a container movement by Freightliner to or from the continent will tend to mean that CMR will more likely apply to those parts of the continental movement which involve international carriage. CMR terms might, however, be provided for the whole movement on a contractual basis. The application of CMR to containers is not without difficulty. A central issue is whether a container despatched under CMR constitutes goods within the meaning of Article 1 of the Convention. On principle there would seem no reason why a container should not be treated as goods whenever it has not been supplied by or on behalf of the carrier.[122] Furthermore it would seem likely that despatch of a container load of goods would amount to a single consignment so that the CMR limit in Article 23(3) would be applied to container and contents as a whole and not separately to the value of the container and to the value of the goods. However where the container only is damaged or the goods only are damaged the limit would then be applied separately.[123]

4C CARRIAGE BY RAIL—INTERCONTAINER-INTERFRIGO (ICF) GENERAL CONDITIONS APPLICABLE TO COMBINED TRANSPORT 2000

4C.1 INTRODUCTION

4.34 Whilst some container movements were marketed by RfD on its own behalf, continental movements were mainly marketed by Intercontainer-Interfrigo (ICF).

119. The definition contained in UR ATMF.
120. See e.g. DB Schenker Rail Deutschland AG for International Carriage by Rail 2007, cl. 1.1.
121. See above, 2.31 *et seq*.
122. See further Clarke, CMR, para. 11, *cf* Hill and Messent, para. 1.6.
123. See Art. 25(2)(b), see further Clarke, CMR, para. 97b.

ICF was an autonomous subsidiary of 26 European railways and a marketing enterprise for international container services supplied by the participating railways. Formerly the railways themselves or their container divisions[124] or subsidiaries acted as local agents on behalf of ICF,[125] but the increasing practice of ICF was to market services directly through subsidiaries and joint ventures. Deregulation of the European transport market enabled ICF also to engage in domestic traffic activities through subsidiaries or joint ventures. The company was engaged in the movement of both containers and swap-bodies Europe-wide, whether organised by itself or under joint service arrangements, and also provided links to other container services such as the Trans Siberian Railway.[126] More recently it had begun to move semi-trailers. Traction would be supplied by the railway and the wagons via ICF. The company went into liquidation and ceased business in February 2011. Parts of its network have been absorbed into the services of various independent companies, such as InterRail Holding AG owned by the Transinvest group as well as into services operated by, or by companies owned by, national railway undertakings. In addition several European companies have extensive networks available for container movement by rail e.g. Rail Link Europe. A great variety of companies and services may thereby be involved in carriage of containers by rail today and can provide services which form part of a movement linked to the UK. The rail infrastructures of continental and UK networks can be linked on the basis of contracts made by freight forwarders, road carriers, railway undertakings and sea carriers. The link can be by sea through lo-lo services or via the Channel Tunnel. Operators marketing a service can obtain traction or access block train or wagon services. Alliances of operators may enable a tailored service for major companies or provide scheduled services marketed more widely. For UK trades via the Channel Tunnel companies such as Eurotunnel (for infrastructure), Europorte (mainly for traction) provide the basic platform for services operated by e.g. GB Railfreight[127] and DB Schenkers contracting the service but making use of traction services provided by Europorte. These are apart from the carriage of road freight vehicles considered further below. Although Intercontainer no long exists, the comprehensive nature of the conditions used by it provide a useful background for discussion especially in the context of a company standing between the customer and the supplier of traction which is true of many of the companies operating in the sector today. For this reason the material on these conditions from the first edition of this book has been retained and comparison with operators' conditions, particularly those of Rail Link Europe[128] is made as appropriate.

4.35 Also retained are some of the older conditions used by Interfrigo. In 1993 the original Intercontainer Company (founded in 1967) merged with Interfrigo (founded in 1949) which was a similar subsidiary of the railways providing temperature-controlled transport services. This necessitated a complete revision of the previous General Conditions of Business 1990. Services then became divided

124. Such as RfD.
125. See below Art. 1 of the Conditions.
126. See now InterRail.
127. A subsidiary of Europorte.
128. www.rail-link-europe.com/conditons-generales.php.

between the provision of combined transport services marketed under the brand name Intercontainer, and services involving the transport and hire of temperature-controlled wagons marketed under the brand name Interfrigo. Prior to this development Interfrigo engaged both in the organisation of specialised wagon transport and the transport of specialised containers and swap-bodies. This involved the use of separate conditions for the different parts of the Interfrigo business. The Conditions Applicable to Transport of Transcontainers Fitted for Controlled Temperature 1973 covered container and swap-body services. Although these old INTERFRIGO Conditions are no longer in use some of its provisions are reproduced to provide a basis for some points of comparison and as part of the context of the ICF Conditions. The General Conditions for Combined Transport 1994 (Intercontainer) included provisions relevant to the transport of containers and swap-bodies fitted for controlled temperature and replaced the previous Interfrigo conditions in this respect. This is true also of the later conditions which are examined below. The General Conditions Applicable to Transport in, and Use of, Wagons Fitted for Controlled Temperature 1994 covered transport in specialised wagons and, apart from covering long-term rental of swap-bodies, were not relevant to container transport. These latter conditions are not, therefore, examined in detail. In many respects they now provide conditions similar to those in the Combined Transport Conditions.

The Intercontainer Conditions 1990 were divided into the General Conditions *4.36*
dealing with a basic service and special conditions for ancillary services. The 1994 Conditions were designed to be shorter and more compact and this carried over into the later conditions. All services were therefore drawn into the General Conditions but a distinction could still be discerned between the basic service which consisted of the movement of a container or swap-body by rail and additional services such as provision of the container or handling and haulage services. The conditions consisted of 58 clauses divided into 12 articles. By clause 57 the General Conditions were governed by Belgian law. This clause also stated that only the courts of the defendant's domicile or registered office shall be competent. In view of the fact that ICF had its registered office in Belgium the conditions were published in the official languages of Belgium (German, French and Dutch) and in English. By Clause 58 all four versions had equal validity.

4C.2 DEFINITIONS AND PREAMBLE

ICF General Conditions, clauses 1–6 *4.37*

1. Intercontainer-Interfrigo (abbreviated to ICF) is a forwarding agent under Belgian Law.[129] It organises its activities with the railways, road hauliers, inland waterway or marine shipping companies and suppliers of ancillary services by the intermediary of its local representatives, a list of whom is obtainable on request.

129. See 4.38.

2. These General Conditions apply to combined transport and ancillary services marketed under the name of "Intercontainer".[130]
3. "Combined transport"[131] comprises all transport of UTI (*Unité de Transport Intermodal* = intermodal transport unit): large containers or swap-bodies of all types, containers or swap-bodies fitted for controlled temperature (particularly mechanically refrigerated, refrigerated and insulated), similar units, semitrailers, etc.[132]
4. "Ancillary services" comprise in particular:
— terminal services inherent in combined transport (handling and road haulage);
— provision of UTI;[133]
— information concerning any irregularity occurring during transport of UTI fitted for controlled temperature;
— supervision of the working of the machinery and maintenance of the required temperature of mechanically refrigerated UTI during transport.[134]
5. The terms "principal" (party giving the order) and "receiver" (beneficiary) refer to the principal and receiver themselves or to any agent they may appoint.[135]
6. The term "client" denotes the freight payer, who, except with the prior agreement of ICF, can only be the principal or the receiver.[136]

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130. Under the 1990 conditions the customer was also held bound to the regulations and conditions of the railway administrations, the representatives appointed by Intercontainer and their subcontractors provided that these did not conflict with the Intercontainer conditions. This provision was omitted from the 1994 conditions, presumably because the guarantee provided in cl. 30 (see Art. 6 below at 4.50) was considered to be sufficient. By cl. 56 in Art. 12 no derogation from the conditions was binding on ICF unless it was based on a written agreement signed by two Directors of ICF.

131. Compare the definition of combined transport used by UN/ECE and ECMT which includes the initial and final legs by road (*cf* also GTC-CIM cl. 1(h)).

132. Compare the definition of ITU in Art. 1 of Rail Link Europe conditions and DB Schenker ALB, cl. 12.

133. See below, Art. 4, at 4.46.

134. See below, Art. 7, at 4.52.

135. As was the case in the 1990 conditions a distinction was drawn between the principal, the receiver and the person who is to pay the freight and, as before, many of the conditions are addressed to or directed at the principal. The 1994 and these conditions more clearly indicated that the principal is the person who gives the order for transport and thus is the co-contractant of the carrier. This may clarify the confusion and difficulty that can surround the more traditional concept of a "sender" used in respect of road and rail carriage whether in English or Belgian law. As to the latter see J. Putzeys, *Droit des Transports et Droit Maritime* 1989, para. 184. The receiver is indicated as the beneficiary who, under Belgian law, can acquire rights under the contract of carriage along with the sender. The clause refers also to the agents of these persons. The intention behind this is not immediately clear. It may have been intended to ensure that the principal and receiver remained responsible for the acts of their agents especially where the conditions made reference to acts of such nature as may be performed by an agent. Alternatively it might have been intended to make the agent responsible as if he were the principal. If the latter was intended there was the further difficulty of whether the responsibility was intended to be joint with the agent's principal or was imposed on the agent alone. By cl. 54 of Art. 12 the principal was deemed to act validly on his own behalf and on behalf of the legally entitled parties. Presumably this was intended to provide a basis for the equivalent to a warranty of authority. More particularly this clause went on to provide that the principal expressly recognises the General Conditions in force at the time of the consignment which are assumed to be known to and accepted by the client. The "client" was the freight payer, as indicated by cl. 6.

136. Notwithstanding the identification of a "freight payer" under this clause, cl. 48 in Art. 10 made the principal jointly liable for freight along with this person and with a right of recourse should this person default on payment. There was, in addition, a right to require a guarantee from the principal or freight payer given by cl. 49. Furthermore cl. 50 in Art. 10 granted a lien on all property, documents and monies handed to it for carriage for all debts due from the designated freight payer, from the principal himself or the owner of the goods. Clauses 45–47 in Art. 10 provided for payment within 30 days of issue of invoice without right of set-off and interest of 12% per annum should there be default after that time.

4C.2.1 Introductory conditions

The definitions in Article 1 of the ICF Conditions reproduced above can be compared with those contained in the conditions adopted by Rail Link Europe.[137] Article 1 of these conditions provides for a much wider range of persons to be bound than under the ICF clause, including, among others, the consignor, freight forwarder, principal, bearer of "this" document (i.e. the document representing the agreement between Rail Link Europe and the customer) and others linked to the document as consignee or assignee. Article 2.2 provides that all of these persons have joint and several liability for proper fulfilment of the obligations incumbent on the customer in the scope of the document. By Article 2.1 the customer, through acceptance of the provisions in the document, confirms that the services provided are subject to the conditions. The definition of Intermodal Transport Unit (ITU), in Article 1, is similar to the definition adopted by the ICF Conditions but ensures that associated equipment is included by providing for the inclusion of any container, movable tank, swap-body or any assimilated equipment (including under controlled temperature, in particular refrigerated, coolant and insulated equipment) used to consolidate the Goods and any related or connected equipment. *4.37.1*

4C.2.2 Classification of the contract

The original conception of Intercontainer was as agents organising rail transport of UTI rather than as carriers, whether undertaking to carry or accepting responsibility as carriers. They were transport agents in the sense understood by Belgian law, i.e. as a *commissionnaire-expéditeur.*[138] They undertook to make contracts with the railways and other operators on behalf of the principal but acted in their own name. They contracted directly with such operators and no privity of contract was established between the principal and such operators. Protection for the principal was provided by rights such as the right to an assignment of a claim under the contract between ICF and the relevant transport operator. By the annual report of 1999, ICF had begun to be described as a pan-European network operator offering one-stop shopping. Whilst these conditions still referred to ICF as a forwarding agent under Belgian law,[139] ICF accepted direct liability in respect of the goods and/or UTI.[140] This may have had the effect of placing them in the position of being regarded as a different type of forwarder under Belgian law. That is, a *commissionnaire de transport* whose legal responsibility is assimilated to that of a carrier. This will be of particular relevance to the application of Belgian law to the operation of uniform laws such as the CMR Convention.[141] By English law the interpretation of the terms of the contract may, under rules of conflicts of law, be a matter of Belgian law even where a uniform law such as the CIM Rules is applicable to the *4.38*

137. www.rail-link-europe.com/conditons-generales.php
138. See J. Putzeys, *Droit des Transports et Droit Maritime* 1989, and Libouton, in *Les auxiliaires de transport dans les pays du marché commun*, IDIT 1977.
139. See below cl. 43 in Art. 9, at 4.56.
140. See below cl. 41 in Art. 9, at 4.56.
141. See further, *Hill and Messent*, para. 1.51.

contract.[142] Where an issue of uniform law is involved, however, the application of that law is a matter of English law where an English court takes jurisdiction.[143] It may be arguable therefore that any issue of how to classify the particular contract made by ICF in a particular case would have depended also upon the proper interpretation of a uniform law in accordance with the principles adopted in the English courts as appropriate to the interpretation of such laws. This is because such uniform laws apply to a contract of carriage and the question may arise how such a contract is to be defined as a matter of uniform law and whether, in the light of the definition, the contract made by ICF could have been recognised as properly falling outside that definition.[144]

4.39 This question of the application of uniform law is directed to the issue of whether an operator such as ICF is acting as an agent or carrier for the purpose of whether the contract can be regarded as a contract of carriage for the purpose of a particular uniform law such as URCIM. Also relevant to this question of classification is whether the operator's contract is truly one of carriage or one of chartering. Services such as those provided by companies such as ICF or Rail Link Europe can involve the wholesale provision of block trains on contracts analogous to voyage or time charters. This was considered recently in *Intercontainer Interfrigo SC (ICF)* v. *Balkenende Oosthuizen BV* by the ECJ[145] in respect of the application of the Rome Convention.[146] ICF had contracted to make train wagons available to a customer and to ensure their transport by the rail network. The argument was that this was not a contract of carriage for the purpose of Article 4(4) of the Rome Convention. The court accepted that this provision applies not just to voyage charterparties but also to other contracts the main purpose of which is the carriage of goods even if they might be classified as charterparties under national law.[147] The court drew a distinction between simply making the means of transport available and carriage of goods proper.[148] This appears to be a distinction between hire of the vehicle as such and provision of the vehicle and crew. As is effectively acknowledged by the court this distinction might not be the sole distinction made by a national court and this may equally be true of the interpretation made by courts of the concept of a contract of carriage for the purposes of uniform law.[149]

4.40 Returning to the issue relevant to the possible intermediary nature of such contracts, Article 4.1 of the Rail Link Europe conditions indicates that this company agrees to organise and accomplish forwarding/transport of ITU handed over by the customer, mainly by rail, from the agreed pick-up location to the destination, and to organise and perform the ITU loading and unloading operations. Although the

142. *Cf Bofors-UVA (A.B.)* v. *Skandia Transport* [1982] 1 Lloyd's Rep 410.

143. See, however, cl. 57 noted at 4.36. This will be subject to the right of a court to take jurisdiction under a relevant uniform law.

144. *Cf Aqualon (UK) Ltd* v. *Vallana Shipping Corp* [1994] 1 Lloyd's Rep 669. See further the discussion of Art. 9 below.

145. (Case C-133/08) [2010] 2 Lloyd's Rep 400.

146. See 2.3.6.

147. At [34].

148. At [35]. See further the reference made in argument at [28] to short-term charterparties. The court made no reference to this possible further distinction.

149. *Cf* the discussion above, at 3.83 *et seq*.

conditions are governed by French law, which also makes use of a concept of *commissionnaire de transport*,[150] it would appear to be likely that a carrier role is anticipated rather than that of an intermediary, which perhaps reflects the more direct role that operators are now able to play in marketing rail transport in current conditions in Europe.

4C.3 OFFERS AND AGREEMENTS

ICF Conditions, Article 1, clauses 7–10 *4.41*

7. Unless otherwise stipulated by ICF, its offers shall remain valid for thirty days from the date of sending, subject to the provisions of clauses 9 and 10.

These offers shall not be binding on ICF unless it has received the express acceptance of the client during the period of validity or the client has handed over a UTI to ICF within the same period, which implies acceptance of the ICF General Conditions by the client.

8. All offers and agreements, even all-inclusive, are based on the tariffs of transport and ancillary services applicable to ICF as well as all other technical and commercial factors prevailing on the date of their compilation.

9. If economic, political or technical circumstances, unforeseeable by ICF at the time of compilation of the offers and agreements and entirely beyond its control, subsequently occur and upset the balance of the above offers or agreements, thus placing an excessive burden on ICF in the discharge of its contractual obligations, ICF may require the client in writing to adjust the offers or agreements, indicating the precise circumstances and giving the reasons for its request. If, in spite of an adjustment of the offers or agreements, it appears economically impossible to maintain them, ICF may cancel them with effect on the seventh day after giving notice of cancellation in writing. This provision does not concern force majeure referred to in clause 10.

10. The clause of *force majeure* of the International Chamber of Commerce (ICC publication No. 421) applies to these General Conditions.[151]

4C.3.1 Price variation

Since ICF largely depended on making use of the wholesale services of the railways its prices were clearly sensitive to changes in tariffs applied by them.[152] These *4.42*

150. But in a different sense from Belgian Law, see above, 4.38, and Hoeks, 2.2.4.2.

151. This clause provided relief from liability to a party for failure to perform any obligation in so far as the failure was due to an impediment beyond his control and he could not reasonably be expected to have taken the impediment and its effects into account at the time of the conclusion of the contract and he could not reasonably have avoided or overcome it or at least its effects. The clause gives examples of such impediments as war, natural disasters or strikes, imposes a notice requirement and makes provision in respect of the relief available including the possibility of either suspending performance or terminating the contract. Unlike other similar provisions (*cf* cl. 9 above), as incorporated by cl. 10, it could have provided relief to both parties to the contract and not solely ICF. GTC-CIM, in cl. 3.2 provides for total or partial suspension of performance when traffic restrictions come into force. For Rail Link Europe, compare Arts 11.2 and 12.2 which distinguish between situations where additional expense is required and situations where modifications are required.

152. Compare the price terms used by current operators, e.g. Rail Link Europe, Art. 5, DB Schenker prices and terms, provision 3, and DB Schenker ALB, cl. 1.3 and DB Schenker AG, cll. 1.3 and 1.4.

clauses therefore limited the amount of time an offer could stay open and remain valid and provided further protection for ICF should there have been a change in the circumstances on which its offer was based. It is unclear how long the right to make the adjustments permitted by clause 9 was to continue. The reference to "agreements" suggests that an adjustment could have been made after the conclusion of the contract. The limited right to cancel provided by this clause can be distinguished from the more general right to cancel for breach of the conditions provided by cl. 55 in Article 12 and where circumstances of force majeure operate as indicated by cl. 10. Further provision for circumstances frustrating performance were contained in Article 8.[153]

4C.4 ORDERS AND INSTRUCTIONS

4.43 **ICF Conditions, Article 2, clauses 11–17**

11. Before UTI are entrusted to ICF, details of the composition of the consignment (length and weight of the UTI) shall be communicated to the ICF agent in good time, so that he can take the necessary steps for furnishing the services requested (provision of wagons, handling, road haulage, etc).
12. For each consignment to be entrusted to ICF, the principal shall complete a form entitled "Transfer Note" (obtainable on request from ICF local agents) and attach all the documents required by Customs and other administrative authorities for the transport. The handing over of UTI, accompanied by signed and dated Transfer Note(s), constitutes the transport order.
13. Before completing the Transfer Note, the principal shall ensure that the conditions of acceptance and delivery requested in the Transfer Note can be provided by consulting the "list of terminals and stations open to Intercontainer traffic", obtainable from ICF on request.
14. The principal shall be responsible for entries made by him on the Transfer Note. He shall bear any consequences arising from the incorrectness or absence of such entries.[154] The same grounds for responsibility of the principal as well as delay in handing over the documents shall apply to documents required by Customs and other administrative authorities for transport.[155] Without prior agreement, ICF shall not involve itself in the carrying out of these formalities and shall not be responsible for the erroneous raising of duties, taxes, charges etc, by these authorities.[156]
15. Division of charges and special prepayment provisions are not allowed, and consignments may not be made subject either to declarations of cash on delivery or disbursements.[157]

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153. See 4.54.

154. The expression of responsibility in this clause and the requirement to bear any consequences suggested an obligation to indemnify ICF for the consequences of error in the Transfer Note (*cf* Contracts, Part 4, para. 4.1.2.18). The responsibility was that of the principal. Compare further Rail Link Europe, Art. 7.

155. Compare the URCIM, Art. 15, see Clarke & Yates, para. 2.515.

156. Compare the CIM Rules, Art. 26 (see Clarke & Yates, para. 2.178), which expressly made the railway liable for the carrying out of Customs formalities. URCIM Art. 15 (see previous footnote) is less specific but appears to be to the same effect.

157. Compare the CIM Rules, Arts 15 and 17, see Clarke & Yates, paras 2.103 and 2.117. These now compare with the much simplified provisions in URCIM Arts 10 and 17.6, see Clarke & Yates, paras 2.504 and 2.519.

16. ICF is not required to verify the accuracy of information given on the Transfer Note or in the instructions or other documents submitted separately.[158]
17. Alterations to orders and instructions entered on the Transfer Note shall be accepted only if they are requested in writing from the ICF local agent in good time and in the manner required by ICF ("Request for Modification to the Instructions of the Transfer Note"). Only written acceptance of this request shall mean that ICF will endeavour to carry it into effect, taking into account the capabilities and regulations of each carrier. Only the principal shall be authorised to modify the instructions. However, these may also be modified by the receiver if the receiver is also a client of ICF for the transport in question and provided that the new station of destination is situated in the same country of destination. The client shall bear the costs arising from such alterations.[159]

4C.4.1 The ICF Transfer Note

4.44 Under the 1990 conditions the Transfer Note was given greater emphasis since the conditions provided that it was to be used to confirm both delivery to and by Intercontainer. Although this was no longer indicated in the extracted conditions the then current copy of the Transfer Note itself indicated that only when the principal received back a copy of the consignment note, duly signed and dated by the local agent, was the consignment officially accepted for carriage. This may have been ineffective unless brought back into the conditions although it must be said that the usual course of dealing of Intercontainer was likely to have been well known. The Transfer Note was clearly an important vehicle of information for the transport and administrative operations to be performed especially as information on it will need to be relayed to the performing transport operators. Furthermore it was recognised as a customs document for use under simplified procedure in EC and EFTA countries. Nevertheless ICF were not required to verify the accuracy of information on the Transfer Note or other documents which is true also of Rail Link Europe.[160] Under older ICF conditions details on the Transfer Note were not to provide proof against Intercontainer of loss or damage. This did not appear in the latest conditions.[161] Where the transport is governed by URCIM, Articles 6–8 deal with the creation and contents of the consignment note.[162] In addition the GTC-CIM make clear that, unless otherwise agreed, the completion of the consignment note is the responsibility of the consignor.[163] Note also that the GTC-CIM make provision for the consignment note to be created as an electronic record[164] in accordance with Article 6.9 of URCIM.[165] This is under development along with

158. Compare Rail Link Europe, Art. 7.5.
159. It would seem to be uncertain whether the last sentence refers back to the whole clause or only to the sentence immediately preceding it. If, as seems likely the intention is that the client (see above cl. 6) must pay for all alterations whether or not made by him this should be made clearer.
160. See Art. 7.5.
161. *Cf* Freightliner Conditions, cl. 6(b), see above, 4.16.
162. See Clarke & Yates, paras 2.493–2.501.
163. See cl. 4.1. Clause 4.2 refers to the GLV-CIM (the CIM Consignment Note Manual published by CIT) which contains the instructions for use of and the information required for the CIM consignment note. See further DB Schenker AG, cl. 2.
164. Clause 4.3.
165. Based on the concept of functional equivalence.

discussions for a new Article 7A in CIM which will give greater emphasis to the e-consignment note.[166]

4C.5 DANGEROUS GOODS

4.45 ICF Conditions, Article 3, clauses 18–20

18. Before entrusting consignments of dangerous goods to ICF, it is mandatory to give at least 24 hours' notice.
19. For consignments of dangerous goods, the principal is required to make all the necessary declarations and to comply with all the conditions prescribed by the prevailing national and international regulations, particularly the RID,[167] ADR[168] and CSC[169] international conventions, with a view to taking the special measures required for this type of transport.
20. The principal shall bear all the consequences for failure to make such declarations and non-compliance with these conditions. Furthermore, he shall be responsible for any loss or damage, any delays or costs that may result from the acceptance of these goods, their transport and any related service.[170]

4C.6 PROVISION OF UTI

4.46 ICF Conditions, Article 4, clauses 21–24[171]

21. ICF shall endeavour to meet orders for UTI necessary for transport. Without a formal undertaking on its part, ICF shall assume no responsibility if UTI are unavailable or are provided late or if they are refused in accordance with clause 22. Provision of UTI shall entitle ICF to raise a charge or is subject to special conditions determined in each case.

166. See CIT Info 1/2012: www.cit-rail.org/media/files/public/CIT-Info_EN/2012/CIT-Info1_2012_EN.pdf.

167. Appendix C of COTIF.

168. The Agreement on the Carriage of Dangerous Goods by Road.

169. The International Convention on Safe Containers 1972. This provides rules in respect of general container safety rather than specifically in relation to carriage of dangerous goods.

170. The second sentence suggested a responsibility beyond the consequences due to the failure of the principal to comply with the conditions indicated in cl. 19, compare Art. 9 of the Rail Link Europe Conditions, especially Art. 9.4. The 1990 Conditions also granted a right to unload, destroy or render the goods harmless where there had been default in respect of the conditions indicated. Such a right is granted to the international carrier by road by Art. 22 of the CMR Convention (see Clarke & Yates, para. 1.136) and Art. 9 of URCIM (see Clarke & Yates, para. 2.502). Compare further DB Schenker ALB, cl. 9.

171. Compare Art. 8 of the Rail Link Europe conditions. These conditions anticipate transport of the ITU supplied and loaded by the customer. Compare further DB Schenker Intermodal provisions which essentially provides for carriage of the loading unit although customers can be provided with containers. GTC-CIM, cl. 5 deals with the possibility of the supply of wagons and ITU etc. to the customer. Clause 5.1 makes explicit the responsibility of the customer for the accuracy and completeness of his request (*cf* DB Schenker ALB, cl. 4.2).

22. The user (principal or ordinary hirer or legally entitled parties) shall inspect the UTI before loading.[172] This inspection must also include checking the working of the refrigerating system of UTI fitted for controlled temperature.[173]

The equipment may be refused if it is defective or unfit for conveyance of the merchandise to be loaded therein. Failing such refusal, the equipment supplied shall be deemed in good condition and fit for the transport in question. If the refusal is not communicated in the 24 hours (Sundays and public holidays excluded) following the supply of the equipment, the user shall be liable for possible demurrage charges as well as a daily compensation based on the daily rent applicable to this type of UTI, and if applicable, on the daily wagon standage charge.

23. The user shall be responsible for the careful treatment of the equipment placed by ICF at his disposal. He shall be responsible to ICF for any damage to said equipment while it is in his custody or in the custody of entitled parties, and he shall be required to compensate ICF for the replacement value of the UTI in the event of its destruction or loss.

Any UTI not returned within three months of the date of provision or by the end of the period of hire shall be considered lost. The aforementioned damages comprise direct damage to the equipment and loss of income due to repairs.

24. The user shall make every effort to return UTI to ICF in good condition, cleaned and, if necessary, disinfected or deodorised, with the motors stopped and the doors closed, either by the receiver after unloading or by the user at the end of the period of hire. If the user fails to comply, ICF shall have the aforementioned work undertaken at the user's expense. A daily compensation corresponding to the daily rent applicable to this type of UTI shall be payable to ICF for late restitution of UTI.

4.47 These provisions dealt with the position where the container or other UTI was provided by ICF. They applied in addition to those in Article 6[174] which also applied to where a UTI supplied by the customer was utilised. Unlike Article 6 these provisions were addressed to the user who was defined as either the principal or ordinary hirer or legally entitled parties. This would seem intended to catch the possibility that the container might have been hired to an operator such as a forwarder who made it available to his own customer who then contracted as principal with ICF or where the principal was utilising ICF as a subcontractor in respect of the goods of the principal's customer and then made the container available to him. A natural reading might suggest that each of the persons referred to was capable of identification as a user without necessarily taking on the status. This might then suggest that a principal would not have been responsible under this Article for the acts of some other (such as a hirer) who could be identified as the user. A difficulty was to determine how to identify persons who in fact acquired this status. The definition used in the 1990 edition defined the user as the person who loads the container (on departure) and unloads it (on arrival). The reference to

172. Compare GTC-CIM, cl. 5.2.

173. Where UTI were delivered to ICF cl. 29 of Art. 6 (see below, 4.50) made clear that the inspection was purely external and limited the obligations of ICF in respect of the detection of possible roof or floor damage. No such limits are indicated in cl. 22 and it must be clear that the principal was bound to undertake both an internal and external inspection. Nevertheless the extent to which the UTI would be deemed to be in good condition would most likely depend upon what could reasonably be expected from the principal both in terms of the extent of the inspection and the level of skill that could be expected to be employed in respect of it. Authority in respect of carriage by sea suggests that a clause such as this may be interpreted as requiring only the level of inspection that can be expected of an unskilled person, see *Marbig Rexel Pty Ltd* v. *ABC Container Line NV (The TNT Express)* [1992] 2 Lloyd's Rep 636, Sup Ct NSW (see below, 4.116).

174. See 4.50.

"legally entitled parties" suggests that, as before, the intention was to attach the status to persons in possession of the container. However, having identified a person as a user, the fact that the container passed into the possession of another party did not remove the status of user from a person initially identified as such as was made clear in clauses 23 and 24. This further confused how the user was to be identified especially as a party "legally entitled" might be a "user" within clause 22 and yet be contrasted with the user in clause 23. The intention may have been to make all the persons indicated in clause 22 jointly responsible as a user. The reference to a party "legally entitled" clearly included a person who did not directly contract with ICF whether as principal or hirer (a point made expressly in the 1990 conditions). This was made clear by and necessitated the protection provided by clause 54 of Article 12.[175] The reference to a party "legally entitled" suggested, in the context, a condition of lawful entitlement to the possession of the container for the purposes of the contractually agreed operation. The 1990 conditions made clear that the user may not transfer the container to third parties. It may be contemplated that sufficient protection against this was provided by the duty of careful treatment placed on the user by clause 23 or was readily to be implied. Similarly the provision in the 1990 special conditions (Article 38) which gave an entitlement to recover possession of the container for breach of the conditions might have been thought to be superfluous in light of the right to cancel an agreement provided by clause 55. Equally the 1990 special condition (Article 39) which indicated that possession of the container gave no right to ownership might have been thought to be too obvious to require stating in the later conditions.

4C.7 USE OF WAGONS

4.48 **ICF Conditions, Article 5, clauses 25–28**[176]

25. If the principal requires a specific type of wagon or placing of UTI on wagons in a particular fashion, ICF shall endeavour to satisfy such requests without formal undertaking.
26. If the principal or the receiver loads or unloads the UTI from the wagon himself, he shall be required to comply with all the railway regulations and to bear all the consequences of inadequate loading or unloading.
27. If the loading or unloading periods allowed by the tariffs of the railways are exceeded before or after railway transport, the party responsible (principal or receiver) shall pay "demurrage charges" directly to the railways for their wagons or to the wagon owner for privately owned wagons.

If demurrage charges are debited to ICF by the railways or other wagon owner, because ICF appears as consignor/consignee in the consignment note, ICF shall pass them on to the client.
28. On the other hand, when transport is effected with wagons from the ICF fleet and the loading and unloading periods mentioned in clause 27 are exceeded, or if such wagons are delayed in transit through the fault of the principal or the receiver, ICF shall invoice "private

175. See above, fn. 135.
176. Compare GTC-CIM, cll. 5 and 6. Clause 6 envisages that normally loading is undertaken by the consignor and unloading by the consignee and this includes loading and unloading of intermodal transport units on and off the wagon. See also DB Schenker ALB, cl. 4.

wagon standage charges", the rates of which will be communicated to the principal on request.

Demurrage charges for wagons parked on railway lines shall be based on the prevailing tariffs of the railways.

4.49 These provisions reflected the fact that wagons might be supplied either from the ICF fleet (owned or hired by ICF) or directly from a railway or wagon operator.[177] They made clear to the customer the possibility of demurrage charges whenever the periods laid down in the railway tariffs were exceeded.[178] The second sentence in clause 27 reflected the usual practice whereby ICF was named as consignor on the international consignment note, so that unless a direct arrangement had been made by the customer with the railway or other operator in respect of wagon supply ICF would be responsible to the railway for such charges. Under the 1990 conditions Intercontainer reserved the right to unload the transport stock and to raise the charges thereby incurred. This would ensure that notwithstanding that it would normally be the receiver's obligation to unload from the wagon, Intercontainer could obviate potential delay by performing the task itself. Only loading of the container, however, was indicated as being subject to the possibility of express agreement. This provision was omitted from the later conditions which simply referred to "handling" as an "ancillary service".[179] The transfer note, however, indicated a variety of possible arrangements which could be selected by making the appropriate entry on it. Thus the customer could select that both loading and unloading at the terminals was to be performed by ICF through its terminal agent or by itself.

4C.8 CONDITION, LOADING, STORAGE OF UTI

ICF Conditions, Article 6, clauses 29–33 *4.50*

29. UTI shall undergo inspection before they are handed over to ICF by the principal. This is a purely external inspection carried out from the ground with the doors closed. Consequently, ICF is under no obligation to detect possible roof or floor damage or to examine the loading of the goods in the UTI.[180]

30. The principal shall be liable for any consequences arising from the inadequate condition or overloading of the UTI. He shall guarantee to ICF that the UTI and its loading comply

177. Compare DB Schenker AG, cll. 1.2.1 and 1.2.2.

178. See e.g. DB Schenker Intermodal Provisions, provision 8, and ALB, cl. 4.3.

179. See cl. 4 above.

180. This limits any implication as to the condition of the container derived from acceptance of it without comment. In some respects this may be more limited than what might be viewed as apparent damage. Article 11.3 of URCIM states that when the consignor loads the goods himself he is entitled to require the carrier to examine the goods and their packaging but this depends on the carrier having the appropriate means to carry it out (see further Clarke & Yates, paras 2.506 and 2.512 and compare Art. 19 of the former CIM Rules, Clarke & Yates, para. 2.127). Presumably having the appropriate means would also qualify Art. 14 by which the consignor is liable for defective packing unless the defectiveness was apparent (*cf* in respect of roof damage, *Lufty Ltd* v. *Canadian Pacific Railway Co* [1974] 1 Lloyd's Rep 106, see above, 3.27).

with all applicable standards and regulations[181] and that it is resistant enough to satisfy the requirements both of transport safety and handling.
31. The principal shall bear any consequences of inadequate loading of the UTI or packing of its contents. UTI loaded with goods subject to special regulations or packaging techniques must comply with these regulations or techniques.
32. The principal shall bear any consequences, even indirect, in the event of loss, shortage or theft of goods arising from failure to lock and seal the UTI properly or from a defect in the locks or seals.
33. If UTI are left by the receiver on the installations or wagons after delivery, typically in the case of delivery on a private siding, immediate instructions for their reforwarding shall be given. Storage charges for UTI arising from the absence of instructions shall be passed on by ICF to its client.[182]

4.51 The ICF provisions were largely concerned with the basic position where the container was not provided by ICF. Nevertheless they were clearly intended and would seem to be wide enough to cover the circumstance where the UTI was provided by ICF, the conditions in Article 4[183] being supplemental to these provisions. Thus even if the UTI was provided by ICF the principal remained liable for any consequences arising from its inadequate condition, the acceptance of the UTI leading to an assumption that it was in good condition under clause 22. Article 6 was, however, addressed to the principal whereas Article 4 was addressed to the user. The Rail Link Europe conditions are more clearly directed to customer supplied ITU especially through Article 8.5 of the conditions, which requires that the customer guarantee that ITUs supplied are suitable for transport, storage and handling operations planned and fulfil all the safety and capacity criteria stipulated by national and international laws, regulations and Conventions. The remainder of Article 8 makes the customer solely liable for the packaging, packing, sheeting, securing and stuffing of the goods, as well as closing ITUs and affixing seals; requires the customer to guarantee that the condition of the goods and ITU closing and sealing allow safe transport and that the goods are packed, packaged, secured, marked or countermarked so as to withstand transport and/or storage, as well as successive handlings which may be required during performance of the operations; makes the customer solely liable for stuffing the goods in a refrigerated ITU, faulty indexing of the required temperature or malfunction of the refrigerated ITU, and finally, provides that the company shall not be obliged to check condition, quantity, weight, nature, packaging, securing or packing of the goods or information provided or documents submitted in this respect by the customer. The ICF conditions drew a distinction between liability for the consequences in clause 30 and a requirement to "bear" consequences in clauses 31 and 32. The former clearly provided a basis for compensation to ICF whereas the latter suggested a basis for exclusion from liability in respect of the matters indicated. The intention would appear to have been to express a potential exclusion not merely on behalf of ICF but others involved in the transport. The 1994 and the extracted conditions were, in part, a simplification of the 1990 conditions and these made clear that an exclusion was intended on

181. Such as those indicated in cl. 19 above. *Cf* DB Schenker AG, cl. 6. Compare generally, Rail Link Europe GC, cl. 8 imposing responsibility on the customer.
182. See cl. 6 above.
183. See above, 4.46.

behalf of Intercontainer, its subcontractors and agents. The previous conditions, by clause 33, denied responsibility for any security surveillance during storage of loaded or empty UTI on railway property or transhipment points. This clause was deleted from the later conditions in line with the more extensive responsibility accepted by ICF.[184]

4C.9 UTI FITTED FOR CONTROLLED TEMPERATURE

ICF Conditions, Article 7, clause 34 *4.52*

34. This concerns transport of insulated, refrigerated or mechanically refrigerated UTI. Such transport can be effected with or without temperature supervision and with or without transport supervision. It is understood that the transport of the UTI without temperature or transport supervision is assimilated to the transport of UTI not fitted for controlled temperature.

The provisions of clauses 29 to 33 shall apply by analogy.

4.53 Article 7 also contained provisions in clauses 35–37 in respect of such specially equipped UTI where these were not supplied by ICF. ICF provided two alternative services. Either:

(i) the provision of temperature and transport supervision which by clause 35 consisted of transport by fast and priority services, supervision of machinery and temperature level and informing the principal of any irregularity occurring during transport; or

(ii) transport supervision without temperature supervision which by clause 36 comprised transport by fast and priority services and informing the client of any irregularity occurring during transport. It is unclear why the reference in clause 35 was to the principal whereas in clause 36 it was to the client. By clause 37 the principal was required to ensure that the machinery was switched on, sufficient fuel supplied and that the temperature was correctly adjusted.

These services would previously have come within the scope of the former Interfrigo service covered by the Conditions Applicable to Transport of Transcontainers Fitted for Controlled Temperature 1973. As noted earlier[185] the Interfrigo service became largely confined to carriage involving the use of specialised wagons. Under the 1973 Conditions Interfrigo undertook the same responsibility towards the principal as laid down for the Railways providing traction and thus assumed responsibility as a carrier. Similar responsibility under these Conditions[186] became applicable to these services. A more restrictive responsibility was adopted by ICF in respect of Interfrigo wagon services under Article 5 of the General Conditions Applicable to Transport in, and Use of, Wagons Fitted for Controlled Temperature, 1994.

184. See Art. 9 below, 4.54.
185. At 4.35.
186. See below 4.56 *et seq.*

4C.10 IMPEDIMENTS TO TRANSPORT AND DELIVERY

4.54 ICF Conditions, Article 8, clauses 38–39

38. If circumstances prevent continuation of transport according to instructions received from the principal, ICF shall take any steps it considers useful or expedient. In all cases such steps shall be considered as having been taken with the principal's consent. Any additional costs, particularly those incurred in protection or preservation of UTI and their contents, shall be charged to the principal.
39. If impediment to delivery arises,[187] ICF shall notify the principal who, on his own responsibility, must issue instructions to ICF without delay as to the steps to be taken (re-forwarding, measures for preserving the goods, etc). All resultant costs shall be charged to the client.[188]

4.55 There may have been some difficulty in relating this Article to clause 10 in Article 1 above. The intention may have been that clause 10 related to events which prevented initial performance whereas clause 38 applied to events once transit had begun. No doubt ICF would have sought to employ whichever was preferred in the circumstances and, unlike clause 10, only ICF could employ clause 38. The chief object of the clause was to maintain the protection for ICF in departing from instructions and to base a right to obtain additional costs. The clause may be compared also with Article 20 of the URCIM[189] which requires the carrier to decide whether it is preferable to modify the route or to seek instructions and to seek instructions if it becomes impossible to continue carrying the goods. No requirement to notify the principal appeared in ICF clause 38[190] (as would have been required under clause 10), or to seek instructions. Under the 1990 conditions Intercontainer was expressly given discretion as to choice of transport and other services, choice of route and choice of performing operator.[191] It is possible that the exercise of any discretion in these respects would have had to depend on what discretion, if any, followed from the instructions given to ICF or whether the circumstances were such as to bring clause 38 into operation. Comparison should be made to similar terms used in combined transport documents,[192] and also forwarding conditions.[193] The 1990 conditions also contained provisions dealing

187. Rail Link Europe GC contains a provision in cl. 12.2 which refers to hindrance to transport which is hard to distinguish from cl. 11.2 unless the timing of the hindrance is significant or the level of difficulty presented. Rather than require instructions from the customer, as in ICF, cl. 39, it permits the operator to take the necessary measures and inform the customer.

188. Compare Art. 21 of the CIM Rules dealing with circumstances preventing delivery, see Clarke & Yates, para. 2.528. The 1990 Intercontainer conditions also pointed out the drastic consequences which followed once the seven days from the date on which the containers were delivered to Intercontainer has lapsed under Art. 57 of the former CIM Rules, see Clarke & Yates, para. 2.436 (see now URCIM, Art. 47, Clarke & Yates, para. 2.584). No claim for non-apparent damage discovered after that time can be made against the carrier. The principal must now discover this for himself although, given the responsibility now accepted by ICF (see s. 4C.11) this presents less of a problem for the customer. The 1990 conditions also reserved a right of sale, omitted from the later conditions.

189. See Clarke & Yates, para. 2.52.

190. In comparison with the similar cl. 11.2 of Rail Link Europe GC which does require the customer to be notified.

191. *Cf* Rail Link Europe CG, cl. 11.1. In respect of authority to use subcontractors, *cf* Freightliners Conditions, cl. 4, above, 4.11.

192. See above, 3.47.

193. See above, 2.134.

with circumstances involving the possibility of a general average contribution arising out of carriage of the container by sea. The omission from the later conditions may have reflected sufficient confidence that the same protection (such as the right to immediate payment of sums as may be required by the captain and to require the principal to sign the damage bond) could be achieved by implication.

4C.11 RESPONSIBILITY

ICF Conditions, Article 9, clauses 40–44 *4.56*

40. The responsibility of ICF begins with the handing over of the UTI and ends with the unqualified acceptance of the UTI by the receiver.[194]

Assessments of damage or loss are only binding on ICF to the extent that ICF has been duly summoned to participate in them.

41. If damage to/loss of UTI and/or goods or detriment occurs and can be localised on the **rail-based portion** of the journey of a combined (multimodal) shipment, the liability of ICF is subject, as the case may be, to the provisions of

— the Berne Convention concerning the International Carriage of Goods by Rail (CIM),

— the SMGS Agreement between several Central and Eastern European and Asian States concerning international shipments of goods by rail,

— the national legislation applicable to the railway company, for national rail shipments.[195]

42. If damage to/loss of UTI and/or goods or detriment occurs and can be localised on any other **non-rail based portion of the journey** (road, non-CIM shipping line, etc) of a combined (multimodal) shipment, the liability of ICF is subject to the provisions of the Geneva Convention concerning international shipments of goods by road (CMR).

The same applies when the portion of the journey in which damage to/loss of UTI and/or goods or detriment have occurred **cannot be determined**.

43. ICF as a forwarding agent under Belgian law is responsible for ensuring that the order issued by the principal in the Transfer Note is executed properly.

In the event of a **purely financial loss** directly involving the liability of ICF through proven fault[196] in the execution of the aforementioned order, ICF shall be liable for compensation only to a maximum of EUR 100,000 for each proven and documented financial loss.

44. If a delivery period for an entire **multimodal** shipment is guaranteed by a special written agreement, the provisions of the CMR shall apply should the delivery period be exceeded.

4C.11.1 The basis of liability

It is useful at the outset to compare the ICF conditions extracted above with those currently adopted by Rail Link Europe governing its liability for loss, damage or delay to the goods. Article 13 of its conditions starts with an exclusion of liability if goods are accepted by the customer without written, specific and duly motivated reservations sent to the company at the latest at the time of delivery, unless it involves hidden damage or losses, in which case notification may be validly sent *4.57*

194. The reference to unqualified acceptance by the receiver ties in with the strict rules governing acceptance of a consignment in CIM, see fn. 204.

195. Compare Rail Link Europe GC, cl. 13.7.

196. This would appear to place the burden of proof on to the claimant.

within three days of delivery, excluding public holidays.[197] Further exclusions are provided by which the company is not to be held liable if losses or damage to the ITU or goods are caused by the customer's fault, by an order that it gave, by an inherent defect of the ITU or goods or by circumstances beyond the control of Rail Link Europe which could not have been prevented or whose consequences could not be remedied, as well as for any loss or damage resulting from insufficient packaging, securing or blocking of the goods or inaccurate, deleted or absent marks, numbers, addressees or description of the goods.

13.4 ITUs handed over to RAIL LINK EUROPE by the customer must be in good condition. RAIL LINK EUROPE may at any time issue reservations as to the condition of ITUs which were handed over at the departure terminal. Rail Link Europe also excludes liability for loss and/or damage of ITU accessories during transport and advises the customer to take all necessary measures so that accessories (such as plates, hoses, seals, etc) are not lost or stolen. Article 13 goes on to provide that, in so far as there is liability for acts committed by agents that it has appointed, liability shall be limited to that incurred by such agents in the scope of the operation with which they are entrusted, by virtue of legal texts applicable to the transport in question, but that whenever RAIL LINK EUROPE is liable for its own actions for loss or damage, liability is limited to: 17 SDIs per kilogramme of gross missing or damaged weight, if damage occurred during the rail phase of the transport; and 8.33 SDIs per kilogramme of gross missing or damaged weight, if damage occurred during the pre/post road transport. No liability is accepted for delay and no claim for compensation can be made for indirect or successive damage such as costs of waiting and detention time, demurrage upon departure and arrival, the cost of replacement transport, damage connected with loss of profit, loss of use or late use of the goods, shutdown or delay in production, loss of image or market shares. The Article ensures that its limitations and exclusions apply whenever loss, damage or any other injury which occur between pick-up of the goods and delivery to the customer may give rise to non-contractual claims and provides for a time limit for legal action against RAIL LINK EUROPE of three months.

Under previous versions of the ICF conditions the intention was that the contract should be viewed as one of commission to procure transport services without an undertaking of direct responsibility. Apart from a duty of care to make appropriate arrangements no responsibility was accepted for the failings of operators employed for the purpose of transport.[198] The protection for the customer was provided through either an assignment by ICF to the customer of its rights of claim against a supplier or enforcement by ICF of these rights on behalf of the customer.[199]

The later conditions were much more favourable to the customer in accepting a direct liability for loss, damage or detriment subject to financial limits. They represented provisions of the kind adopted by combined transport operators[200] although with a distinctive nature. Clause 41 provided for rail transport to be largely governed by the appropriate rail Convention or legislation provided that the loss,

197. *Cf* seven days under URCIM, see Article 47.
198. *Cf* the discussion in 2.59 and Palmer, 23–006 in respect of substitutional bailment.
199. Clause 41.
200. See generally 3C.1.

damage or detriment could be localised to that portion of the transit. The reference to the Berne Convention in order to incorporate the CIM Rules was slightly inaccurate. Even by the time these conditions were in operation the appropriate reference was to the CIM Rules of the COTIF Convention. The clause omitted any reference to the current version in force, a reference to which would have enabled account to be taken of subsequent versions of this regime.[201] The clause also referred to national legislation applicable to the railway company. This was inappropriate in respect of rail carriage in the UK so far as the liability of a railway is concerned as such liability is governed by common law rather than by legislation. Loss, damage or detriment occurring during a non-rail stage as well as unlocalised loss was, by clause 42 made subject to the CMR Convention. Separate provision was made by clause 43 for purely financial loss based on a liability for fault and subject to a financial limit. Presumably this type of loss was to be distinguished from the detriment which was referred to in clauses 41 and 42 and which also needed to be distinguished from the delay covered by clause 44. A clause such as this should be viewed as a financial limitation applicable to guaranteed periods. It should not be viewed as an exclusion of liability for delay arising apart from where there is a guarantee in the context of an entire multimodal shipment. This was reinforced by the fact that clause 51[202] envisaged a potential claim for exceeding the delivery period affecting the purely rail-based portion of the journey.[203]

4.58 Given that these provisions involved the acceptance of a direct liability of a kind appropriate to a carrier it was likely that ICF would be considered to have contracted as a carrier or to have assumed responsibility as such. It also made it more likely that they would be considered to be contracting carriers for the purposes of the compulsory application of the CMR Convention. This would have been the case where there was a period of road carriage caught by this Convention and would be regardless of whether or not ICF supplied the means of transport or used a subcontractor.

4.59 In respect of carriage by rail, whilst they might generally be considered to have contracted as rail carriers, the former CIM rules of the COTIF Convention would not have applied compulsorily to regulate their liability. The fact that ICF did not supply traction meant that they could not be regarded as a Train Operating Company for the purpose of these rules. This was reinforced by the fact that a through consignment note would have been made out between ICF and the initial railway in which ICF would be named as consignor and consignee. In respect of the contract of carriage governed by this consignment note only ICF would have had the right to sue.[204] The position is substantially different under URCIM introduced by the Protocol of Vilnius 1999 in force from 1 July 2006.[205] Article 1 of URCIM applies the rules to every contract of carriage by rail falling within the criteria as to

201. *Cf* UIRR Conditions, cl. 8.3, below, 4.76.
202. See below 4.60.
203. See Art. 16 of URCIM and Clarke & Yates, para. 2.517.
204. See CIM Rules, Art. 54 and Clarke & Yates, para. 2.420; see also *OLG Dusseldorf* 4 July 1996, (1998) 23 ETL 438. Similar provision appears in URCIM, Art. 44, see Clarke & Yates, para. 2.578.
205. See Clarke & Yates, Part 2(II). See also *Bulletin des transports internationaux ferroviaires*, 3/2000, pp. 217–234.

transit there indicated. Provided an operator is regarded as so contracting there seems to be no reason why they cannot fall within its compulsory rules especially given the relaxation of rules governing the consignment note and lists of lines. Consequently, by Article 6[206] it is possible to challenge the accuracy of the consignment note without affecting the validity of the contract of carriage which can remain subject to the Rules. In consequence, and as under the CMR Convention it should be possible to challenge the non-compulsory application of the Rules to a contract made with an operator such as ICF by asserting that they have, in fact, contracted to carry by rail for the international rail sections over which the goods travel. The fact that a consignment note has also been issued by a railway undertaking to the operator should make no difference. This would seem to be equally true of Rail Link Europe.

4.60 Where ICF could be made liable clause 51 of Article 11 required claims for damage/loss/detriment to be submitted within six months of delivery to the receiver. Claims for exceeding the delivery period affecting the purely rail-based portion of the journey had to be submitted within six weeks of delivery to the receiver. Clause 52 required claims concerning invoices to be submitted within six weeks of the date of each invoice. Clause 53 stated that submission of a claim did not dispense with settlements of the invoice. This linked with clause 47 of Article 10 which made clear that setting off claims against payment was not permitted.[207] By clause 47 invoices were payable within 30 days of date of issue and interest on arrears was calculated at a rate of 12 per cent per annum.

4D CARRIAGE BY RAIL—INTERFRIGO CONDITIONS 1973

4D.1 INTRODUCTION

4.61 Prior to 1993 Interfrigo was a separate subsidiary of the European railways providing services in respect of carriage by rail of perishable goods in specialised wagons or containers. As explained at paragraph 4.35, this company merged with Intercontainer to form Intercontainer-Interfrigo (ICF). The movement of temperature controlled containers and swap-bodies was brought within the scope of the General Conditions for Combined Transport 1994 (Intercontainer) and this continued to be the case under the later conditions which are examined above. Prior to the merger Interfrigo supplied such services and applied its Conditions Applicable to Transport of Transcontainers Fitted for Controlled Temperature 1973. These conditions consisted of 35 Articles divided into six chapters as well as an appendix providing a summary of details to be supplied in respect of the order to transport. By Article 35 the French and German texts were expressed to be equally binding.

206. See Clarke & Yates, para. 2.493.
207. *Cf* Rail Link Europe GC, cl. 5.4, DB Schenker ALB, cll. 10.2 and 10.3.

These conditions contrast with both the previous Intercontainer Conditions 1990 and the 1994 Conditions principally in respect of liability.

4D.2 LIABILITY OF INTERFRIGO

Interfrigo Conditions, Articles 24–28 *4.62*

24. Unless there are provisions to the contrary in these Conditions, in regard to the execution of the actual transport, INTERFRIGO assumes towards the principal the same responsibilities as those laid down for the Railways subject to the "International Convention concerning the Carriage of Goods by Rail (CIM)" or to the appropriate national laws of transport.

If INTERFRIGO utilises the services of other transport undertakings or organisations, it assumes responsibility as laid down in the legislation applicable to those undertakings or organisations and in their own general conditions. In respect of the services provided and the supplies made by INTERFRIGO within the framework of the refrigeration technique, INTERFRIGO is only liable to the principal for any damage resulting from a proven fault in fulfilling its contractual obligations, and after taking into consideration the obligations of the principal as laid down in Articles 14, 15 and 16.

This responsibility extends, either from the time of acceptance by INTERFRIGO (Article 17) or from the time of supply of stock by the Company (Article 8) as appropriate, until delivery (Article 18).

In certain cases other conditions of liability may be fixed by special agreement.

25. In all circumstances, unless there are provisions to the contrary in these Conditions, the amount of any damages due from INTERFRIGO for loss, damage, total or partial, or delay, relating to the responsibilities referred to in Article 24, are limited, as appropriate, to the amounts payable by the Railways under the CIM, or under the appropriate national law, or as laid down in their own Conditions by the other transport undertakings and organisations whose services INTERFRIGO has utilised.

However, with regard to INTERFRIGO's own services within the framework of the refrigeration technique, other limits may be established by special agreement.

26. The principal must take all necessary steps to have INTERFRIGO notified immediately of all damage, verified or suspected, occurring to the merchandise or transcontainer. In addition he must then take or have the necessary steps taken for safeguarding the merchandise.

Claims shall be lodged with INTERFRIGO or its representatives by the principal or his authorised agents, accompanied if possible by a survey report made out by arrangement between both parties and covering the extent and origin of the damage, also by an official damage report completed by the carrier.

27. If damage, for which INTERFRIGO is not liable occurs whilst carrying out a task entrusted by the principal, INTERFRIGO undertakes to assign to the principal, at his request, all its rights against the transport undertakings and other organisations whose services INTERFRIGO has utilised, or other third parties responsible.

When duly appointed to that end, INTERFRIGO may also at the request of the principal, at his expense and risk, assert the rights of the principal against these undertakings, organisations or third parties responsible.

28. Except for damage which is not apparent, which must be notified on discovery and at the latest within 5 calendar days following the date of delivery in accordance with Article 18, all rights against INTERFRIGO shall be extinguished by acceptance without reservation of the consignment by the receiver or his agent.

A distinct difference can be seen between the extent of the liability adopted by Interfrigo prior to 1994 in respect of the transport of temperature controlled containers and swap-bodies and that adopted by Intercontainer-Interfrigo (ICF) *4.63*

between 1994–2000. Unlike under both the Intercontainer Conditions 1990 and the General Conditions for Combined Transport 1994 (Intercontainer), Interfrigo under its 1973 conditions accepted a liability as a carrier in respect of the execution of the actual transport. This appeared from the assumption of responsibility indicated in Article 24. Presumably the intention of Article 24 was that CIM liability applied to govern Interfrigo's liability to the customer where it was applicable to the railway to which Interfrigo had recourse. In cases where CIM did not apply it was unclear whether "national laws of transport" refer to those laws applicable to each stage of the transport or whether a single national law is to be applied throughout. The latter seems more likely and identification of the relevant law may have been provided by Article 33 which stated that the law of the forwarding country shall apply in all cases not provided for in the conditions and by Article 34 which submitted legal disputes to the courts of the forwarding country if it was a country in which Interfrigo was represented (otherwise the courts of law in Basle Town). The ICF 2000 conditions adopted a position much closer to that which appears in these Interfrigo conditions[208] at least in respect of accepting liability as a carrier. The English common law might well have been the appropriate law in respect of a movement by rail (or possibly part of a movement) not governed by CIM. Where Interfrigo utilised the services of other transport undertakings or organisations (i.e. not railways), it assumed responsibility as laid down in legislation applicable to those undertakings or organisations and in their own general conditions. In respect of services provided and supplies made by Interfrigo within the framework of the refrigeration technique, however, Interfrigo accepted only a liability for any damage resulting from proven fault, the burden of proof under this formulation presumably resting on the claimant.

4.64 Article 25 provided a similar rule in respect of limits on liability which is limited to the amounts payable by the railways under the CIM or under the appropriate national law, or as laid down in their own conditions by the other transport undertakings and organisations whose services Interfrigo had utilised. Special limits could be agreed in respect of services related to Interfrigo's own refrigeration technique. Article 27 provided for the transfer of Interfrigo's rights against others where its own liability was not established. Given the fact that, in general, Interfrigo's liability was networked in with the liability to it of its subcontractors, it is hard to see the circumstances where this would have been of use to the claimant. A possibility might have been where a breakdown of the refrigeration technique occurred without the fault of Interfrigo but in respect of which Interfrigo had a right of action against others.

4E CARRIAGE OF ROAD VEHICLES BY RAIL

4E.1 INTRODUCTION

4.65 For some years services have been available on the European mainland for the international carriage of road vehicles and swap-bodies on railway wagons organised

208. Section 4C.11.1.

by companies specialising in such transport. Originally conceived as concerned with the movement of vehicles and swap-bodies, their operations today are more flexible and can include the movement of containers. They provide a retail market in respect of block trains for companies without the capacity to contract for whole trains. Their customers are commonly hauliers and the companies retail the rail wagons and organise the transport. They may supply the transport unit and ancillary movement to or from the terminal. Companies which are members of the UIRR (International Union of Combined Rail and Road Transport Companies) will operate under the UIRR Conditions. The latest conditions are those of 1998 which were implemented on 1 July 1999 and replaced those of 1984. They are intended to create a transparent legal framework and favour the customer.[209] The conditions consist of 10 clauses and although a translation is available in English, clause 10.8 provides that only the contents of the French or German language versions will prevail. Other conditions can be found in view of the increasing competitiveness of the sector and the ability of companies to move both road vehicles and containers. Although true piggyback rail carriage was not available in the UK due to the standard railway gauge in use it is now possible for trains carrying unaccompanied road vehicles to make use of the High Speed 1 track and thereby use the Channel Tunnel to connect with the Continental network. At least one such service is currently in operation. Apart from that accompanied road vehicles can be moved by rail via the Tunnel under Eurotunnel Freight Terms and Conditions and the Le Shuttle Conditions of Carriage.

4E.2 PRELIMINARY STATEMENT AND DEFINITIONS

UIRR Conditions, Preamble and Clause 1 *4.66*

These General Conditions of the UIRR govern the relationship between a combined transport company, which is a member of the UIRR, hereinafter called "UIRR company" and a customer carrying out combined international rail and road transport.

Definitions—clause 1

The definitions set out below apply to the terms used in these General Conditions:
1.1 The "UIRR contract" is the contract made between the customer and a UIRR company with a view to transporting one or several transport units by rail.
1.2 "Framework agreement" should be understood to mean a general agreement made initially between the client and the UIRR company, which contains the provisions which will apply to all UIRR contract [*sic*] made in application of the said agreement.
1.3 The "Customer", who is also referred to as the orderer or invoicee, is the person who gives the order to transport the unit, either in person or through an authorised representative, in writing or within a framework agreement, and who consequently undertakes to pay the

209. UIRR Report 1998, p. 3.

price of the transport. The Customer alone, and not his representatives, is the contract partner of the UIRR company.[210]
1.4 For the purposes of concluding the contract, apart from the representative defined in paragraph 1.3, the "Customer's representative" is the person referred to as the "consignor" at the point of departure, and as the "consignee" at the point of arrival.[211]
1.5. The "UIRR company" is understood to be the company which receives the customer's order, either directly or through a representative, to transport one or more transport units, and which subsequently issues the invoice.
1.6. A "combined transport" is the transport of transport units, whether or not intermodal, by at least two means of transport, in this case, road and rail.
1.7 An "intermodal transport unit"—also referred to as an ITU (Intermodal Transport Unit) is understood to be a container, a mobile crate or any similar appliance designed to contain merchandise, as well as a semi-trailer, which can be moved by a grabber or bimodally.

A "non-intermodal unit" is understood to be a vehicle designed for the transport of merchandise by road.
1.8 "Arrival" is understood to be the moment at which the transport unit is made available at the agreed transshipment site or at another agreed location where the customer may remove it, and not the time of arrival of the train.
1.9 "Handover" is the act by which the transport unit is transferred at departure by the customer to the manager of the transshipment site or to another agreed third party or, conversely, at the point of arrival. The handover must be made by mutual agreement of the parties concerned.

In the case of an intermodal transport unit, handover at a transshipment site is effected if the unit has been separated from the tractor vehicle at departure, and if, on arrival, it has been placed onto the tractor vehicle.

In the case of a non-intermodal transport unit, that is to say, a lorry driven by the customer onto or off the railway wagon, handover is effected when the unit has been finally positioned and secured on the wagon or when disembarkation from the wagon has been commenced.

4E.2.1 Comparison with scope of previous conditions

4.67 The previous conditions were more limited in two respects than the current conditions. Firstly, they made reference to carriage on the international system. This has been removed presumably in response to the greater freedom of rail operators in Europe today to provide cabotage services. Secondly, the previous conditions were confined to the movement of road vehicles, with swap-bodies being included in the definition of such vehicles. As is clear from 1.6 and 1.7 the movement of containers and other intermodal units is now also contemplated as within the range of services provided by these companies. Unlike the previous conditions, clause 1.2 now makes clear that a framework agreement is possible providing for a series of movements to which the general conditions are applied to each movement. See also clause 3.2 below.

210. This clause and cl. 1.4 appear designed to ensure that the person defined as the customer is the party contracting with the company and that others are regarded as representatives of the customer (if different people) whether named as consignor or consignee. The French version of cl. 1.4 is clearer in this respect.

211. See previous footnote.

4E.3 OBJECT OF THE CONTRACT, OBLIGATIONS OF THE PARTIES, COMMENCEMENT AND TERMINATION OF CONTRACTS AND OPERATIONS

UIRR Conditions, clauses 2, 3 and 4 4.68

2.1 On the basis of UIRR contract, the UIRR company undertakes:

* to transport the transport unit, whether or not the unit is intermodal, handed over, or loaded by the customer, or a number of units simultaneously, by rail to the agreed destination,
* to load the said unit onto the wagon prior to transport, or if appropriate, to transship the unit between two wagons, and to unload it from the wagon, except in the event of a separate branch line without transshipment or a non-intermodal unit, and
* to provide the customer or the customer's representative with any information received in the event of any irregularity arising between the commencement and completion of the UIRR contract terms.

2.2 On the basis of the UIRR contract made with the UIRR company, the customer undertakes:

* to bring the transport unit on the agreed date to the agreed transshipment site or to another agreed site,
* to remove the transport unit on the date of arrival at the agreed transshipment site or to take delivery or [*sic*] it at another agreed site, and
* to pay the agreed price to the UIRR company.

The detachment of the intermodal transport unit from the tractor vehicle or its attachment thereto, particularly the bolting or unbolting of fixing units, together with the necessary adjustments for forwarding by rail (securing/releasing of the non-intermodal transport unit) or by road (for example, adjustment of props, bicycle shields and bumpers, and the securing and releasing of non-intermodal transport unit) must be carried out by the customer on his own responsibility.

If the customer does not bring or remove the transport unit himself, he must appoint a representative to do so, in accordance with Clause 1.4, and must nominate that representative in a framework agreement, by a separate letter, or in the pro forma contract.

Conclusion and coming into effect of the UIRR contract—Clause 3

3.1 A UIRR contract is made between the UIRR company and the Customer who gives the order. A duly completed pro forma contract formalises each contract.

3.2 Where transports provided for in a framework agreement are to be carried out from transshipment sites on which the UIRR company which is a partner in the framework agreement does not have a presence, the customer authorises the company, by way of these General Conditions, to appoint another UIRR company to conclude the UIRR contract as its representative, even if the pro forma contract of that company is used without reference to the UIRR company represented.

3.3 The UIRR contract will take effect upon signature of the pro forma contract by the UIRR company or its representative and by the customer or his representative.

The signature for the UIRR company may be replaced by a company stamp, a mechanographical indicator or any other appropriate means. The signature by the customer may not be replaced by any of these means, unless he has already accepted these General Conditions in writing for all future UIRR contract [*sic*], and unless the UIRR company has given its consent.

3.4 Signature of the pro forma contract by the customer carries his acceptance of these General Conditions.

3.5 Unless it is proved otherwise, signature of the pro forma contract by the UIRR company constitutes and [*sic*] acknowledgment that the transport unit has been handed over to the manager of the transshipment site.

3.6 Liability of the UIRR company for loss, damage or delay will not take effect until the date of transport, in accordance with the provisions of Clause 8.2 paragraph 3.

The relationship between the customer and the UIRR company arising out of the handover of the transport unit by the customer before the date of transport and having a bearing on the storing of the unit until the liability of the UIRR company commences in accordance with Clause 8.2 paragraph 3, will be governed by separate conditions.

End of the UIRR Contract—clause 4

4.1 The UIRR contract will be ended on the date of arrival, either by the handover of the transport unit to the customer or his representative, or in the event that it is not removed, by the locking of the transshipment site, or at the latest at 2400hrs.
4.2 In the event that the customer fails to meet his obligation to remove the transport unit before the end of the UIRR contract, the unit will be stored on the transshipment site at his expense. The relationship between the customer and the UIRR company relating to the storage period will be governed by separate conditions.

4E.3.1 Start of contract and nature of UIRR operation

4.69 Under the previous conditions the contract came into effect on the handing over of the road vehicle to the company at a rail terminal for despatch and ended on arrival and setting down of the vehicle at the terminal of destination. Under the new conditions the operation is still envisaged as essentially the movement of the unit from terminal (termed transhipment site) to terminal. The conditions now provide in clause 3.3, however, for the contract to take effect on the signing of the pro forma contract by both the company and the customer. Nevertheless the standard liability of the company commences only on the date of transport at the point of handover of the transport unit. If the transport unit is handed over prior to that date it is subject to separate conditions.[212]

4.70 The former provisions also anticipated the possibility that the company might provide or arrange road transport to or from the terminal (or any required sea transport). This is not indicated in the new conditions. The new conditions may reflect a major change in the conception of the responsibility of the UIRR company. Formerly the service was described as an undertaking to organise loading and unloading of the vehicle and its despatch by rail. Clause 2.1 of the current conditions now indicate that the company undertakes to transport the transport unit to the agreed destination, which clauses 1.8 and 4 make clear is a transhipment site at an agreed place of arrival. The French version uses the word "expédier" which is to despatch. Nevertheless a change in the conceived nature of the service would appear to be reflected in clause 8 dealing with liability which is discussed below. Whereas the former conditions gave an undertaking to effect dispatch within the availabilities [*sic*] of means no such undertaking is given in the new conditions.[213]

212. Clause 3.6.
213. *Cf* cl. 8.5 below.

4E.4 CUSTOMER'S LIABILITY FOR THE CONDITION OF THE TRANSPORT UNIT AND MERCHANDISE

UIRR Conditions, clause 5 4.71

5.1 In signing the pro forma contract, the customer undertakes:

1. to provide complete and accurate information in respect of the transport unit and the goods, in particular the weight and nature of the latter, irrespective of whether it is the customer himself or the UIRR company who enters the information or has it entered on the pro forma contract;
2. to ensure that all documentation accompanying the transport unit and which is required by the authorities for the various controls, is duly and correctly completed;
3. to ensure that any time limits prescribed by the countries through which the transport unit will be forwarded are equally respected.[214]

5.2 By the handover of the transport unit, the customer gives his assurance that it is suitable for combined transport and that the transport unit and the merchandise it contains meet the safety criteria for combined transport.

"Suitability" should be understood to mean, for an intermodal transport unit, in particular that it has the technical qualifications for combined transport, that is to say, that it is provided with a classification plate or, in the case of ISO containers, with the Safety Approval Plate in accordance with the Container Safety Convention,[215] and that the condition of the intermodal transport unit, which led to its acceptance for combined transport, has not since altered.

"Security" should be understood to mean, in particular, that the condition of the transport unit and the merchandise which it contains will allow the transport to be carried out in safety, and in particular that the packaging of the merchandise, stowage and fixing inside the transport unit are adapted to the requirements of combined transport. This is a particular requirement for transporting liquids or goods which require storage at a particular temperature.

5.3 Even if no fault can be attributed to him, the customer will be liable for all losses caused where his obligations set out in Clauses 5.1, 5.2 and 6.3 are not met.

The UIRR company may make the conclusion of the UIRR contract subject to an obligation on the customer to provide an insurance covering all his liabilities arising out of the terms of paragraph 5.1 above.

5.4 The UIRR company will accept no liability either for the suitability for transport, or for the safety criteria of the transport unit handed over and the merchandise contained therein.

5.5 The UIRR company is not required to check the transport unit,[216] the merchandise or the packaging, the stowage or the fixings, nor the information supplied or the documentation submitted by the customer.

5.6 The UIRR company may, however, make an external inspection of the transport unit from the group at the time of handover and record its findings in the pro forma contract.

If, at the time of handover, nothing has been recorded on the pro forma contract in relation to apparent external damage when the transport unit was removed by the customer, or that parts are clearly missing, the absence of any such record will not constitute proof that the transport unit was intact and that nothing was missing at the time of handover by the customer.

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214. The first seven words are a translation of the following French words: "*les éventuelles prescriptions particulières*" which clearly is a reference to the statutory requirements imposed by the relevant States.

215. The International Convention on Safe Containers as implemented by the Freight Containers (Safety Regulations) 1984 (SI 1984/1890).

216. At the very least the company will be required to make some checks to comply with its own obligations under the requirements of e.g. the International Convention of Safe Containers and other regulations concerned with safety.

4.72 The former provisions focused mainly on the safety of the vehicle whereas the current provisions make reference to both the goods and the transport unit. Whereas the previous conditions gave a right to the company to reject a defective vehicle this is not expressed in the current provisions. Presumably this can be implied. Clause 5.3 now makes clear that a strict warranty is imposed on the customer.

4E.5 DANGEROUS OR UNAUTHORISED GOODS

4.73 **UIRR Conditions, clause 6**

6.1 The shipment of a transport unit containing dangerous goods must be requested by the customer at least 24 hours before the time limit for loading, excepting Sundays and Bank Holidays. The customer is required not to hand over any such transport unit until the date of departure.
6.2 A transport unit containing authorised dangerous goods must comply with national and international statutory and regulatory requirements for the forwarding of such goods by road and rail.[217]
6.3 In handing over this type of transport unit, the customer undertakes, in addition to the undertakings given in Clause 5:
— to comply with the provisions of clause 6.2
— to provide an accurate description of the goods in the pro forma contract, in accordance with the special provisions for dangerous goods
— to hand over the appropriate safety and other necessary documentation
— to provide information on precautions to be taken which are either prescribed by the authorities or which are necessary in any event.
6.4 The customer will be required to remove this type of transport unit immediately upon arrival. In the case of an intermodal transport unit, the manager of the transshipment site will not be required to unload the unit from the wagon for so long as the customer's vehicle is not present on the site to remove it.
6.5 Measures which may be taken when the transport unit containing the dangerous goods is not removed immediately are, by way of example (although the list is not exhaustive), removal of the wagon to another site, return, unloading or destruction, all of which will be at the customer's risk and expense.
6.6 The UIRR company will, upon request, provide information on goods—whether or not they are dangerous—which are not authorised for transport or which are only so authorised under certain conditions. Goods which are authorised for forwarding under certain conditions will require an additional form of agreement in advance, which may require a special UIRR contract to be made.

4.74 Apart from the rights given in Clause 6.5 at the end of transit no right is expressly given to destroy dangerous goods of which the company is not informed or which have begun to manifest the danger. This contrasts with the Freightliner Conditions[218] but follows Intercontainer conditions.[219]

217. The provisions of both the ADR Agreement (European Agreement Concerning the Carriage of Dangerous Goods by Road) and the RID Regulations in Appendix C of COTIF will need to be complied with.
218. See above, 4.18.
219. See above, 4.45.

4E.6 PAYMENT TERMS

UIRR Conditions, clause 7 *4.75*

7.1 The agreed price will become payable upon the UIRR contract entering into force, unless the contract partners have entered into a written agreement varying the terms of payment.
7.2 A payment period may be granted to the customer if he has paid a bank deposit or has supplied some other form of guarantee acceptable to the UIRR company. The UIRR company will determine the amount of the deposit, in accordance with the payment period granted and the customer's estimated turnover figure and, if necessary, the amount will be adjusted subsequently.

Any delay in payment will result in the forfeit of the agreed terms, and all sums due will become payable immediately, including interest for delay as provided by the legislation of the State in which the UIRR company entitled to make the demand is situate.
7.3 Non-payment of the sums due by the customer and offsetting by the latter of any debt on which he may rely, are excluded,[220] except in the event that there is a debt which is established either by a final Court judgment, after all possible routes of appeal have been exhausted, or which is expressly acknowledged by the UIRR company.
7.4 The exercise by the UIRR company of a right of retention or a pledge is based on the national laws applicable by virtue of Clause 10.3.[221]

4E.7 LIABILITY OF THE TRANSPORTING COMPANY

UIRR Conditions, clause 8, Eurotunnel Conditions of Carriage clause 11 *4.76*

8.1 The liability of the UIRR company is governed exclusively by the following provisions of this Clause.
8.2 The UIRR company will assume liability, exclusively towards its customer, for any loss or damage to the transport unit or the goods contained therein, and for any damage caused by exceeding the delivery time or by the loss of documents, except where either is caused by the fault of the customer, by an order given by the customer, by a defect in the transport unit or the goods,[222] or by unavoidable circumstances or consequences which could not be forestalled.

Where such loss or damage is partly caused by the conduct or by an error on the part of the customer, or by a defect in the transport unit or the goods, the obligation and the amount of the indemnity payable by the UIRR company will be limited and shared by the customer in proportion to the consequences of the particular circumstances.

Liability of the UIRR will take effect on the date of transport by the handover of the transport unit. In the event that the unit is handed over by the customer before the date of transport, liability will not take effect until the date of transport, when the transshipment site opens for business. Liability will end at the same time as the termination of the contract in accordance with Clause 4.1.

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220. The exclusion of set-off in this sub-clause is more qualified than under the previous conditions. See further above, 2C.21, in respect of such clauses.

221. Particular difficulty may arise in establishing a lien under English law against third parties whose goods may be contained within the transport units transported by the company, see further above, 2C.9.

222. In the decision of the *Cour d'Appel de Paris* (see 4.79) the nature of the loading operation and the opportunity this provided to discover defects in the vehicle was noted, and the liability of the road-railing company was established, since it had not made any reservation concerning the visible defect which caused the subsequent accident.

8.3 Where it is established that the loss or damage occurred between acceptance and delivery of the transport unit by the railway operators concerned, liability of the UIRR company and its limitations will be based on the provisions of the uniform regulations governing contracts for the international transport of goods by rail ("CIM"), which constitute Appendix B to the convention on international rail transport ("COTIF"), in the version current at the time of entry into force of the UIRR contract.
8.4 Outside the period of rail forwarding as provided in clause 8.3, the indemnity payable by the UIRR company for loss or damage to the transport unit and the goods contained therein is limited to 8.33 DTS per kilogram of gross weight lost or damaged. DTS means Special Drawing Rights as defined by the International Monetary Fund.

In addition, the indemnity may not exceed 300,000 DTS per transport unit, inclusive of the goods, nor may it exceed 2 million DTS per loss where more than 6 transport units are involved in one and the same loss. In the event that a loss exceeds 2 million DTS, the amount is divided between the customers in proportion to the gross weight of each transport unit, including the goods.
8.5 In the event that the delivery date is exceeded, for whatever cause, and similarly in the event of the loss of documents or any other failure to comply with contractual obligations, beyond cases of loss or damage, an indemnity will only be payable in respect of a material, direct and certain loss to the customer. In such cases, the amount of the indemnity due from the UIRR company is limited to twice the price of the transport unit in question.

Delay in delivery should be understood to mean delays by railway companies, since the timetables provided by the UIRR company do not, in any circumstances constitute delivery periods.

In the event of the loss of documentation, and [*sic*] indemnity will only be payable in respect of a negligent loss of documents required by the authorities for the various controls, for example, customs, veterinary or phytosanitary documentation, or documents relating to dangerous goods, and which are handed over by the customer to be forwarded together with the transport unit.
8.6 In the event that an indemnity for total or partial loss or damage is payable by the UIRR company, the amount is calculated on the basis of the value of the transport unit and the goods contained therein or the diminution in their value in comparison to the value at the time and place of their handover by the customer.
8.7 Liability for indirect or consequential loss is excluded. Such loss is understood to be, in particular, costs of waiting time and immobilisation of the transport unit and tractor vehicle upon departure and arrival, costs of replacement transport, losses relating to business interruption, the non-use or delayed use of the goods transported, stoppage or delay in production, loss of reputation or market share.
8.8 Only the customer, and not his representative, is entitled to compensation from the UIRR company which entered into the UIRR contract and issued the invoice, and may bring legal action against that company.[223]

223. It may be queried whether this would this be sufficient to raise an implied obligation to indemnify the company if they are made liable. It does not appear to involve any promise by the customer to prevent others from suing (see further above, 2C.19) and might be read merely as an exclusion (see also cl. 8.2). This last point also raises the question whether this exclusion is binding on a third party, perhaps on the basis of a bailment on terms (see above, 3.21). Since the company does not normally retain actual possession throughout the entire transit there may be some difficulty about regarding them as bailees to the fullest extent. Nevertheless they obtain possession at the start of transit and retain control through the consignment note during the sub-bailment to the railway until taking possession at the destination terminal and they accept liability throughout the period. This may be enough to constitute them as bailees sufficient to bring them within the scope of the rule. The fact that cl. 8.2 indicates that they assume liability exclusively towards the customer may not be enough to remove their liability as bailees as long as they have sufficient notice of the interest of others beside their immediate customer. But with that liability will come the opportunity to rely on a bailment on terms provided that English law is applicable to the claim (see cl. 10.3).

8.9 In the event that damage or any other loss occurring between the entry into force and the end of the UIRR contract is likely to give rise to extra-contractual claims against the UIRR company, the exclusions covering liability and limitation of indemnity provided in this Clause 8 will also apply.

11.1 Eurotunnel accepts liability for death of or personal injury to Passengers arising out of an accident providing that it occurs (a) during carriage, and (b) out of or in connection with Shuttle Operations, save that Eurotunnel shall not be liable to the extent that it proves that such accident was caused by (i) the negligence of the Passenger and/or (ii) the act of a third party and/or (iii) an event beyond Eurotunnel's control.
11.2 Eurotunnel accepts liability for loss of or damage to Passenger Vehicles, Commercial Vehicles, Luggage, Goods and Commercial Goods arising during carriage, and in connection with Shuttle Operations, save that there shall be no presumption of liability upon Eurotunnel to the extent that the loss or damage is caused by events or circumstances unrelated to Shuttle Operations, or by the fault or negligence of the Passenger. In any event, Eurotunnel's liability shall be limited as follows:
11.3 Eurotunnel's liability for loss or damage in respect of Passenger Vehicles shall in no event exceed 8,000 SDR per vehicle. A Passenger Vehicle towing a trailer, whether loaded or unloaded, shall be considered as a single Passenger Vehicle.
11.4 Eurotunnel's liability for loss or damage in respect of Luggage shall in no event exceed 1,000 SDR.
11.5 Subject to 11.6, Eurotunnel's liability for loss or damage in respect of Commercial Goods shall in no event exceed 8.33 SDR per kilogram gross weight lost or damaged (including packaging). Notwithstanding this, in no case shall Eurotunnel's liability exceed the depreciation in value of that part of the Commercial Goods damaged.
11.6 Eurotunnel's liability for total or partial loss or damage in respect of Commercial Goods and/or Commercial Vehicles shall, in no event exceed 70,000 SDR per Vehicle. A Commercial Vehicle towing a trailer whether loaded or unloaded, shall be considered as a single Commercial Vehicle.

4.77 Under the previous UIRR conditions the liability of such a company, in respect of the period of rail carriage was that of a forwarder. In essence the company undertook either to pursue a claim against the railway or assign its rights to the customer. Claims outside the period of rail transport but within the responsibility of the company would be determined under the CIM Rules but subject to a limit of 8.33 Special Drawing Rights as under the CMR Convention. Under the current conditions the company now undertakes a liability throughout the period from the handing over to the arrival of the transport unit. During the period of the rail movement the company's liability and limitation of liability for any loss or damage occurring within this period are based on the CIM Rules. This will enable the liability of the UIRR company to be "back to back" with the liability of the railway operators involved at least where an international rail movement subject to CIM is involved. Whilst under clause 10.5[224] the company may assign any claim it may have against the railway operator the use of the words "in addition" make clear that this possibility is additional to the liability of the company and does not qualify it.

4.78 Outside the period of the rail movement the company is liable for loss or damage subject to four defences which loosely correspond to the primary defences in the CMR Convention and the CIM Rules.[225]

224. See below, 4.84.
225. See generally Clarke & Yates, 1.77 *et seq.* and 2.271 *et seq.*, and 2.532 *et seq.*

4.79 The limit of 8.33 SDRs corresponds with the CMR limit. The limit of 300,000 SDRs per transport unit contrasts with the limit of 70,000 SDRs per consignment under the previous conditions although there is a new total limit of two million SDRs. Liability for delay is also absorbed within the general liability provision in clause 8.2. Nevertheless there is an exclusion of liability for delay in clause 8.5 except where the delay is the responsibility of the railways. In respect of any such delay the company's liability is limited to twice the carriage charge for the transport unit involved. This contrasts with the current CIM limit of four times the carriage charges.[226] The question arises as to the nature of the combined transport contract and whether it is likely to be caught by either of the principal transport conventions governing the international carriage of goods by road or rail or by other rules of compulsory application to contracts of carriage. In France, a road-railing company has at times been viewed by the courts as a *Commissionnaire de Transport.*[227] A decision of the *Cour d'Appel de Paris*[228] suggested that such a company is an entrepreneur with more than a simple liability for proved fault.[229] The increased responsibility undertaken under the new conditions might well raise anew the question whether such companies might be regarded as carriers. Even if the new conditions prompt the recognition of such companies as carriers they are unlikely to be regarded as CMR carriers since they are not concerned with the movement of the goods by road. They appear to be in an analogous position to that of a ferry operator. Difficulties may arise if they provide for a road movement to or from the terminal unless such a movement can be regarded as being provided under a separate contract from the main combined transport movement. The issue of separate documentation would assist in reinforcing this view of the contract.

4.80 In respect of URCIM, the current position is likely to be similar to that in respect of ICF.[230] Traction will normally be provided by a separate railway operator who will issue a through consignment note to the company. However, it could still be the case that UIRR could be regarded as contracting to carry by rail and any consignment note it issues to its customer regarded as falling within Article 6.

4.81 So far as the company's customer is concerned, where he is a haulier, his liability to his own customer may well depend on the form of transport technique adopted. Carriage by road from the UK will normally be subject to the CMR Convention. The fact that the haulier's vehicle is carried on a railway wagon will not break the application of CMR although the proviso to Article 2 may be applicable. If a swap-body is used, however, the compulsory application of CMR will be broken by the rail transport since unloading from a road vehicle will be involved. The liability of the haulier, at least in respect of this section, will depend on the contractual terms he has agreed with his customer which may well maintain the contractual application of CMR.

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226. See Clarke & Yates, 2.556.

227. Two seemingly contradictory decisions were made by the *Cour d'Appel de Paris*, 10 April 1996 and 6 June 1996, *Bulletin des Transports* (1996) No. 2671, p. 557. They may possibly be explained on the basis of the actual obligations, in respect of time of delivery, undertaken in each case.

228. 22.1.1993, *Bulletin des Transports* (1993) No. 2523, p. 402,

229. See also fn. 222, above.

230. See above, s. 4C11.1.

4.82 A particular difficulty with regard to piggyback transport should also be noted in respect of the application of compulsory rules. This problem was raised by the decision of the district court of Frankfurt of 13 October 1989.[231] A road-rail company organised transport of a swap-body which was placed on a rail wagon and covered by a tarpaulin. The swap-body contained cartons of video cassettes which disappeared, presumably as a result of theft. The road-rail company ceded its rights of action to the customer but the court rejected the liability of the railway on the basis *inter alia* of a defence available under the former German railway law (the EVO) which was applicable to the case. This defence in Article 83(1) of the EVO was equivalent to Article 36(2)(a) of the former CIM Rules whereby the railway's liability was negated where the loss or damage arises from the special risks inherent from carriage in open wagons. The carriage was held to be by open wagon and the court pointed to the accessibility to the swap-body by the simple action of tearing the tarpaulin, which had occurred here, and the fact that few pains were necessary to gain access to the contents of the swap-body. This was subject to possible proof by the customer as to a lack of surveillance by the railway. Whilst the same reasoning was applicable to the CIM Rules an Additional Uniform Regulation[232] provided that: "Apart from damage resulting from air and moisture, goods carried in large containers, swap-bodies, semi-trailers or in other unit loads, which are closed, for the purpose of combined transport, or in closed vehicles by means of rolling motorway shall not be regarded as being carried in open wagons".[233] Article 23.3(a) of URCIM now makes similar provision.

4.83 The haulier customer, in the context of a CMR movement might also seek to work this defence back to his customer by means of the proviso to Article 2 of CMR in the context of where a road vehicle is carried on a rail wagon. Whether he can do so raises complex questions which go to the heart of the interpretation of this proviso, especially:

(a) whether the event was not caused by an act or omission of the carrier by road (e.g. failure to ensure the security of the vehicle);
(b) whether the event could only have occurred by reason of the carriage by rail, i.e. the event may be viewed, on the one hand, as theft from an open rail wagon and therefore an event which could only have occurred on rail[234] or may be viewed as an event which merely involves theft from a road vehicle which does not peculiarly bear any relation to rail transport;
(c) the exact meaning of conditions prescribed by law applicable if the contract had been made by the sender, given that the sender could not have made a contract with the railway but only with the road-rail company

231. *Transportrecht* (1990) No. 5, p. 196, and *Bulletin des Transports Internationaux ferroviaires* (1990) p. 116.
232. DCU 2, to Art. 36(3)(a).
233. See Clarke & Yates, para. 2.273.
234. *Cf Thermo Engineers* v. *Ferrymasters and Anhydro* [1981] 1 WLR 1420.

which may not be subject to the CIM Rules, the relevant conditions prescribed by law.[235]

4E.8 TERMS OF INDEMNITY AND CLOSING PROVISIONS

4.84 UIRR Conditions, clauses 9, 10

9.1 An indemnity will only be payable if, on the one hand, the loss is notified and, on the other hand, an indemnity is demanded in the form provided below. Otherwise, any action against the UIRR company will be extinguished.
9.2 The notice of loss must provide a sufficiently detailed description of the loss, and must be submitted to the local representative of the UIRR company responsible for the transshipment site or the destination or, in his absence, to the person handing over the transport unit.

By contrast, the indemnity must be claimed from the UIRR company defined at Clause 1.5.
9.3 In the case of an apparent loss or damage, also where they involve customs seals or other systems of sealing the transport unit, the customer or his representative must give notice of reservations as soon as the unit is handed over to him.[236]
9.4 In the case of non-apparent loss or damage, which is only established after the handover of the transport unit to the customer, the latter or his representative must:
— give notice of reservations immediately upon discovery of the loss or damage, but in any event within 5 days of the arrival of the transport unit.[237]
— allow the loss or damage to be examined immediately.
— confirm the reservations by fax, telex, telegram, express letter or any other written evidence to be received within the said period of 5 days and immediately afterward by registered letter accompanied by an acknowledgment of receipt.
— keep all proof that the loss or damage occurred between the entry into force and the end of the UIRR contract.
9.5 If the transport unit failed to arrive on the agreed date, the customer must give immediate notification and follow this with a written request for an investigation into the circumstances, unless the reason for the delay is known.
9.6 Losses, other than cases of loss or spoiling, which arise as a result of the delivery period being exceeded, loss of documentation or other failure to meet the contractual obligations must be notified by the customer at the latest within 5 days of the arrival of the transport unit.
9.7 Where notice is given in accordance with the preceding clause, the local representative of the UIRR company will record the investigations into the extent of the presumed cause of the loss on the pro forma contract or on a separate document which the customer will also be required to sign, and of which he will be given a copy. In the event of a dispute, each party may, at its own expense, make its own investigations by appointing an expert, on either an amicable or a judicial basis.
9.8 Any indemnity must be required by the customer by registered letter accompanied by an acknowledgment of receipt, enclosing documentary evidence. The claim must be made within a period of 8 months from the date of entry into force of the UIRR contract, although

235. See on the proviso to Art. 2, Clarke, CMR, para. 15, *Hill and Messent*, para. 2.17 *et seq*., and Glass [2000] JBL 562.

236. This is in keeping with the strict rule in Art. 57(1) of the CIM Rules. It may be questioned whether acceptance for the purpose of Art. 57 occurs at the time of arrival of the train at the transhipment site or on handing over of the transport unit to the customer.

237. Compliance will enable the UIRR company to make its own claim against the railway within Art. 47(2)(b) of URCIM.

this period is reduced to 40 days in cases as provided in Clause 9.6.[238] Representatives as cited in Clause 1.4 may not claim an indemnity in their own names.
9.9 In the event that the customer does not remove the transport unit until after the end of the UIRR contract, as defined in clause 4.1, not only must the notification and the indemnity claim be made in the form and within the time limits provided in this clause, but the customer must also furnish proof that the loss occurred between the entry into force and the end of the UIRR contract.
10.1 Any legal actions arising out of the UIRR contract must be brought within a period of one year from the date of entry into force of the contract, unless otherwise provided by applicable national law or international conventions on public order.
10.2 All disputes between the customer and the UIRR company will be exclusively subject to the jurisdiction of the Courts in the place where the head office of the UIRR company is situate, irrespective of the identity of the claimant. However, action against the customer may also be taken in the jurisdiction where his registered office is situate.
10.3 Applicable law is the law of the State in which the UIRR company has its registered office, unless the customer and the UIRR company agree otherwise in writing.
10.4 These General Conditions will enter into force in accordance with the national law applicable as indicated in Clause 10.3, and will replace any previous UIRR General Conditions.
10.5 The UIRR company may set additional special conditions or agree these with the customer. Such special conditions may not contradict these General Conditions.

The UIRR company may, however, by exemption from paragraph 2 of this Clause, make provisions relating to an extension of the end of the contract or, on certain lines of transport, make exemptions from these General Conditions upon its own responsibility. Such exempting provisions must be lodged with the registered office of the UIRR in Brussels and notified by each UIRR company involved, for example, by way of reference in the catalogue of prices to the line of transport to which they apply.

In addition, the UIRR company is authorised to transfer any claims for indemnity which he may have against a third party responsible for the loss.
10.6 Any waiver by the UIRR company to exercise its rights in a particular case, on either an amicable or a judicial basis, will not constitute a precedent which may prejudice it in other cases, even if the nature of such cases is similar.
10.7 In the event that a clause or sub-clause or any part thereof is unworkable or void, all the other clauses of these General Conditions will remain in force.
10.8 Only the contents of the French or German language versions of these General Conditions will prevail.

4F CARRIAGE BY ROAD

4F.1 INTRODUCTION

Road carriage of containers within the UK may well be subject to the RHA Conditions of carriage which are widely adopted by carriers by road in domestic carriage. The current edition of 2009 provides an example of conditions which have some reference to the carriage of containers. Operators providing a road service to or from terminals under their control may well supplement the RHA conditions to *4.85*

238. Compliance will enable the UIRR Company to make its own claim against the railway within Art. 57(2)(c) of the CIM Rules. Clarke & Yates, 2.436.

ensure that any wider service elements are covered.[239] In addition to clauses relevant to container carriage, clause 2(4) of the 2009 Conditions should also be noted. This contrasts with the adoption of a carrier's liability during road carriage by providing that the haulier acts as agent only when arranging carriage by other means of transport.[240]

4F.2 DEFINITION OF CONSIGNMENT

4.86 **RHA Conditions 2009, clause 1**

1. In these Conditions:
"*Consignment*" means goods, whether a single item or in bulk or contained in one parcel, package or container, as the case may be, or any number of separate items, parcels, packages or containers sent at one time in one load by or for the Customer from one address to one address.

4F.2.1 The container as a consignment

4.87 This clause makes clear what was held to have been implied into a previous edition in *Acme Transport Ltd* v. *Betts*[241] that carriage of an empty container amounts to a consignment.[242] This decision was concerned with clause 10 of the conditions in use at that time which required notice of loss of the whole consignment within 28 days and this requirement was held by the Court of Appeal to be applicable to loss of the container.

The equivalent provision in clause 13 of the current conditions provides for seven days' notice[243] in respect of damage to the whole or any part of the consignment or physical loss, mis-delivery or non-delivery of part of the consignment and 28 days' notice of any other loss.[244] The 1991 Conditions required three days' notice in respect of loss from a parcel, package or container, and 28 days' notice for loss etc, of the whole of the consignment or any separate parcel, package or container forming part of a consignment. The change in wording produces the effect that loss of a container as part of the consignment is now subject to the stricter notice requirement. Clause 11 in respect of limitation of liability provides for a tonnage limitation and does not expressly refer to where a container forms part of the

239. See e.g. Roadways Container Logistics Conditions 2002 (www.roadways.co.uk/terms/index.html). See especially cl. 9 which distinguishes liability for carriage (and applies RHA conditions) and liability for services which, among others, includes an exclusion for circumstances "beyond our reasonable control and any consequences that we were unable to prevent". This compares with the strict liability reflected in cl. 9(2)(b) of the RHA Conditions 2009.

240. See generally above, 2C.4 and in particular *Victoria Fur* v. *Roadline*, above, at 2.68.

241. [1981] 1 Lloyd's Rep 131.

242. The Roadways Container Logistics Terms and Conditions distinguish between "Equipment" which includes all types of containers, transport tanks, trailers, flats, vehicles, machinery, plant, ancillary equipment and accessories and "Goods" which is defined as any cargo, merchandise or other article whether valuable, precious, dangerous, time sensitive, or other special type to include its packaging. Separate limits of liability are applied in cl. 10.

243. And a claim in writing within 14 days.

244. And a written claim within 42 days.

consignment.[245] The limit is computed on the basis of gross weight, the reference made in previous conditions to a volumetric calculation related to freight (introduced in light of containerisation) having been removed, presumably because of the decision of the Court of Appeal in *Spectra International Plc* v. *Hayesoak Ltd.*[246] As with the CMR Convention the limit rate is applied to the consignment as a whole and is not applied separately to the container and its contents[247]

4G CARRIAGE BY SEA

4G.1 INTRODUCTION

4.88 Contracts of carriage by sea whether or not they deal additionally with combined transport are commonly adapted to cater specifically for the carriage of containers or other unit loads. In respect of time chartering of containerships, the common practice is to amend common forms of charterparty such as Linertime, Baltime or the New York Produce Exchange Charterparty with the addition of the Inter-Club Agreement recommended by the P&I Clubs.[248] BIMCO has also developed a "Uniform Time Charter Party for Container Vessels" with the code name "Boxtime".[249] Of especial importance is the need to deal with liability and the limit of liability in respect of loss of or damage to the charterer's containers otherwise the shipowner may find himself without limit as in *The Aegis Spirit.*[250]

4G.2 CONTAINER CONSORTIA

4.89 Much modern containership operation is provided by means of slot- and cross-chartering often within the context of consortia agreements. Contracts in this field display much variety and a variety of terminology although some basic elements follow an identifiable pattern at least in respect of management of liability. It should be noted that since arrangements involve the sharing of ship space there may be cross-charters on either side or a single agreement involving a sharing arrangement[251] and since the chartering involves the hire of container slots the term slot-

245. *Cf* cl. 15 dealing with detention expressly refers to detention of any container.
246. [1998] 1 Lloyd's Rep 162.
247. See further, Clarke, CMR, para. 97b.
248. See e.g. *The Aegis Spirit* [1977] 1 Lloyd's Rep 93 (District Ct, WD Wash), *Exercise Shipping Co Ltd* v. *Bay Maritime Lines Ltd (The Fantasy)* [1992] 1 Lloyd's Rep 235, and *The Holstencruiser* [1992] 2 Lloyd's Rep 378, which involved the NYPE charterparty. See also *Compagnie General Maritime* v. *Diakan Spirit SA (The Ymnos)* [1982] 2 Lloyd's Rep 574 where the Linertime form was used.
249. See further J. Richardson, *A Guide to the "Boxtime" Charter Party*, (1990), and D.A. Glass, "The Boxtime Charterparty" [1992] LMCLQ 514.
250. [1977] 1 Lloyd's Rep 93.
251. See, e.g. *The Hamburg Star* [1994] 1 Lloyd's Rep 399. Where the sharing arrangement includes ships time chartered from a third party shipowner a slot charterer bears a risk that the vessel might be withdrawn by the shipowner for non payment of hire by the time charterer partner without redress from the shipowner, *The Marcatania* (HK Ct of 1st Instance, 2 December 2011), www.onlinedmc.co.uk.

charter may also be used.[252] It is common for non-negotiable receipts or service bills of lading to be issued to charterers as the slots are filled. A standard form of slot charter party, "Slothire", has been offered by BIMCO since 1993. The fact that one operator engages in container interchange with other operators who together have made an interchange agreement does not necessarily indicate assent of that party to be bound by the agreement made by the other operators, *Azov Shipping Co* v. *Baltic Shipping Co.*[253]

4.90 Basic features of these arrangements involve the need to keep charterers' insurance to a minimum so as to prevent duplication of insurance costs and to ensure that merchant claims are directed to the party who contracts with the merchant and not to other partners to the arrangement.[254] Thus either the charterer's liability to the shipowner is excluded or limited to whatever can be obtained from third parties.[255] The shipowner normally accepts a Hague Rules liability to the charterer which may well be restricted to shipboard operations where the charterer takes responsibility for terminal operations in respect of his own customer. Limits of liability are commonly based on Hague or Hague-Visby Rules with special provision being made in respect of the charterer's containers.[256]

4.91 The structure of liabilities is maintained by means of complex indemnity clauses and agreement to utilise protective clauses in bills of lading or waybills in order to prevent third party claims from disrupting it.[257] In the context of a combined transport movement this protection needs to be extended to ensure that liability arrangements between the contracting operator and other operators is maintained. A typical bill of lading clause is the subcontracting and indemnity clause,[258] which contains an undertaking on the part of the merchant that no claim is brought against any person whomsoever by whom the carriage is performed or undertaken (including subcontractors) other than the carrier coupled with an indemnity and a Himalaya provision in favour of such persons.[259] The clause goes on to extend these obligations in favour of persons chartering space on the carrying vessel and to provide for an indemnity in respect of claims against the carrier by persons other than the merchant.

252. See also the discussion and references at 1B.3. Note that a slot charterer can be a "charterer" for the purposes of s. 21 of the Senior Courts Act 1981, so that a ship belonging to him can be arrested to secure a claim arising out of the slot charter, *The Tychy* [1999] 2 Lloyd's Rep 11, CA. Furthermore slot charterers fall within the term charterer in Art. 1 of the Convention on Limitation of Liability for Maritime Claims 1976 for the purposes both of entitlement to limitation under the Convention and for the fund to be regarded as constituted by them alongside others who have constituted the fund e.g. the shipowner, *Metvale Ltd* v. *Monsanto International SARL (The MSC Napoli)* [2008] EWHC 3002 (Admlty), [2009] 1 Lloyd's Rep 246.

253. [1999] 2 Lloyd's Rep 159.

254. See further *Modern Liner Contracts*, J. Richardson, *Combined Transport Documents* and C. Hancock, "Containerisation, slot charters and the law" in *Legal Issues Relating to Time Charterparties*, ch. 14.

255. See, e.g., Slothire, cl. 15(a).

256. See generally, Slothire, cl. 14.

257. See Slothire, cl. 13.

258. See e.g. cl. 4 of Maersk Line Terms and Conditions. *Cf* cl. 4 of the DAMCO Bill of Lading, Evergreen Line Bill of Lading, cl. 4, TT CLUB 100, cl. 5, NSFCC cl. 15.

259. See further Gaskell *et al.*, ch. 12 and 2.

4G.3 CONTAINER BILLS AND WAYBILLS ETC

The prevalence of the use of containers means that bills of lading in the liner trade will commonly contain provisions relating to them whether or not they may be considered, strictly speaking as combined transport bills. Some bills may add a few simple clauses or include the more extensive clauses commonly to be found in combined transport bills. Apart from bills of lading other forms of contractual documentation such as waybills developed importance in liner trades. Similarly, both in respect of containers and other unit loads it was common to find in short-sea shipments provision for the issue of a non negotiable receipt (sometimes termed a commercial movement order or receipt note) or waybill. The use of this form of documentation in short-sea shipments reflected the fact that such shipments are commonly made by other operators such as road hauliers. Today such documentation is much less common in view of online booking and the availability of terms and conditions online. The issue of a waybill or other non-negotiable document or the absence of any "document" means that the Hague-Visby Rules as scheduled to the Carriage of Goods by Sea Act 1971 are not compulsorily applicable to shipments from the UK unless incorporated by means of a paramount clause within the terms of section 1(6)(b) of the 1971 Act.[260] This may be reinforced by the terms of the document or carriage conditions under which the parties agree that the provisions of Article VI of the Rules are applicable or providing that no bill of lading is to be issued whether or not demanded by the shipper. Consequently it has not been unknown for all liability to be completely excluded (especially on the Irish trade), including an express exclusion of liability for unseaworthiness.[261] On the North Sea and Channel trade, several operators use the North Sea Freight Conditions of Carriage 2008 which make use of standard port to port and multimodal provisions common in liner trade and provide for application of the Hague-Visby Rules for port to port carriage. Such operators are likely to make use of the guidelines for the settlement of claims relating to articles of transport which provides useful insight into the types of problems commonly occurring to such articles especially in respect of road vehicles carried on ro-ro vessels.[262] Alternatively some conditions may provide for the application of the original Hague Rules.[263] Where a bill of lading is issued, however, it is more common to find a clause which acknowledges the potential compulsory application of the Hague or Hague-Visby Rules (or national equivalents) and apply them. This may reflect the fear that failure to apply the Rules by the contract may mean that the carrier is unable to obtain their benefits should they prove to be compulsorily applicable. Apart from the basic issue of application

4.92

260. *The European Enterprise* [1989] 2 Lloyd's Rep 185, esp. pp. 188 and 191, *cf The Vechscroon* [1982] 1 Lloyd's Rep 301. Some sea waybills also incorporate the CMI Rules for Sea Waybills, see below, fn. 274.

261. See e.g. P&O Ferries Freight Terms & Conditions, cl. 9.2 in respect of Irish Sea services. For an older example see *Nelson Line (Liverpool) Ltd* v. *James Nelson & Sons Ltd* [1908] AC 16.

262. See the NSOCC Green Card 2011 (www.stenalinefreight.com/ferry/general-terms/green-card/~/media/Freight/Downloads/NSOCC Green Card.ashx). This also includes a section on securing of cargo within vehicles and Articles of Transport for carriage by sea (formerly the yellow card). See also, generally, the European Commission's *Good Practice Guide for Sea Container Control*, 2002.

263. E.g. Sea-Cargo Bill of lading (www.sea-cargo.no/Ny Bill of Lading.pdf).

of the Hague Rules a degree of similarity exists between container bills and other carriage by sea documents. Issues in relation to all such documents are considered below.

4G.3.1. Definitions

4.93 **Maersk Line Multimodal Transport Bill of Lading, clause 1**[264]

1. "Merchant" includes the Shipper, Holder, Consignee, Receiver of the Goods, any Person owning or entitled to the possession of the Goods or of this bill of lading and anyone acting on behalf of such Person.[265]
"Goods" means the whole or any part of the cargo and any packaging accepted from the Shipper and includes any Container not supplied by or on behalf of the Carrier.
"Container" includes any container (including an open top container), flat rack,[266] platform, trailer, transportable tank, pallet, or any other similar article used to consolidate[267] the Goods and any connected equipment.

4.94 A definition of goods is common in most forms of carriage by sea document. This definition draws into the concept of goods various forms of unit load device via the definition of container. A different method is to provide a definition of goods which lists the various devices.[268] Where a ferry service is involved it is usual to include the word "vehicle" or "unit" in the definition.[269] The definition of goods is designed to ensure the attachment of the conditions to all parts of the shipment.[270] It ties in also with the definition of "merchant" sometimes referred to in other conditions as the "owner". Despite the width of this clause it may not cover containers supplied by a time charterer to the shipper in circumstances where the shipper's contract is with shipowner. In *Matsushita Electric Corp of America* v. *S.S. Aegis Spirit*,[271] a time charterer's containers were held not to be covered by the bill of lading for the purposes of COGSA. In that case a possibly narrower definition of goods was used in the bill of lading which included containers supplied by or on behalf of the merchant who was defined as including the owner of the goods. The essence of the decision, however, was the characterisation of the container arrangement as a simple

264. See also similar definitions in cl. 1 of DAMCO Bill of Lading, TT CLUB 100, Evergreen Line Bill of Lading, NSFCC. The definition of container in the Evergreen Line Bill of Lading makes reference to any ISO standard container as well as to other transportation equipment in conformance with ISO standards.

265. See Gaskell *et al.*, ss 4E and 4F. See also *Australian Tallow & Agri-Commodities Pty Ltd* v. *MISC* [2001] NSWCA 16 (2001) 50 NSWLR 576 and *MISC* v. *VISA Australia* [2003] VSCA 64, 30 May 2003 (see www.onlinedmc.co.uk).

266. In a US decision in respect of a claim arising out of an agreement in a slot charter to indemnify for bad lashing in containers the court accepted that this included lashing on a flat rack. A flat rack is a container in its "ordinary shipping-contract meaning," *Hartford Fire Insurance Co* v. *Novocargo USA Inc* [2003] AMC 851 (SDNY).

267. Presumably the use of this word is not meant to impose a technical limitation, see below, 4.148.

268. *Cf* the distinction made between equipment and goods in the Roadways Container Logistics Terms & Conditions, see above, fn. 242. NSFCC in clause one defines an "Article of Transport" which includes a container and includes such articles in the definition of goods when not supplied by or on behalf of the carrier.

269. See P&O Ferries Freight Terms.

270. *Cf* the definition of consignment used in some terms, see above, 486.

271. 414 F. Supp. 894 (WD Wash 1976), [1977] 1 Lloyd's Rep 97.

bailment between the charterer and the shipowner which might have been regulated by the charterparty but was not. The case compares with *Stolt Tank* v. *Evergreen Marine*[272] where the definition of "merchant" in the bill of lading, which included the owner of any container, was held to bind the supplier of a tank container to the shipper to the limitation in the bill, notwithstanding that he was not named in the bill.[273]

4G.3.2 Carrier's tariff

Maersk Line Multimodal Transport Bill of Lading, clause 2[274] *4.95*

2. The terms and conditions of the Carrier's applicable Tariff are incorporated herein. Attention is drawn to the terms therein relating to free storage time and to container and vehicle demurrage or detention. Copies of the relevant provisions of the applicable Tariff are obtainable from the Carrier upon request. In the case of inconsistency between this bill of lading and the applicable Tariff, this bill of lading shall prevail.

4.96 In addition to this clause in the small print a reference appears on the face of the bill to the carrier's applicable tariff. This type of clause is common in liner trades where it is necessary for the tariff to contain terms agreed at the level of the shipping conference and include relevant details and conditions affecting rates and charges, conditions for acceptance of merchant supplied containers, demurrage rates in respect of carrier supplied containers etc.[275] In *The Chevalier Roze*[276] the tariff was of relevance in determining the scope of the contract of carriage.[277] Incorporation of the tariff will depend upon whether, even with this clause, sufficient notice of the contents of the tariff has been given by the carrier.[278] Alternatively there may be a separate service contract between a regular merchant and the shipping line.[279] In addition there is also likely to be a separate equipment handover agreement wherever a container or vehicle is supplied for packing or left for unpacking dealing with responsibility in respect of damage to the equipment. A clause in the bill of lading[280] will commonly require the merchant to return the container, if unpacked at the merchant's premises, with interiors clean at a designated place and to be liable for any detention.

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272. [1991] AMC 1761 (SDNY 1990).
273. See also *E.M.S. Industrie SA* v. *Polskie Towarzystwo Stevetowe* [1986] AMC 217 (EDNY 1985).
274. See also cl. 2 of DAMCO Bill of Lading, TT CLUB 100. *Cf* cl. 2 of the Evergreen Line Bill of Lading which also states that if issued as a Sea Waybill the CMI Rules for Sea Waybills (excluding cl. 4 (which applies international rules which would have applied if the document were a bill of lading)) apply.
275. See further Gaskell *et al.*, s. 2B.
276. [1983] 2 Lloyd's Rep 438.
277. See also *The Antwerpen* [1994] 1 Lloyd's Rep 213 (Sup Ct NSW) (CA).
278. *Cf TICC Ltd* v. *Cosco Ltd* [2001] EWCA Civ 1862, [2002] CLC 346, (2001) WL 1476256).
279. The "merchant" might well be an NVOCC, see e.g. the US case of *Maersk-Sealand* v. *Eurocargo Express, LLC* [2004] AMC 1098, where a general lien clause in the shipowner's bill of lading was held to be incorporated either because the bill of lading was in itself binding or was incorporated by reference into the service agreement.
280. See e.g. Maersk Line Bill of Lading, cl. 15.5.

4G.3.3 Perishable goods

4.97 **Maersk Line Multimodal Transport Bill of Lading, clause 12**[281]

12. Perishable Cargo

12.1 Goods, including Goods of a perishable nature, shall be carried in ordinary Containers without special protection, services or other measures unless there is noted on the reverse side of this bill of lading that the Goods will be carried in a refrigerated, heated, electrically ventilated or otherwise specifically equipped Container or are to receive special attention in any way. The Merchant undertakes not to tender for Carriage any Goods which require refrigeration, ventilation or any other specialised attention without giving written notice of their nature and the required temperature or other setting of the thermostatic, ventilation or other special controls to the carrier. If the above requirements are not complied with the Carrier shall not be liable for any loss of or damage to the Goods howsoever arising.

12.2 The Merchant should note that refrigerated Containers are not designed

(a) to freeze down cargo which has not been presented for stuffing at or below its designated carrying temperature and the Carrier shall not be responsible for the consequences of cargo being presented at a higher temperature than that required for the Carriage; nor

(b) to monitor and control humidity levels, albeit a setting facility exists, in that humidity is influenced by many external factors and the Carrier does not guarantee the maintenance of any intended level of humidity inside any Container.

12.3 The term "apparent good order and condition" when used in this bill of lading with reference to goods which require refrigeration, ventilation or other specialised attention does not mean that the Goods, when received were verified by the Carrier as being at the carrying temperature, humidity level or other condition designated by the Merchant.[282]

12.4 The Carrier shall not be liable for any loss or damage to the Goods arising from latent defects, derangement, breakdown, defrosting, stoppage of the refrigerating, ventilating or any other specialised machinery, plant, insulation and/or apparatus of the Container, vessel, conveyance and any other facilities, provided that the Carrier shall before and at the beginning of the Carriage exercise due diligence to maintain the Container supplied by the Carrier in an efficient state.[283]

4.98 It is common to find a clause in liner bills of lading dealing with the possibility of specialised transport such as use of a refrigerated container.[284] They generally exclude liability for latent defects in a container supplied by the carrier. Some clauses also exclude liability in respect of the care of the refrigeration unit when the container is not in the actual possession of the Carrier.[285] In respect of short-sea ferry services terms can be found which include a clause which states that the carrier will use reasonable endeavours to connect any vehicle, trailer or container to the vessel's supply of steam or electricity and to maintain the supply, but will not be

281. *Cf* DAMCO Bill of Lading, cl. 12, TT CLUB 100, cl. 9, Evergreen Bill of Lading, cl. 18, NSFCC, cl. 20.

282. This definition might be open to challenge if the Rotterdam Rules come into force. Article 36(4) defines apparent condition as being based on a reasonable external examination of the goods as packaged. If a court finds that a reasonable external examination includes verification of temperature levels etc, then the clause might be considered void under Art. 79.

283. The continuing duty in respect of seaworthiness to be found in Art. 14 of the Rotterdam Rules may prove a challenge to this clause if the Rules come into force.

284. See also Gaskell *et al.*, s. 10D. For a US decision on the duty of care under COGSA see *Sunripe (Cape) (Pty) Ltd* v. *Mediterranean Shipping Co SA* [2004] AMC 1 (SDNY 2003).

285. See e.g. Evergreen Line Bill of Lading, cl. 18(2). This might well fall foul of any continuing duty of care found to be imposed by a compulsory rule e.g. Art. III, r. 2 of the Hague Rules.

liable for the breakdown, etc, of the supply.[286] Clause 12 focuses on the actions of the carrier once informed of the special requirements of the goods. It compares with clause 11(2)(c) which is concerned with the shipper's failure to set controls correctly. Some conditions make clear generally that without a written request the carrier is not obliged to provide a container of any particular type or quality.[287]

4G.3.4 Optional stowage and deck cargo

Maersk Line Multimodal Transport Bill of Lading, clause 18[288] *4.99*

18. Optional Stowage, Deck Cargo and Livestock

18.1 The Goods may be packed by the Carrier in Containers and consolidated with other goods in Containers.
18.2 Goods, whether packed in Containers or not, may be carried on deck or under deck without notice to the Merchant unless on the reverse side hereof it is specifically stipulated that the Containers or Goods will be carried under deck. If carried on deck, the Carrier shall not be required to note, mark or stamp on the bill of lading any statement of such on-deck carriage. Save as provided in clause 18.3, such Goods (except livestock) carried on or under deck and whether or not stated to be carried on deck shall participate in general average and shall be deemed to be within the definition of goods for the purpose of the Hague Rules or US COGSA and shall be carried subject to such Rules or Act, whichever is applicable.
18.3 Goods (not being Goods stowed in Containers other than flats or pallets) which are stated herein to be carried on deck and livestock, whether or not carried on deck, are carried without responsibility on the part of the Carrier for loss or damage of whatsoever nature or delay arising during the Carriage whether caused by unseaworthiness or negligence or any other cause whatsoever and neither the Hague Rules nor US COGSA shall apply.

4.100 The liberty to carry on deck granted by this type of clause is of particular importance[289] and it is important not to negate its effect by obscure terms on the face of the bill of lading or by a confirmation note.[290] Such a liberty is generally to be found in shipping documents in respect of containers and other unit loads where carriage on deck is common practice. The object of the clause is to negate operation of the common law rule,[291] derived from cases such as *Royal Exchange Shipping Co Ltd* v. *Dixon Ltd,* that stowage on deck is not a permissible form of stowage in the absence of agreement or custom of the trade.[292] Recently, however, in Australia, Emmett J in *Chapman Marine Pty* v. *Wilhelmsen Lines (The Tarago)*[293] has suggested that no such principle derives from the *Royal Exchange* case. The suggestion is that there is no general implication that all cargo will be carried under deck. Any such

286. See, P&O Ferries Freight Terms & Conditions of Carriage cl. 6.3; *cf*, however, Brittany Freight General Conditions for the carriage of Freight cl. 5.b. See further, J. Wong, "Container Transportation and Anomalies in the Law" (1995) 23 ABLR 340.
287. *Cf* TT CLUB 100, cl. 8(3).
288. See also DAMCO Bill of Lading, cl. 18, TT CLUB 100, cl. 12, Evergreen Line Bill of Lading, cll. 16 and 17, NSFCC, cl. 8.
289. See also Gaskell *et al.*, s. 10B.
290. As occurred in *Geofizika DD* v. *MMB International Ltd Greenshields Cowie & Co Ltd (Third Party) (The Green Island)* [2010] EWCA Civ 459, [2010] 2 Lloyd's Rep 1, see above, 2.118 *et seq.*
291. See also the Hamburg Rules, Art. 9 and Art. 25 of the Rotterdam Rules.
292. (1886) 12 App Cas 11. See *Scrutton*, Art. 99, 9–108. See also S. Hodges & D. A. Glass, "Deck cargo: Safely stowed at last or still at sea?", ch. 12 in Thomas RR.
293. [1999] AMC 1221 (Fed Ct NSW District Registry), pp. 1240–1242.

implication will arise from the nature of the cargo and the surrounding circumstances.

4.101 Emmett J also had no doubt about the efficacy of the liberty clause in the bill of lading to protect the carrier.[294] US authority suggests that a printed liberty, absent a custom of the port to carry on deck, will not, in itself, excuse the carrier from his *prima facie* breach of contract. This is derived from the issue by a carrier of a "clean" bill of lading i.e. one that does not indicate the place of stowage.[295] This has been applied to container carriage and the carrier is deemed to be *prima facie* liable for deviation unless the bill of lading states, on its face, that the container is to be carried on deck, or otherwise indicates that the shipper has consented to on-deck stowage.[296] The burden in respect of port custom or practice is to establish that the custom exists in the circumstances of the case, as in *Ets Gustave Brunet SA* v. *M.V. Nedlloyd Rosario*.[297] No custom was established to load over-height, open-topped containers on deck with cargo whose tarpaulins do not completely cover them and scheduled for transportation across the North Atlantic at a time of year when heavy winds, high swells and storms are foreseeable. In *Great American Insurance Companies* v. *M/V Romeral*[298] proof that it is customary in the maritime industry to stow oversized equipment on a flat rack, and to stow the flat rack on top of other containerised cargo, did not establish a custom specifically in the port, nor did it address on-deck versus below-deck stowage.[299] In *Konica Business Machines* v. *The Sea-Land Consumer and Sea-Land Service*[300] the appeal court acknowledged that

294. Tetley, at p. 1594 doubts the efficacy of liberty clauses. *Cf Armour & Co Ltd* v. *Leopold Walford (London) Ltd* [1921] 3 KB 437, *Svenska Traktor Akt.* v. *Maritime Agencies (Southampton) Ltd* [1953] 2 Lloyd's Rep 124 and *Guadano* v. *S.S. Cap Vincent* [1973] FC 726, with *St-Simeon Navigation Inc* v. *A. Couturier* (1974) 44 DLR (3d.) 478 (Sup Ct Canada).

295. *St. John's N.F. Shipping Corp* v. *Comp. Geral Commercial Do Rio De Janiero*, 263 U.S. 119 (1923), [1923] AMC 1131. See, however, Emmett J's explanation of this case in *The Tarago* above, fn. 293 at pp. 1240–1241 that it turned more on the effect of the option contained in the freight reservation agreement and cannot stand for a general proposition that a "clean" bill in all circumstances constitutes a representation that cargo will be stowed under deck. See further Tetley, pp. 1591–2, and also *Ingersoll Milling Machine Co* v. *M.V. Bodena* [1987] AMC 988 (SDNY 1985 and 1986).

296. *Encyclopaedia Britannica* v. *The Hong Kong Producer*, 422 F. 2d 7 (2d Cir. 1969), [1969] AMC 1741, [1969] 2 Lloyd's Rep 536, *Lime Intl* v. *Alpha N.A. Line* [1979] AMC 2693 (SDNY 1979), *I.N.A.* v. *Dart Containerline*, 629 F. Supp 781 (ED Va 1985), [1987] AMC 42. *Cf Rosenbruch* v. *American Export Istbrandtsen Lines*, 543 F. 2d 967, [1976] AMC 487 (2d Cir. 1976). *Cf* also, *Royal Embassy* v. *Ioannis Martinos* [1986] AMC 301 (ED N Carolina 1984) where the shipper knew of the deck stowage. In *English Electric Valve Co Inc* v. *M/V Hoegh Mallard*, 814 F. 2d. 84 (2d Cir. 1987), Sorkin, para. 13.16(5), the shipper had actual notice through his forwarder who arranged shipment and was familiar with the carrier's custom of on-deck shipments. Further, the special design of the ship constituted a custom and practice of the industry (*cf Konica Business Machines* below). A sophisticated shipper need not receive actual notice of on-deck stowage prior to departure where he knows of industry practice that the carrier would not guarantee under-deck stowage of oversize cargo and would not issue original bills of lading until the cargo was on board and the freight paid: *Deltamax Freight System* v. *M/V Aristotelis* [1999] AMC 1789 (DC Cal 1998). There remains a live issue whether knowledge that the goods will be stowed on deck is sufficient or whether actual consent must be shown, *Marinor Associates Inc* v. *M/V Panama*, 2011 WL 710616 (SD Tex).

297. [1997] AMC 803 (SDNY 1996). *Cf*, however, *Alternative Glass Supplies* v. *M/V Nomzi* [1999] AMC 1080 (SDNY).

298. [1997] AMC 2431 (ED La).

299. In later proceedings proof that this was normal usage in the port was accepted [1999] AMC 2542.

300. [1995] AMC 1065 (9th Cir.).

evidence of a custom in the trade is also an exception to the general rule and remitted the case back for consideration of evidence as to port custom or general usage of the trade. The lower court[301]returned the finding that by the time of the incident (1991), on-deck stowage of containers on ships such as the vessel in the case which was a ship specially built for the carriage of containerised cargo with a greater capacity for on-deck stowage for containers than under-deck, was a well-established custom of the trade throughout the world. This provides further recognition of the technical advances made in relation to container ships which had been made previously in *Du Pont de Nemours International SA* v. *S.S. Mormacvega*.[302] In *Insurance Co of North America* v. *Blue Star (North America) Ltd*,[303] the court noted that the custom of stowing containers on deck has matured over the 22 years since *Mormacvega*.

4.102 The effect of the breach of a duty to carry below deck has been regarded in the US as a form of deviation sometimes termed "quasi deviation".[304] This has the same effect as a geographical deviation which in American law is a fundamental breach depriving the carrier of the benefit of the bill of lading limitations and exclusions.[305] As an "unreasonable deviation" it deprives the carrier of rights under COGSA such as the right to limit his liability under s.1304(5), or the benefit of the presumption in s.1303(6) although probably not the time limit.[306] In *Metro Leather Corp* v. *M/V Savannah*,[307] however, the carrier was allowed to rely on the COGSA package limitation as there was nothing about the stowage of a container on deck which made it any easier for thieves to steal the contents than if it were stowed below deck. This appears to be based on the conclusion that the deviation was not thereby unreasonable[308] which is considered in the next paragraph.

4.103 Apart from the recognition of the development of trade custom,[309] US authorities also gave recognition to the technical advances made in relation to container ships in the context of COGSA by regarding the carriage of a container on the deck of a ship specially designed to carry containers as not per se unreasonable for the purposes of s.1304(4) of COGSA. This was on the basis that whilst a clean bill of lading imports below-deck stowage, nevertheless, stowage elsewhere will be held to be an unreasonable deviation only when a ship's hold is the ordinary and

301. [1996] AMC 1761, (CD Cal), affirmed [1998] AMC 2705 (9th Cir.).
302. 493 F. 2d 97 (2d Cir. 1974), [1974] AMC 67, [1974] 1 Lloyd's Rep 296, see below, 4.103.
303. [1997] AMC 2434 (SDNY).
304. See Sorkin, para. 13.13(1)(e).
305. Sorkin, para. 13.13(2).
306. *Italia Di Navigazione SpA* v. *M.V. Hermes I*, 724 F. 2d 21 (2d Cir. 1983). Similarly in respect of carriage on deck, *Coral Int'l Inc* v. *Saudi Nat'l Lines*, 439 So. 2d. 1035 (Fla Dist Ct App 1983), see Sorkin, para. 13.13(2) fn. 90.
307. [1994] AMC 2178 (SDNY 1992).
308. The position also appears to be that where the stowage on deck is not causally related to the damage then it may not be deemed to be an unreasonable deviation, *O'Connell Machinery Co Inc* v. *M.V. "Americana"* 797 F. 2d. 1130, 1136 (2d Cir. 1986), Sorkin, para. 13.16(5), *cf* this author's discussion of causation in respect of deviation generally at para. 13.13(3)(a), and compare further *Romano* v. *West India Fruit & S.S. Co* 151 F. 2d. 727 (5th Cir. 1945) .
309. Tetley, pp. 1571–2 suggests that there is no basis for the application of the custom where the Hague Rules apply.

contemplated stowage area.[310] This reflects a paradox in that whilst the traditional rule would regard below deck stowage, absent consent or custom, as a technical breach of contract, the effect of COGSA is such that a reasonable deviation is not deemed as a breach of the contract of carriage.[311] A separate stream of authority can be said therefore to have commenced with the decision in *Du Pont de Nemours* v. *The Mormacvega*.[312] It may perhaps be reconcilable with the traditional approach by saying that the carriage of a container on the deck of a containership, such "deck" being a suitable place for stowage of containers, is not carriage on deck for the purpose of the traditional rule.[313] Apart from where a specially constructed or converted containership or combination ship is used a similar view has been taken where the ship has been modified to permit the safe carriage of containers on deck.[314] It has even been suggested that a request for under-deck stowage would be ignored.[315] On the other hand an express agreement to try to stow below deck or otherwise inform the customer was recognised in *American Dornier Machinery Corp* v. *MSC Gina*.[316] In the absence of custom or recognition that the ship's deck is a contemplated stowage area consideration may still be given to whether stowage on deck is reasonable given special circumstances such as evidence that the goods are more safely stowed on deck.[317] Where stowage on deck exposes the goods to no

310. *Du Pont de Nemours* v. *The Mormacvega*, 493 F. 2d 97 (2d Cir. 1974), [1974] AMC 67, [1974] 1 Lloyd's Rep 296; *Electro-Tec Corp* v. *S.S. Dart Atlantica* 598 F. Supp. 929 (DC Md 1984), [1985] AMC 1606; *I.N.A.* v. *Dart Containerline*, 629 F. Supp. 781 (ED Va 1985), [1987] AMC 42; *Neuenberger Schweitz* v. *Aldebaran* [1990] AMC 1886 (SDNY); *Leather's Best Intl* v. *Lloyd Sergipe* [1991] AMC 1929 (SDNY 1991). See also *Konica Business Machines* v. *The Sea-Land Consumer and Sea-Land Service Inc* [1995] AMC 1065 (9th Cir. 1995) and *Konica Business Machines* v. *Vessel Sea-Land Consumer* [1998] AMC 2705 (9th Cir.). *Cf* the view of Tetley, however, at p. 1584.

311. See *Konica Business Machines* v. *Vessel Sea-Land Consumer* [1998] AMC 2705 (9th Cir.) at p. 2708. For a critical review of this use of COGSA see Rutgers Camden Law Journal, Vol. 6:417, pp. 437–452.

312. See previous footnote.

313. In *Du Pont de Nemours,* the lower court relied on a statement in Carver's *Carriage by Sea* 1971, at p. 603, that given the manner in which steamers are now commonly built it cannot perhaps be said that cargo must always be below the main deck in order to be in the ordinary loading space of the ship, citing the US decision in *The Neptune* (1867) 16 LT 36. See McMahon (1973) 4 JMLC 323, at p. 327.

314. *American Home Assurance Co* v. *M/V Tabuk* [2002] AMC 184 (SDNY 2001)

315. *Per* Motley DJ in *The Red Jacket* [1978] 1 Lloyd's Rep 300 at p 303. See also *Insurance Co of North America* v. *Blue Star (North America) Ltd* [1997] AMC 2434 (SDNY) at p. 2446. See further *Taisho Marine* v. *Sea-Land Endurance* 815 F. 2d 1270 (9th Cir. 1987), [1987] AMC 1730, and see also James B. Wooder, "Deck Cargo: Old Vices and New Law" (1991) 22 JMLC 131 and R. Glenn Bauer, "Deck Cargo: Pitfalls to be avoided under American Law in Clausing Your Bills of Lading" (1991) 22 JMLC 287.

316. [2002] AMC 560 (SDNY 2001).

317. See *Great American Insurance Companies* v. *M/V Romeral* [1997] AMC 2431 (ED Louisiana), at p. 2433, and *Ets Gustave Brunet*, (above, 4.101). Equally the converse should be true so that the mere fact that the deck of a containership is, in general, a proper place for stowage does not necessarily make it a reasonable place if, to the knowledge of the carrier, it is not a suitable place for the particular goods. A danger of *Du Pont* is that such a consideration might be ignored and an advantage of the traditional approach is the possibility of showing a custom to carry certain types of goods below deck even on containerships (see McMahon, above, fn. 313 at p. 328). Nevertheless the rule in *Du Pont* is essentially concerned with the reasonableness of the carrier's action in choosing a particular place of stowage and the legitimate expectations of the cargo owner can be expected to be considered in the court's assessment of it.

greater foreseeable danger than when stowed below deck there will be no unreasonable deviation.[318]

4.104 There seems little doubt that in English law a carrier who ignores an agreement to stow the goods below deck will be regarded as being in breach of contract,[319] and is unlikely to be able to employ any overarching concept of reasonable deviation to enable him to ignore it. However, the English courts have not yet had the opportunity to face squarely whether stowage of a container on the deck of a containership is a breach per se in the absence of consent or custom. The Court of Appeal has made clear that application of the traditional rule regarding deviation, if it still exists, does not apply to unauthorised carriage on deck so that the carrier does not automatically lose the right to rely on a package limitation in the contract. In *Daewoo Heavy Industries Ltd* v. *Klipriver Shipping Ltd*,[320] the Hague Rules were incorporated by contract into a bill of lading. The court held that the package limitation in Article IV, rule 5 could apply notwithstanding the unauthorised restowing of excavators on deck at an intermediate stage of the voyage. The problem was to be treated purely as one of construction and given that the limit was expressed to apply "in any event" there was little doubt that it applied in these circumstances.[321] So far as the application of defences such as insufficiency of packing or jettison in Article IV, rule 2 (l) and (n) are concerned the breach of contract in shipping the cargo on deck is likely to be a cause.[322] This was the position in *Royal Exchange* v. *Dixon*[323] which was never an authority that in the case of any carriage on deck the carrier could never rely on any exceptions. In respect of other defences, such as Act of God or fire the events giving rise to them might apply whether the cargo was loaded on deck or not.

4.105 Quite apart from the question of breach of contract the issue may arise as to whether the stowage on deck or method of stowage on deck amounts to a failure to

318. *Kia Steel Co Ltd* v. *M.V. Maren Maersk* [1999] AMC 2068 (SDNY). Stowage below deck is normally inherently safer and where this is the case there will be no unreasonable deviation in stowing the goods below deck despite the issue of a bill of lading showing on-deck stowage, *Atlantic Coast Yacht Sales Inc* v. *M/V Leon, In Rem* [2003] AMC 1871 (D Md).

319. *Evans* v. *Merzario* [1976] 2 Lloyd's Rep 165, *Sheerwood* v. *The Lake Eyre* [1970] Ex CR 672. See further in respect of uncontainerised goods *The Nea Tyhi* [1982] 1 Lloyd's Rep 606, *The Antares* [1987] 1 Lloyd's Rep 424, *The Chanda* [1989] 2 Lloyd's Rep 594. See also, Livermore, "Deviation, Deck Cargo and Fundamental Breach" (1990) 2 *Journal of Contract Law* 241.

320. [2003] EWCA Civ 451, [2003] 2 Lloyd's Rep 1.

321. The court overruled the *The Chanda*, (fn. 319), having noted an article on this case by Davenport (1989) 105 LQR 521, and approved the contrary decision in *The Nea Tyhi* (fn. 319). In *The Antares* (fn. 319), the Court of Appeal had held that the time limit in Art. III, r. 6 of the Hague-Visby Rules applied to an unauthorised deck stowage where the Rules applied as a matter of statute. Longmore LJ in *Daewoo*, at p. 13 did not think the conclusion would have been any different had the Rules been incorporated by clause paramount. Longmore LJ also pointed out that the limit applied to a breach of the obligation of seaworthiness as established in *The Happy Ranger* [2002] 2 Lloyd's Rep 357 which was equally serious in undermining the obligation of the carrier. *Evans* v. *Merzario*, (fn. 319) where there was a wholly separate and collateral promise which induced the business to continue, was distinguished (see p. 14).

322. Longmore LJ at p. 14. The suggestion being, it seems, that in such case the defence would not apply.

323. Above, 4.100.

exercise proper care of the goods.[324] The stowage of a container loaded with calcium hypochlorite in the top outer tier of containers was held not to be negligent in *Standard Commercial Tobacco Co* v. *The M/V Recife*.[325] This was because such stowage was permitted by the International Maritime Dangerous Goods Code and also was customary. In *Nelson Pine Industries Ltd* v. *Seatrans New Zealand Ltd (The Pembroke)*,[326] it was held to be recklessness on the part of the master to stow on deck open-top containers which he knew were already damaged and which were not covered at the ends of the container by tarpaulins. Consequently the defendants, who were the New Zealand agent and legal representative of the master and the owner and charterer, were not entitled to rely on the package limitation in the Hague-Visby Rules. As noted in the previous paragraph generally, however,[327] the carrier will be able to limit liability in accordance with Article IV, rule 5 of the Hague-Visby Rules, whether they apply compulsorily or contractually by virtue of a paramount clause, given that the limit applies in any event.

4.106 Some liberty clauses in use indicate that the conditions in the document are to apply whether the goods are stated to be or are in fact carried on or below deck. Such a clause would not seem likely to exclude liability for misstatement of the facts as in *The Nea Tyhi*[328] or for breach of an undertaking to stow below deck as in *Evans* v. *Merzario*.[329]

4.107 Clause 18 of the Maersk Line Bill of Lading appears to reflect and to make clear the position in respect of the Hague Rules. Article 1(c) of the Rules which excludes their operation in respect of deck cargo but does so only when the goods are stated to be and are carried on deck.[330] Where the goods are not so stated the Rules apply. Sub-clause (3) applies the exclusion directly whereas sub-clause (2) maintains the operation of the Rules where the liberty is exercised.[331] In some conditions, where it is sought to incorporate the Hague Rules contractually, there may simply be a statement that the Rules apply to the carriage of the goods on deck. This might have the effect of negating the exclusion of deck cargo in Article 1(c) of the Rules unless

324. *Cf Selected Machinery Imports Pty Ltd* v. *A. Hartrodt Italiana SRL*, 23 June 1989, Supreme Court of Victoria, unreported, where the carrier was not liable for salt water damage to goods within an open-top container carried on deck, the carrier being entitled to assume that the goods had been adequately packed to withstand a sea voyage, with *Carling O'Keefe* v. *C.N. Marine* [1990] AMC 997 (Fed App Ct Canada affirming [1987] AMC 954).

325. [1994] AMC 1208 (SDNY 1993).

326. [1995] 2 Lloyd's Rep 290 (High Ct, New Zealand).

327. Unless the circumstances are within Art. IV, r. 5(e) of the Hague-Visby Rules.

328. [1982] 1 Lloyd's Rep 606.

329. [1976] 2 Lloyd's Rep 165.

330. *Cf Svenska Traktor Akt* v. *Maritime Agencies (Southampton) Ltd* [1953] 2 Lloyd's Rep 124. In *Sideridraulic Systems SpA* v. *BBC Chartering & Logistic GmbH & Co KG (The BBC Greenland)* [2011] EWHC 3106 (Comm), [2012] 1 Lloyd's Rep 230, clausing of a bill of lading by the Master to state "All cargo carried on deck at shipper's/Charterer's/Receiver's risk as to perils inherent in such carriage" was interpreted as a statement of carriage on deck, see further, Y Baatz, "Mandatory application of the Hague-Visby Rules, Deck Cargo and Jurisdiction" (2012) 9(1) S&TI 10.

331. In this case the Rules can operate in the normal way (unless stowage on deck involves some issue of fault, see above 4.105). See e.g. *Tasman Orient Line CV* v. *New Zealand China Clays Ltd (The Tasman Pioneer)* [2010] NZSC 37 [2010] 2 Lloyd's Rep 13.

special provision is made in respect of such cargo.[332] Where the conditions incorporate the Hague-Visby Rules, the effect of section 1(6) and (7) of the Carriage of Goods by Sea Act 1971 will likewise negate the exception in Article 1(c). This will mean that specific exclusion of deck cargo will be necessary if the intention is that the Rules should not apply to such cargo.[333]

4.108 Where the Hamburg Rules are applicable the specific provisions made in respect of deck cargo will fall for consideration. By Article 9 the carrier is entitled to carry the goods on deck only if this has been agreed with the shipper or is in accordance with the usage of the particular trade or is required by statutory rules or regulations. An agreement with the shipper must be inserted into the bill of lading if it is to be binding on a third party. In respect of the shipper the carrier would have the burden of proving the agreement if it did not so appear. The carrier will be liable for loss damage or delay resulting solely from unauthorised carriage on deck which may include loss of the right to limit liability if such carriage constitutes an act or omission of the carrier done with intent to cause loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.[334] If the carriage on deck is contrary to an agreement to carry below deck this is deemed to be an act or omission of the carrier which deprives the carrier of the right to limit.

4.109 The Hamburg Rules do not specifically address the issues surrounding container transport. It seems that this will be addressed if the Rotterdam Rules come into force. Article 25(1) of the Rules provides that goods may be carried on the deck of a ship only if: (a) such carriage is required by law; (b) they 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; (c) the carriage on deck is in accordance with the contact of carriage, or the customs, usages, and practices of the trade in question. Where such carriage is required by law or the goods are carried on deck under the contract, custom or usage it is provided that the carrier shall not be liable for loss of or damage to such goods or delay in their delivery caused by the special risks involved in their carriage on deck. Containers carried on the deck of ships specially fitted to carry them incur liability in the normal way without regard to whether they are carried on or above deck.[335] The remainder of the provision is in broadly similar terms to the Hamburg Rules.

4.110 Presumably an express liberty in respect of carriage of containers on the deck of a containership should not be interpreted to mean that such carriage can never be a breach of the Rules. It should be possible to argue that the carrier can still be in

332. For an example of a clause dealing specifically with deck cargo in respect of the carriage of timber see: *The Tilia Gorthon* [1985] 1 Lloyd's Rep 552. See also Gaskell *et al.*, para. 10.30 and the discussion of *Tasman Express Line Ltd* v. *J.I. Case (Australia) Pty Ltd* (1992) 342 LMLN (CA NSW).

333. Where, however, the bill of lading simply incorporates the Rules where they apply compulsorily they will not apply to cargo carried on and stated as being carried on deck since in that case they are not compulsory, *Sideridraulic Systems,* fn. 330.

334. See Art. 8.

335. Which creates some difficulty in determining precisely how the liability under the Rotterdam Rules and the defences therein are to be applied in the different cases provided for in Art. 25, see S. Hodges & D.A. Glass "Deck cargo: Safely stowed at last or still at sea?" ch.12 in Thomas, RR, see further, however, the footnote following.

breach of his duty of care if, in the circumstances of the case, the positioning of sensitive goods, albeit stuffed into a container, on the deck of the ship is inappropriate.[336]

4G.3.5 Description of goods

4.111 **Maersk Line Multimodal Bill of Lading, clause 14**[337]

14. Description of Goods

14.1 This bill of lading shall be prima facie evidence of the receipt by the Carrier in apparent good order and condition, except as otherwise noted, of the total number of Containers or other packages or units indicated in the box entitled "Carriers Receipt" on the reverse side hereof.
14.2 No representation is made by the Carrier as to the weight, contents, measure, quantity, quality, description, condition, marks, numbers or value of the Goods and the Carrier shall be under no responsibility whatsoever in respect of such description or particulars.
14.3 The Shipper warrants to the Carrier that the particulars relating to the Goods as set out on the reverse hereof have been checked by the Shipper on receipt of this bill of lading and that such particulars, and any other particulars furnished by or on behalf of the Shipper, are adequate and correct. The Shipper also warrants that the Goods are lawful goods, and contain no contraband, drugs, other illegal substances or stowaways, and that the Goods will not cause loss damage or expense to the Carrier, or to any other cargo during the Carriage.
14.4 If any particulars of any Letter of Credit and/or Import License and/or Sales Contract and/or Invoice or Order number and/or details of any contract to which the Carrier is not a party, are shown on the face of this bill of lading, such particulars are included at the sole risk of the Merchant and for his convenience. The Merchant agrees that the inclusion of such particulars shall not be regarded as a declaration of value and in no way increases Carrier's liability under this bill of lading.

4G.3.5.1 Container bills as evidence of contents of the container[338]

4.112 This clause acknowledges that the bill of lading is *prima facie* evidence of the receipt by the carrier of the goods in accordance with the description on its face. It seeks to make clear that the only representations made on behalf of the carrier as to the receipt of and apparent condition of the goods are in respect of the quantity of goods indicated in the number of containers/packages box on the face of the bill. Although

336. This will depend on the extent of the carrier's knowledge of the goods stuffed in the container exposing them to any special risk by carriage on deck notwithstanding the protection provided by the container. Absent such special knowledge the liberty should provide the carrier protection from any residual risk arising from such carriage, in line with the Rotterdam Rules.

337. See also DAMCO Bill of Lading, clause14. *Cf* Evergreen Line Bill of Lading, cl. 12 which states that the carrier does not have facilities to weigh sealed containers at the loading port and has neither inspected the contents of or weighed the containers. It goes on to indicate that any statements on the bill as to marks and numbers, number and kind of packages, description, quantity, quality, weight, measure, nature, kind, value or other particulars of the content of such container(s) are as furnished by the merchant and unknown to the carrier who accepts no liability for them. The acknowledgement of the carrier is confined to the number and apparent condition of the container(s). This is reinforced by the received clause at the start of the conditions that acknowledges receipt in good order and condition of the goods, containers or other packages or units said by the merchant to contain the cargo herein mentioned.

338. See also Gaskell *et al.*, ss 7B and 7C.

it appears to indicate that only a limited representation might be made its effect may be to act as a qualification of other representations made on the face of the bill since particulars of the goods will likely be placed in the main box headed "Kind of Packages; Description of Goods; Marks and Numbers; Container No./Seal No." The qualification is reinforced by a further statement below it which indicates that the above mentioned particulars are as declared by the shipper but without responsibility of or representation by carrier, along with a reference over to clause 14. This technique compares with or may be used in combination with other indications or notations on the face of the bill, common in container transport, which seek to qualify any statement of the contents of the container by using expressions such as "said to contain" or "shipper's load and count".

Where the Hague or Hague-Visby Rules are applicable such qualifications are effective to negate statements as to the contents of the containers as providing *prima facie* proof[339] against the carrier at least where he is relying on statements made by the shipper as where the container has been packed and sealed by the shipper or his agents. This was the case in the Australian decision of *ACE Imports Pty Ltd* v. *Companhia de Navegacao Lloyd Brasileiro (The Esmeralda 1)*.[340] A clause similar to clause 14(1) did not affect this.[341] In *The River Gurara*,[342] however, Phillips LJ suggested that it was at least arguable that the words "said to contain" do no more than make plain that the carrier is, as required by Art. III, rule 3 of the Hague Rules, stating on the bill the "number of packages . . . as furnished in writing by the shipper" without dissenting from the description, so that the description can be relied upon as providing *prima facie* evidence as to what was within the containers. With respect this does not appear to be a natural view of the words and contrasts with the view of Donaldson J in *The Galatia*[343] that the words "said to weigh" were not qualified by the words "weight unknown".[344] Even if the carrier is in a position to verify the particulars provided by the shipper qualifications of this type have still been considered to be effective. In *The Mata K*[345] it was held that it was up to the shipper to require the carrier to acknowledge such statements by demanding them under the terms of Article III, rule 3 of the Rules and in the absence of such demand there could be no duty to make them. Furthermore such qualifications prevented liability from being created rather than lessened and so did not fall foul of Article III, rule 8 of the Rules.[346] A stricter application of the Hague Rules can be found, 4.113

339. Or conclusive proof in respect of a third party transferee of the bill within Art. III, r. 4 of the Hague-Visby Rules. They will also be effective to prevent any representation from being made for the purposes of s. 4 of the Carriage of Goods by Sea Act 1992.

340. [1988] 1 Lloyd's Rep 206 (Sup Ct NSW 1987).

341. See at p. 210, *cf Plastique Tags Inc* v. *Asia TransLine Inc* [1996] AMC 2304 (11th Cir.).

342. [1997] 4 All ER 498.

343. [1979] 2 Lloyd's Rep 450 at p. 497.

344. *Cf Zim Israel Navigation Ltd* v. *The Israeli Phoenix Assurance Co* (1999) 34 ETL 535 (Sup Ct Israel, 1 September 98).

345. [1998] 2 Lloyd's Rep 614.

346. See also *The Atlas* [1996] 1 Lloyd's Rep 642.

however, in some jurisdictions.[347] At the very least the effect of the proviso is treated as requiring that a carrier will only be permitted to limit the statements he makes if he cannot verify the contents of the container.[348] The strictest interpretation of the Rules suggests that a carrier who is unable to verify the statements in the bill should refuse to issue a bill with those statements in them,[349] and is reflected in cases where the carrier has not been permitted to rely on a reservation even where he has not been able to verify the contents of the container.[350] Similar issues arise in respect of the other transport conventions[351] but can be of less moment than in carriage by sea where statements on the bill of lading are capable of conclusive effect. The concern arises precisely because of the reliance of third parties on the statements in the bill. It may be thought that the English courts are sufficiently astute to this and will ensure that any qualification is sufficiently clear so as not to present a trap for the unwary.[352] A further possible consideration may be a perceived need to bolster the use and merchantability of bills of lading. This appears as a policy behind Article III, rule 3 of the Rules at least where the carrier is in a position to verify the statements made by the shipper otherwise why should a carrier be required to issue a bill at all or one containing the required particulars? In effect the decision in *The Mata K* runs counter to this policy by leaving it to the bargaining power of the shipper to insist on his rights. A more purposive approach to Article III, rule 8 has been suggested so as to disallow the use of such clauses and thereby encourage carriers to be more specific in making their reservations.

4.114 The Hamburg Rules require the carrier to specify any inaccuracies, grounds of suspicion or the absence of a reasonable means of checking when making a

347. See *The American Legacy* (1980) 15 ETL 385 (French Sup Ct 1980), at least in respect of the words "said to contain", *cf* Clarke, "Containers: Proof that Damage to Goods Occurred During Carriage" in Schmitthoff and Goode, p. 64, especially at p. 77. See further Tetley at pp. 1557–8, Shachar, "The Container Bill of Lading as a Receipt" (1978) 10 JMLC 39, De Wit, para. 9.20 *et seq*. See also *Coutinho, Caro & Co (Canada) Ltd* v. *Owners of the Vessel Ermua* (1979) 100 DLR (3d) 461 (reversed on appeal (1981) 121 DLR (3d) 571) (Canada), *Austracan (USA) Inc* v. *Neptune Orient Lines Ltd,* 612 F. Supp. 578 (SDNY 1985), *Leather's Best Intl* v. *Lloyd Sergipe* [1991] AMC 1929 (SDNY 1991), *Fox and Associates Inc* v. *M/V Hanjin Yokohama* [1998] AMC 1090 (CD Cal 1997), although this case was not followed in respect of the condition of the contents of the container in *Intercargo Insurance Co* v. *L.C. Shipping Inc* [1998] AMC 2561 (App Div of Superior Ct County of Los Angeles). *Cf* the position in US law, however, where the Pomerine Act was applicable, *Dei Dogi* v. *Summa Trading Corp* [1990] AMC 1628 (this Act was repealed and replaced in 1994 by the Bills of Lading Act (108 Stat. 1346)). See also Suprema Corte de Justicia, Uraguay, 28 March 2001, [2002] 4 ULR 1234.

348. This proviso does not appear in s. 4 of the Carriage of Goods by Sea Act 1992. It may be implied that a bill of lading which qualifies the statement of contents of the container no longer represents shipment of the quantity so stated for the purpose of s. 4 of that Act.

349. See Shachar, p. 64. This is a literal approach to Art. III, r. 3 which indicates that a carrier in not bound to state the particulars which he has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking. A carrier might equally be said not to show the particulars if he qualifies them. The Hamburg Rules and the Rotterdam Rules avoid this difficulty by permitting the carrier to make reservations or to include a qualifying clause rather than permitting him not to show the particulars which, if applied strictly, is an unrealistic requirement given the trade need of shippers for a transport document showing such particulars.

350. E.g. *Continental Distributing Co Inc* v. *M/V Sea Land Commitment* [1992] AMC 1743.

351. See e.g. in respect of CMR, Clarke, CMR, para. 25

352. See the approach taken at first instance in *The Galatia*, above fn. 343.

reservation as to the bill of lading's particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods.[353]

The Rotterdam Rules deal more specifically with the ability of the carrier to qualify the contract particulars required under Article 36.[354] By Article 40(1) the carrier shall qualify the information in Article 36(1) if the carrier has actual knowledge of a false or misleading statement or has reasonable grounds to believe that this is the case. Article 40(2) permits the carrier to qualify the information to show that the carrier does not assume responsibility for the accuracy of the information provided by the shipper. However, Article 40(1) also indicates that the carrier may so qualify in the circumstances and in the manner set out in paragraphs 3 and 4 of the article. Paragraph 3 deals with where the goods are not delivered in a closed container or vehicle or, even if they are, the carrier nevertheless actually inspects them. In that case if the carrier had no physically practical or commercially reasonable means of checking the information the carrier can indicate which information it was unable to check. If, however, the carrier had reasonable grounds to believe the information to be inaccurate it may include a clause providing what it reasonably considers accurate information. Paragraph 4 deals with goods delivered for carriage in a closed[355] container or vehicle. In that case the carrier can qualify the information if either the goods have not actually been inspected or if neither the carrier nor a performing party has actual knowledge of the contents before issuing the transport document or electronic record. Paragraph 3 is precise as to what must be stated whereas paragraph 4 gives no indication of how the qualification should be made. The preliminary draft used the words "appropriate qualifying clause" which, it seems, would include phrases such as "said to contain" and "shipper's weight and count".[356] Possibly such phrases may be sufficient but for both paragraph 3 and 4 the circumstances indicated must exist. Since Article 41 provides for the evidential effect of statements except where the contract particulars have been qualified in the circumstances and manner set out in Article 40, then it is suggested that a non-compliant qualification, in the sense of failing to qualify in the correct manner and circumstances, will simply be ineffective. This would seem to undermine the reasoning that was successful in *The Mata K*.[357] A further provision deals with where goods are delivered to the carrier in a closed container, the carrier being permitted to qualify any statement of the weight of the goods if container was not weighed and either there was no agreement for the container to be weighed or there was no commercially reasonable means of checking its weight.[358] This provision may help to clarify the debate as to whether there is an expectation to weigh a container in the absence of any other means of checking its contents.[359]

4.115

353. Article 16. Article 14, refers to the carrier issuing the bill of lading on demand of the shipper.
354. See 3.159.
355. Presumably this does not mean sealed since sealing is a further operation than closing.
356. See Note by the Secretariat, A/CN.9/WGIII/W, p. 21, para. 140.
357. [1998] 2 Lloyd's Rep 614. See 4.113.
358. Article 40(4)(b).
359. See below, 4.119.

4.116 The statement as to apparent good order and condition is similarly likely to be qualified. In general where a container is delivered to the carrier locked and sealed the statement of apparent condition is likely to be regarded as relating to the state of the container rather than its contents as in *Marbig Rexel Pty Ltd* v. *ABC Container Line N.V. (The TNT Express)*,[360] where the bill of lading acknowledged receipt of a container with particulars as declared by shipper, contained a similar clause to clause 14 of the Maersk Line bill and indicated shipper's load, stow and count s.t.c. (said to contain). The judge was clear that this was only acknowledging receipt of the container and not its contents. This contrasts with *M. Paquet & Co* v. *Dart Containerline*,[361] where the court applied the statement of apparent good order and condition to the contents of a container although stuffed and sealed by the shipper. It appears to be based on the fact that the carrier has the power (granted by the bill of lading) to open the container and check the contents for himself.[362] It may not be regarded as commercially reasonable to expect the carrier to open a container to inspect its contents,[363] and it seems more likely that a statement of apparent good order will be taken to refer to the external condition of the container when presented locked and sealed to the carrier. Less worrying therefore are those cases where the statement has been applied to the contents of a container where the carrier's servant or agent has been present at the loading of the goods.[364]

4.117 The level of inspection of external condition that is assumed to have taken place or to be required may, however, be a matter of some difficulty. Whilst it is generally true to say that the carrier "is required to refrain from closing his eyes to the obvious rather than to exert himself in search of existing signs of damage",[365] a visual inspection of all parts of the container (including the top) might well be assumed notwithstanding the practical difficulty this may present.[366] A sense of what is regarded as commercially reasonable might be obtained by scrutinising common

360. [1992] 2 Lloyd's Rep 636 (Sup Ct NSW). See also *Schuyler* v. *Cunard S.S. Co* [1967] AMC 896, *Aetna Insurance Co* v. *General Terminals* [1969] AMC 2449, *Recumar Inc* v. *Dana Arabia* [1985] AMC 2284 (SDNY 1985), *Rit-Chem Co* v. *Valiant* [1990] AMC 2935 (SDNY) *Transatlantic Marine Claims Agency Inc* v. *M/V IBN Zuhr* [1994] AMC 2086 (SD Georgia, 1994), *American Home Assurance Co* v. *Zim Jamaica* [2004] AMC 393 (SDNY) 393.

361. [1973] AMC 926 (NY Civil Ct 1973).

362. See *I.N.A.* v. *Dart Containerline*, 629 F. Supp. 781 (ED Va 1985) [1987] AMC 42. *Cf*, however, other cases in respect of inherent vice, *Caemint Food Inc* v. *Lloyd Brasileiro Companhia de Navegacao* [1981] AMC 1801 (2d Cir. 1981), *Perugina Chocolates and Confections Inc* v. *S.S. Ro Ro Genova* [1987] AMC 801 (SDNY 1986), *Amorex Machine* v. *Maersk Mango* [1991] AMC 2941 (SD Texas 1991). See further *Daewoo International*, (below, 4.119).

363. *Cf Owners of Cargo Lately laden on Board the Ship David Agmashenebeli* v. *Owners of the Ship David Agmashenebeli (The David Agmashenebeli)* [2002] EWHC 104 (Admlty), [2003] 1 Lloyd's Rep 92. *Cf* further in respect of CMR, Clarke in Schmitthoff and Goode at p. 68, and Clarke, CMR, para. 25a(i).

364. See *Inter-American Foods Inc* v. *Coordinated Caribbean Transport Inc* 313 F. Supp. 1334 (SD Va 1970), *Cameco Inc* v. *S.S. American Legion*, 514 F. 2d 1291 (2d Cir. 1974), *Yeramex Int.* v. *S.S. Tando* [1977] AMC 1807 (ED Va 1977); see further Clarke in Schmitthoff and Goode, p. 74.

365. Shachar, at p. 74.

366. See *Lufty Ltd* v. *Canadian Pacific Ry Co (The Alex)* [1973] FC 1115 (Canada Fed Ct (Trial Div) 1973), [1974] 1 Lloyd's Rep 106, see further above, 3.27.

forms of equipment interchange receipts used between carriers or sent to shippers along with a container supplied to them.[367]

4.118 In respect of claims arising for loss of contents from the container, important evidence arising from the condition of the seal on arrival may be available. A common bill of lading clause excludes liability for loss of goods ascertained at delivery if a shipper-packed container is delivered by the carrier with its original seal, as affixed by the shipper, intact.[368] This would seem to express a natural result.[369] However, the ingenuity of some thieves in obtaining access to a container whilst enabling the seal, on casual inspection, to appear intact is described in *AIG Europe SA* v. *M/V MSC Lauren*.[370] The effect of Article III, rule 8, of the Hague or Hague-Visby Rules would, however, render the clause void where the Rules are compulsorily applicable, although application of the Rules would likely render the same result.

4.119 Where there has been loss of the container or its security has clearly been compromised at some point in the carriage, proof of quantity or the nature of the contents may well have to be given by the shipper who is best advised to obtain independent evidence.[371] Further possibilities arise from comparison of the weight of the container prior to carriage and after delivery, the shipper obtaining special support where there is an unqualified statement of the weight on the bill of lading.[372] In *Daewoo International (America) Corp* v. *Sea-Land Orient Ltd*,[373] however, the plaintiff could not rely on the stated weight where the claim involved the complete substitution in the sealed container of cement blocks for video cassette casings in the absence of proof of what a proper load of such casings would have weighed. Even if the container had been weighed, the weight differential would not have revealed the condition of the goods inside since weight is not logically related to whether the cargo is in good condition. Further, absent notice that something was amiss, the carrier does not have an independent duty to break the seals. In *Bally*

367. As in *Marbig Rexel*, above fn. 360.

368. See e.g. Maersk Line Bill of Lading, cl. 11(3), below 4.122. *Cf* the CIM Rules, Art. 11(4), see Contracts, Part 4, para. 4.1.2.11.

369. See *Miles International Corp* v. *Federal Commerce & Navigation Co (The Federal Schelde)* [1978] 1 Lloyd's Rep 285 (Superior Ct Quebec 1977) (contrast *Continental Distributing Co Inc* v. *M/V Sea-Land Commitment* [1994] AMC 82 (DC SDNY 1992) and *Hartford Fire Insurance* v. *Trans Freight Lines Inc* [1994] AMC 1650 (DC Mass 1994)). See also *Outboard Marine International* v. *S.S. American Lancer* [1976] AMC 1839 (SDNY 1976) where the history of the seal was an important indicator that the loss had occurred before shipment.

370. [1997] AMC 341 (ED Va 1996).

371. *Cf Peters Fabrics Inc* v. *S.S. Hermes* [1984] AMC 1685 (SDNY 1984). See further Clarke in Schmitthoff and Goode at p. 78. See also *I.N.A.* v. *Frio Brazil* [1990] AMC 2506 (MD Fla) where past procedure of the shipper provided sufficient evidence.

372. See Clarke in Schmitthoff and Goode, p. 79, and Shachar, p. 59. See further *Westway Coffee Corp* v. *M.V. Netuno* [1982] AMC 1640 (2d Cir. 1982), *Leather's Best Intl* v. *Lloyd Sergipe* [1991] AMC 1929 (SDNY 1991), *Continental Distributing Co Inc* v. *M/V Sea-Land Commitment* [1994] AMC 82 (SDNY 1992) *Hartford Fire Insurance* v. *Trans Freight Lines Inc* [1994] AMC 1650 (Mass 1994), *AIG Europe SA* v. *M/V MSC Lauren* [1997] AMC 341 (ED Va 1996), affirmed [1988] AMC 1161 (4th Cir.), *Fox and Associates Inc* v. *M/V Hanjin Yokohama* [1998] AMC 1090 (CD Cal 1997).

373. [2000] AMC 197 (3d Cir. 1999).

Inc v. *M/V Zim America*[374] the US Court of Appeals, second circuit, confirmed that there is no obligation on the carrier to weigh the container at the time of delivery. It is for the consignee to establish the shortfall in weight at outturn, which in this case was at the point where the consignee or his agent took delivery of the container and not at the later stage when the container arrived at the consignee's premises.[375] As noted above, the Rotterdam Rules contemplate that there is no obligation on the carrier by sea to weigh a container at the start of the transit and is entitled to qualify the bill of lading accordingly.

4.120 The shipper may be able to draw on several different forms of evidence to establish a *prima facie* case that the loss or damage occurred during carriage and not at some prior point.[376] Included among these items of evidence may well be the condition of the container itself on arrival, the damage to which may leave little doubt as to the cause of the damage to its contents,[377] and most obviously where the nature of the damage is such that it could only have occurred at sea.[378] The documentation used between carriers is available as evidence in favour of the shipper.[379] The shipper may, however, be faced with proof by the sea carrier that its method of storing containers on its vessels virtually eliminates the possibility of theft at sea.[380]

4.121 Apart from needing to show that loss or damage did not occur prior to shipment, the shipper may need to prove that it did not occur after delivery especially if caught by the presumption of good delivery in Article III, rule 6 of the Hague or Hague-Visby Rules.[381] For example, in *Allied Signal Technical Services Corp* v. *M/V Dagmar Maersk*[382] a telescope packed in wooden crates secured to a flatrack container was discovered to be damaged as it was being installed, but no notice was given to the carrier in accordance with the rule. It was held that the presumption was not rebutted by evidence of replaced lashing, torn plastic covering and grease stains on the crates. Similar difficulties of proof arise in respect of determining the stage of the transport at which the loss occurred which assumes major importance in the context of a combined transport which is examined at paragraphs 3.24 *et seq*.

374. (1994) 390 LMLN 3, [1994] AMC 2762 (USCA 2d Cir. 1994).

375. Contrast *Continental Distributing* above fn. 372.

376. Including circumstantial evidence of carrier's negligence, see *Arkwright Mutual Ins.* v. *Oriental* [1991] AMC 2237 (SDNY 1990). *Cf Transatlantic Marine Claims Agency Inc* v. *M/V IBN Zuhr* [1994] AMC 2087 (SD Ga 1994). Evidence from someone who saw the cargo being loaded will naturally be relevant, *Bally Inc* v. *M.V. Zim America*, above, fn. 374, at p. 2767. Evidence from invoices was available in *New York Marine & General Ins. Co* v. *S/S Ming Prosperity* [1996] AMC 1161 (SDNY) and from bar codes scanned into a database in *Levi Strauss & Co* v. *Sea-Land Service Inc* [2003] AMC 1447.

377. See *Matsushita Electric Corp of America* v. *S.S. Aegis Spirit*, 414 F. Supp. 894 (WD Wash 1976), *Centennial Ins. Co* v. *M./V. Constellation Enterprise* [1987] AMC 1155 (SDNY 1986).

378. See e.g. *Transatlantic Marine Claims Agency Inc* v. *M/V OOCL Inspiration* [1998] AMC 1327 (2d Cir.). Contrast *American Home Assurance Co* v. *Zim Jamaica* [2004] AMC 393 (SDNY 2003), where because the wetting was by fresh water and the carrier offered evidence that fresh water wetting was unlikely to have occurred during its custody meant that there was a genuine issue of fact for trial.

379. E.g. *Hartford Fire Ins.* v. *Savannah* [1991] AMC 1923 (SDNY 1991).

380. *AIG Europe SA* (above fn. 372).

381. See also Art. 19(1) of the Hamburg Rules and Art. 23(1) of the Rotterdam Rules.

382. [2002] AMC 2433 (D Maryland).

4G.3.6 Shipper-packed containers

Maersk Line Multimodal Transport Bill of Lading clauses 11 and 13[383] 4.122

11. Shipper-packed containers

If a Container has not been packed by the Carrier:
11.1 This bill of lading shall be a receipt only for such a Container;
11.2 The Carrier shall not be liable for loss of or damage to the contents and the Merchant shall indemnify the Carrier against any injury, loss, damage, liability or expense whatsoever incurred by the Carrier if such loss of or damage to the contents and/or such injury, loss, damage, liability or expense has been caused by all matters beyond his control including, inter alia, without prejudice to the generality of this exclusion:

(a) the manner in which the Container has been packed;[384] or
(b) the unsuitability of the Goods for carriage in Containers; or
(c) the incorrect setting of any thermostatic, ventilation, or other special controls thereof; or
(d) the unsuitability or defective condition of the Container provided that, if the Container has been supplied by the Carrier, this unsuitability or defective condition could have been apparent upon reasonable inspection by the Merchant at or prior to the time the Container was packed.

11.3 The Merchant is responsible for the packing and sealing of all shipper-packed Containers and, if a shipper-packed Container is delivered by the Carrier with any original seal intact, the Carrier shall not be liable for any shortage of Goods ascertained at delivery.
11.4 The Shipper shall inspect Containers before packing them and the use of Containers shall be prima facie evidence of their being sound and suitable for use

13. Inspection of Goods

The Carrier shall be entitled, but under no obligation, to open and/or scan any package or Container at any time and to inspect the contents. If it appears at any time that the Goods cannot safely or properly be carried or carried further, either at all or without incurring any additional expense or taking any measures in relation to the Container or the Goods, the Carrier may without notice to the Merchant (but as his agent only) take any measures and/or incur any reasonable additional expense to carry or to continue the Carriage thereof, and/or to sell or dispose of the Goods and/or to abandon the Carriage and/or to store them ashore or afloat, under cover or in the open, at any place, whichever the Carrier in his absolute discretion considers most appropriate, which sale, disposal, abandonment or storage shall be deemed to constitute due delivery under this bill of lading. The Merchant shall indemnify the

383. See also DAMCO Bill of Lading, cl. 11, Evergreen Line Bill of Lading, cl. 10. *Cf* TT CLUB 100, cl. 8(3) contains similar terms but deal with other aspects of container use in the remainder of cl. 8. Note also cl. 19 of the Evergreen Line Bill of Lading. This states that it is agreed that superficial rust, oxidation or condensation inside the container or any like condition due to moisture is not the responsibility of the carrier unless due to failure to provide a seaworthy container and goes on to stipulate for special arrangements to be made in writing if required.

384. Where the carriers' defence was that the cause of the damage was attributable to the fault of the shipper in failing properly to load, stow, brace and block the containers in which the damaged goods were transported, the plaintiffs' submission that the long-standing history of shipments of the same cargo, under identical packing and stowing conditions, without giving rise to a single issue of damage other than the one in issue, was turned forcefully against them in *General Motors Corp* v. *Cast (1983) Ltd (The Cast Muskox)* (1994) 378 LMLN 2 (Fed Ct of Canada (Trial Div), 28th February 1994), since it could be shown that the container, exceptionally in this instance, had been stowed in a fundamentally different manner from the other shipments. In respect of the possible ineffectiveness of the indemnity for damage other than to the goods, *cf The Burlington Northern and Santa Fe Railway Co* v. *Interdom Partners Ltd* 2004 WL 734081 (ND Tex, 26 March 2004).

Carrier against any reasonable additional expense so incurred. The Carrier in exercising the liberties contained in this clause shall not be under any obligation to take any particular measures and shall not be liable for any loss, delay or damage howsoever arising from any action or lack of action under this clause.

4G.3.6.1 Container supply and the container as packing

4.123 Clauses such as these are commonly found in container bills of lading and relate particularly to issues arising from the condition of the container and the state of packing of the goods. The authority granted by clause 13, to open any package or the container to inspect the contents, is necessary to ensure that the carrier is able to carry out his responsibilities regarding the safety of the ship and its ability lawfully to carry the goods. This authority has on occasion been thought relevant in respect of the strength of the carrier's acknowledgment of the details on the face of the bill, but this is not normally the position in light of the absence of a general duty to inspect.[385]

4.124 In the context of the Hague and Hague-Visby Rules, where the carrier performs the entire operation of supplying and packing the container, difficult issues arise as to whether this falls within the scope of the operations envisaged in Article II of the Rules, bearing in mind the fact that these operations take place away from the ship. Such operations might be viewed as outside the scope of control and subject to the freedom of the carrier within Article VII, but probably subject, nevertheless, to the right of the carrier to rely on the time limit.[386] In *Comalco Aluminium Ltd* v. *Mogal Freight Services Pty Ltd (The Oceanic Trader)*[387] the Federal Court of Australia held that the failure of the carrier-forwarder to secure the goods properly in the container was outside the period envisaged by the Rules. Consequently, by virtue of Article VII, the carrier-forwarder could take advantage of the exclusion clause in his consignment note. Under the Rotterdam Rules this will no longer be possible so long as it is the carrier who is in control of these operations and proceeds to carry the goods after completing them.

4.125 The position appears to be clearer where, as in the circumstances envisaged by clause 11, the shipper himself loads the container. For the English courts *Pyrene Co Ltd* v. *Scindia S.N. Co Ltd,*[388] stands for the view that there is freedom as to the quantity of performance that the carrier binds himself to perform. This extends to the right of the carrier to contract for the cargo interest to undertake responsibility for the loading, stowing, trimming and discharging of cargo.[389] This contrasts with the view taken in the US case of *Associated Metals & Minerals Corp* v. *M/V Arktis*

385. See above, 4.116.

386. *Cf The Zhi Jiang Kou* [1991] 1 Lloyd's Rep 493 (Sup Ct NSW CA) and *The Captain Gregos* [1990] 1 Lloyd's Rep 310. Contrast *Kamil Export (Aust.) Pty Ltd* v. *N.P.L. (Australia) Pty Ltd* [1996] 1 V.R. 538 (Sup Ct Victoria) following the approach taken in *Sze Hai Tong Bank Ltd* v. *Rambler Cycle Co Ltd* [1959] AC 576.

387. (1993) 113 ALR 677. See M. Davies (1993) 21 ABLR 377, S. Hetherington [1993] LMCLQ 313 and J. Wong (1995) 23 ABLR 340.

388. [1954] 2 QB 402.

389. *Jindal Iron and Steel; Co Ltd* v. *Islamic Solidarity Shipping Co (The Jordan II)* [2004] UKHL 49, [2005] 1 Lloyd's Rep 57.

Sky[390] that contractual provisions relieving the carrier of its non-delegable duty under COGSA in respect of loading and discharge are void. This does not, however, prevent the carrier from establishing the COGSA defence of "Act or Omission of the Shipper",[391] so that this may be viewed as performance outside the control of the rules.[392] The Rotterdam Rules will also make it possible for there to be an agreement as to these operations.[393]

In respect of the container, the responsibilities surrounding its supply might well *4.126* be viewed as part of the complex of duties imposed in respect of the seaworthiness of the ship.[394] Nevertheless, as with the duty of care, the argument may be that, at least as regards the shipper, and those bound by his actions by reason of their becoming party to the bill of lading, there can be a division of performance so that part of these responsibilities can be placed on the shipper. Accordingly, liability for them can be excluded as in sub-clause 11.2(d). An even more favourable view from the perspective of the carrier would be to regard the supply of the container as a bailment separate from the carriage and so altogether outside the scope of the Hague Rules.[395] In a French decision[396] the court held that the exclusion of liability for supply of a defective container was not null and void by reason of Article III, rule 8, where the damage occurred outside the period of carriage by sea. In the US decision of *Cigna Insurance Co of Puerto Rico* v. *The M/V Skanderborg*[397] the unsuitability of the container provided by the carrier was treated as defective packing and that, even if there could be liability for some common law negligence, COGSA imposes no duty on carriers regarding their packaging arrangements with shippers so that liability for it can be excluded.[398] In *Harpers Trading (Singapore) Pte Ltd* v. *R.F.L. International (The Planeta)*,[399] goods in a container suffered water damage during a voyage from Sydney to Singapore because the container had been

390. [1993] AMC 509 (2d Cir. 1992).

391. *Tubacex Inc* v. *M/V Rison* [1995] AMC 1305 (5th Cir. 1995).

392. See further Gronsfors, "Container Transport and the Hague Rules" [1967] JBL 298 and Wong, "Containerisation—Its Legal Implications", (1970) 12 *Malaya Law Journal* 364.

393. Article 13(2).

394. See e.g. *Zim Israel Navigation Ltd* v. *The Israeli Phoenix Assurance Co Ltd* (1999) 34 ETL 535 (Sup Ct Israel, 1 September 98).

395. Wong, "Container Transport—Position under the FCL System and Marine Insurance Law" (1975) 17 Mal LR 271. Note cl. 8(2) of TT CLUB 100 which states that the terms of the bill of lading govern the responsibility of the Carrier in connection with or arising out of the supply of the container to the Merchant, whether supplied before or after the goods are received by the Carrier or delivered to the Merchant. This might have a more limited effect than appears since much of the liability of the carrier is built on the period between receipt and delivery of the goods (in respect of combined transport). It might defeat an argument that liability for loss or damage to goods caused by the container during transit within the carrier's period of responsibility is to be treated separately from loss or damage from other causes within this period. It might also enable other limitation clauses to apply to loss of damage to goods caused by the container outside this period.

396. *Cour d'Appel de Rouen*, 7 February 1985, [1987] DMF 510. See Tetley, p. 1553, and De Wit, pp. 416–417. *Cf* also *Federated DepartmentStores* v. *Brinke*, 450 F. 2d 1223 (5th Cir. 1971).

397. [1996] AMC 600 (USDC PR 1995). See further the discussion of a decision of the Shanghai High People's Court by Guo Yu in [1995] LMCLQ 15.

398. Nevertheless where there is no evidence that provision of the container went beyond the sea carrier's obligation as a sea carrier it is COGSA and not state law which governs the case especially where COGSA is extended by the bill of lading to pre-loading and post-discharge operations: *Junior Gallery Ltd* v. *NOL Ltd* [1999] AMC 565 (SDNY 1998).

399. 1994, unreported, NSWSC, see M. Davies, (1995) LMCLQ 385 at p. 387.

punctured as a result of the negligence of a crane driver during loading. The carrier sought to rely on a clause in the bill of lading which excluded liability for defects in a container unless caused by want of due diligence on its part. The Australian court held that the carrier was not protected by the clause in view of its non-delegable duty to exercise due diligence. This case falls more naturally into the scope of the Hague Rules as normally perceived and the non-delegable duty imposed by it. On the other hand Brooke LJ in *The Kapitan Sakharov*[400] said, in the context of such non-delegable duty, that those responsible for the manufacture, stuffing and shipping of containers were plainly not carrying out any part of the carrier's function for which he should be held responsible. It should be noted, however, that this was said in respect of a container supplied and packed by the shipper.[401] A recent decision of the Netherlands Supreme Court has sided with the view that the fitness of a container supplied by the carrier forms part of the duty to exercise due diligence to make the ship seaworthy within Article III rule 3 of the Hague-Visby Rules. In *Nile Dutch Africa Line B.V.* v. *Delta Lloyd Schadeverzekering (The "NDS Provider")*[402] the court held the carrier liable for the entry of seawater into rusty containers and that there could be no reliance on an exclusion of defective condition of containers in the bill of lading. The court drew inspiration from the developing work on the Rotterdam Rules. Once in force they will clarify the position since by Article 14(c) the duties of the carrier will include a duty to exercise due diligence to make and keep any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

4.127 The difficulty then is to identify precisely what does fall within the scope of the carrier's responsibility where the shipper is involved in the supply and/or loading of the container. There is little doubt that, in the context of the Hague Rules the carrier will have a duty of due diligence of ensuring that a defective container is not loaded on board where this has the effect of making the ship unseaworthy. In the US case of *Houlden & Co* v. *The Red Jacket*[403] a carrier was found responsible when a defective container containing tin ingots collapsed and consequently caused the collapse of a stow of 50 containers during a storm. The container was old and prior damage to it was visible on inspection prior to loading. In loading it the carrier had failed to exercise due diligence to make the ship seaworthy. This was in addition to the carrier's failure to supply a fit container which was also a breach of the duty. Presumably, therefore, the carrier would still have been liable even if the container had been supplied by the shipper. More interesting was the view expressed by the

400. [2000] 2 Lloyd's Rep 255 at p. 272.

401. If the functions of e.g. supplying or stuffing the container were performed by a charterer, even if responsibility for it were imposed on the shipper by the terms of the bill of lading, there might yet be some doubt as to whether the duty surrounding this operation could be delegated at least in respect of other shippers, *cf*, *Balli Trading Ltd* v. *Afalona Shipping Co Ltd (The Coral)* [1993] 1 Lloyd's Rep 1 at p. 5. *Cf Associated Metals & Minerals Corp* v. *M/V Arktis Sky* [1993] AMC 509 (2d Cir. 1992) and *The Blommer Chocolate Co* v. *Nosira Sharon Ltd* [1994] AMC 1807 (SDNY 1991). See further, Davies, "Two Views of Free In and Out Stowed Clauses in Bills of Lading" (1994) 22 ABLR 198 (*cf* further, *The Jordan II* [2003] EWCA Civ 144, [2003] 2 Lloyd's Rep 87, see Baughen [2004] LMCLQ 129), and [2004] UKHL 49, [2005] 1 Lloyd's Rep 57.

402. C06/082HR, 1 February 2008. See www.onlinedmc.co.uk and N.J. Margetson (2008) 14 JIML 153.

403. [1977] AMC 1382 (SDNY 1977), [1978] 1 Lloyd's Rep 301, see further Harrington, p. 13.

judge that the carrier was negligent in failing to require of the shipper or otherwise check details of the method of stowage inside the container when placed on notice of its contents which were liable to produce a danger if not properly stowed.[404] However, although the container had been poorly stowed by the shipper, this was not considered to be the proximate cause of the loss. Presumably, therefore, the carrier's negligence in this respect was equally not causative. Had it been, a serious issue would have arisen as to whether the carrier would still have been liable notwithstanding that the shipper could be said to be equally at fault and the carrier being able to point to this fault as a defence. It seems likely, however, that the judge would have dealt with this on the basis of a shifting burden of proof,[405] the carrier having the final and practically insuperable burden of proving the quantity of damage not caused by his negligence. In respect of this particular duty it has, however, been held not to apply, at least towards the shipper, where the shipper provides legally required certification as to the contents, as in the case of dangerous goods, unless the carrier knows it to be false.[406] This reflects, in general, and confirmed in *The Kapitan Sakharov*,[407] the absence of a requirement to inspect the contents of the container except in the special circumstances noted above.

Where the state of the container or the state of its contents does not affect the seaworthiness of the ship but rather its capacity to provide a safe means for the conveyance of the goods there will likewise be an issue as to the duty of the care of the carrier. When supplied and/or loaded by the shipper the state of the container and its contents are matters which could fall within exceptions which relate to the responsibility of the shipper such as Article IV, rule 2(i) and (n) of the Hague Rules. Nevertheless the container itself represents the outer packing of the goods, and the carrier's duty properly and carefully to carry the goods might well be thought to extend to dealing with defects which the state of that packing reveals. A similar principle perhaps underlies the position taken at common law where the carrier can be liable for failing to protect goods which he can see are defectively packed unless the risk is clearly placed on the owner of the goods as in *Gould* v. *S.E. & Chatham Ry Co.*[408] Some US decisions support a duty of care to check the container and deal with obvious defects. Thus if the seals on the container are broken the carrier should check the contents as held in *Peter Fabrics* v. *S.S. Hermes 1*.[409] If the carrier should realise from the information that he has about the goods that the temperature reading on a refrigerated container is incorrect, he should take steps to discover the correct temperature as in *Mooney Ltd* v. *Farrell Lines*.[410] Likewise the effect of this

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404. [1978] 1 Lloyd's Rep 301 at p. 309, *cf Rufis L. Smith JR* v. *Spanish Line* [1998] AMC 1791 (USDC S Carolina). See also *The Tor Mercia*, 1977 (Sup Ct Sweden), (1980) 15 ETL 23. *Cf*, however, the position of the on-carrier in *American Foreign Insurance Assoc* v. *Seatrain*, 689 F. 2d 295, [1983] AMC 2782 (1st Cir. 1982).

405. [1978] 1 Lloyd's Rep 301 at p. 309.

406. *Polskie Linie Oceaniczne* v. *Hooker Chemical Corp* 499 F. Supp. 94 (SDNY 1980), see Maloof and Krauzlis, "Shipper's Potential Liabilities in Transit" (1980) 5 *The Maritime Lawyer* 175. See also Clarke in Schmitthoff and Goode, p. 72.

407. Above, fn. 400.

408. [1920] 2 KB 191.

409. [1984] AMC 1685 (SDNY 1984).

410. 616 F. 2d 619 (2d Cir. 1980), [1980] AMC 505.

packing on the goods of other shippers could equally occasion liability if failure to deal with it amounts to a failure of care.[411]

4.129 The printed clause may not be sufficient to put the risk fairly on to those bound by it where a defect is patent to the carrier, unless there is a specific qualification of the bill of lading.[412] In the absence of a sufficient qualification a carrier will be bound by the estoppel in favour of third parties arising from the statement of good order and condition on the bill of lading in respect of visible defects. He will thus seek indemnity under sub-clause 3.

4.130 Even where clause 11 can take effect in respect, for example, of a defect in the container, visible at the time of packing but not at the time of loading onto the ship, the onus of proving that the defect was visible to the shipper rests on the carrier. The inspection required is that of an unskilled person, as distinct from a person with special skills and experience such as a marine surveyor.[413]

4G.3.7 Limitation of liability

4.131 **Maersk Line Multimodal Transport Bill of Lading, clause 7.2(a)**[414]

7.2 Save as is provided in clause 7.3:
(a) If the Hague Rules apply as national law, by virtue of clause 5.1 or clause 6.2(b) the Carrier's liability shall in no event exceed the amounts provided in the applicable national law and if the Hague Rules apply under clauses 5.1 or 6.2(c), the Carrier's liability shall in no event exceed GBP 100 per package or unit.

4G.3.7.1 Package limitation

4.132 Clause 7(2) envisages the possibility that the Hague or Hague-Visby Rules may not be compulsorily applicable. It envisages circumstances where the Rules are to be applied contractually and applies a limit per package or unit as envisaged by the original Hague Rules. This express provision ties in with the need to ensure that the gold standard referred to in the original Hague Rules is not applied even where the Rules are otherwise contractually incorporated. Whilst Article IV, rule 5 of the Rules provides for a limit of £100 per package or unit, Article IX states that the monetary units mentioned in the Rules are taken to be the gold value. In *The Rosa S*[415] this meant the value of the gold content of £100 sterling as ascertained under the Coinage Act 1971. This produced a limit of £6,630 per package or unit. For this

411. See *Burck Mills Ltd* v. *Black Sea Steamship Co (The Grumont)* (1973) FC 387, [1973] 2 Lloyd's Rep 531; *Grace Plastics Ltd* v. *The Bernd Wesch 11* (1971) FC 387; *cf Goodwin, Ferreira & Co* v. *Lamport & Holt* (1929) 34 Ll L Rep 192 at p. 196.

412. *Cf* under Clarke, CMR, para. 84.

413. *Marbig Rexel Pty Ltd* v. *ABC Container Line NV (The TNT Express)* [1992] 2 Lloyd's Rep 636 (NSW Sup Ct).

414. See also DAMCO Bill of Lading, cl. 7.2(a). *Cf* TT CLUB 100, cl. 6(3)(B)(ii) which applies a limit of $500 per package or unit. Since the heading of sub-clause (B) refers to package or shipping unit limitation it is unlikely that the US concept of a customary freight unit (see below) will be applied despite the reference to US dollars (*cf* cl. 7(2) of the Evergreen Line Bill of Lading which, for US trade refers to $500 per package, or when the goods are not shipped in packages, $500 per customary freight unit).

415. [1989] QB 419. See also *The Nadezhda Krupskaya* [1989] 1 Lloyd's Rep 518 (NSW CA).

reason it is also common to limit the contractual incorporation to Articles I-VIII of the Rules as e.g. clause 6.2 (c) of the Maersk Line Bill of Lading. It seems that even standing alone, clause 7(2) achieves the same effect. In *The Tasman Discoverer*,[416] the New Zealand Court of Appeal considered a clause which contractually incorporated the Hague Rules and stated that: "for the purposes of this sub-paragraph the limitation of liability under the Hague Rules shall be deemed to be £100 sterling lawful money of the United Kingdom per package or unit". The court held that this clause similarly avoided the gold clause trap. This was an express limitation and the more general provision in Article III, rule 8, which might otherwise strike down the clause, gave way to the more specific provision in the contract, this provision being preferred as a matter of common-sense reading of the bill of lading as a whole and giving effect to the plain purpose of the parties to alter the effect of the Hague Rules. Note that the clause was slightly stronger than clause 7(2) in that it went on to require the Rules to be "construed accordingly". Further, it can be noted that the reference to sterling was not treated merely as a reference to the method of payment. In the court's view to alter the Hague Rules to achieve only that result makes no commercial sense. In practice payment would be made in a currency acceptable to the shipper. The decision has been upheld by the Privy Council[417] which, for essentially the same reasons found no lack of clarity in the clause. The fact that there is a view[418] that it is advisable to write in only Articles I to VIII and then to provide separately for a package limitation of £100 does not mean that this is the only drafting formula capable of achieving the result.

4.133 A feature in some shipping documents, especially as used in short-sea trades, is a provision that vehicles, or containers etc, and their goods are to constitute one unit for the purposes of the Hague Rules limit. This relates to the fact that Article IV, rule 5, of the original Hague Rules was, as with clause 7(2), problematic in its application to unit loads. That is, the difficulty of how the limit "per package or unit" was to be applied to them. The problem is resolved to an extent whenever the Hague-Visby Rules are applicable or incorporated because of special provision in these rules in Article IV, rule 5(c) which is considered below.

4.134 A considerable body of jurisprudence has developed in the United States in respect of the classification necessary for application of the package limitation. The precise starting point differs from English law since the US courts make a direct contrast between a package or unit. The latter is defined in terms of a customary freight unit derived from the wording of COGSA 1936. The two concepts cover the whole ground of limitation so that it is important for the US courts to be able to define exactly what is meant by a "package".[419] The wording used in COGSA 1936 does not appear in the Hague Rules as scheduled to the English legislation. The same is true in Canada where there is much authority to treat the word "unit" to

416. [2002] 2 Lloyd's Rep 528.
417. [2004] UKPC 22, [2004] 2 Lloyd's Rep 647.
418. Given by John Richardson in *The Hague and the Hague-Visby Rules* (4th edn, 1998), at p. 43 and relied on by counsel.
419. See Wilson, *Carriage of Goods by Sea* (7th edn), p. 196.

mean shipping unit[420] and not freight unit, as e.g. in *Falconbridge Nickel Mines* v. *Chimo Shipping*,[421] and some English authority supports this.[422] It is important to keep this in mind when seeking to draw comparison with the approach of US courts for the purpose of considering this issue both in respect of the original Hague Rules and the Hague-Visby Rules.[423] In particular it means that the important distinction for an English court applying the Hague Rules is rather between goods which fall within the phrase "package or unit" on the one hand and goods which fall outside, such as goods shipped in bulk in respect of which there may be no limit.[424] Nevertheless, in the particular context of containerisation, the primary issue will tend to be whether to attach the limit to the container itself or to its contents. In so far as it may be useful to focus on whether a container can ever be regarded as a package the US authorities are useful especially as they may give an indicator to important policy factors. Furthermore, the developed approach can be said to represent the standard approach internationally regarding the application of the Hague Rules limit in the context of containers. Consequently much of the following discussion is devoted to it. The majority decision of the English Court of Appeal in *The River Gurara*, which involves a departure from it, is discussed below.[425] Until this case there was little English authority on the precise issue. In *Whaite* v. *Lancashire & Yorkshire Ry Co*,[426] it was held that a railway wagon with wooden sides was a "package" for the purposes of the Carriers Act 1830. In *Bekol BV* v. *Terracina Shipping Corp*[427] which, until *The River Gurara* seems to have been the only recorded case in which the English court has considered the meaning of "package" in the Hague Rules, bundles of timber, rather than the individual pieces of timber were held to be packages for the purposes of Article IV, rule 5. Leggatt J made reference to the Oxford English Dictionary definition of a package as " . . . a bundle of things packed up, whether in a box or receptacle, or merely compactly tied up . . . ". The contrast between the two cases may well reflect a contrast that appears in the US

420. In other contexts the meaning of a "unit" naturally depends on the contractual construction. In *Associated British Ports* v. *Ferryways NV* [2008] EWHC 1265 (Comm), [2008] 2 Lloyd's Rep 353, the word unit in a throughput clause did not extend to empty slave trailers carried for a return voyage with no container loaded upon it.

421. [1974] SCR 933 at p. 948, [1969] 2 Lloyd's Rep 277. See also *N.S. Tractors* v. *M.V. Tarros Gage* [1986] AMC 2050 (Fed Ct) and see Tetley, p. 2178.

422. *Studebaker Distributors Ltd* v. *Charlton S.S. Co Ltd* [1938] 1 KB 459, see also Scrutton (18th edn), p. 443. See further the Australian decision of *El Greco (Australia) Pty Ltd* v. *Mediterranean Shipping Co SA* [2004] FCAFC 202, [2004] 2 Lloyd's Rep 537, where, at para. 278, Allsop J considered that the addition of the word "unit" to the Hague Rules package limitation was intended to clarify the rule by making unnecessary any debate in individual cases about the extent and nature of the wrapping, so that individual articles capable of being carried without packaging—boilers, cars etc, and which could be seen as units of cargo as shipped, would be covered. He also pointed out at para. 277 that before the days of containerisation and unlike cars or boilers etc, shippers did not approach a carrier and ask it to carry loose bottles or posters etc without also asking the carrier to make them up for carriage so that it was unlikely that there would arise for debate the question whether "unit" meant any article of transport however small and unsuitable for transportation without being made up for transport, see further para. 4.146 below.

423. *Cf* e.g. *Orion Insurance Co* v. *M/V Humacao* [1994] AMC 1922 (SDNY, 1994).

424. *Cf* Gaskell *et al.*, para. 16.33.

425. At 4.146.

426. (1874) LR 9 Ex 67.

427. 13 July 1988, unreported.

cases as to whether the word "package" is to be treated as a term of art or to be given its ordinary meaning.

After much debate the US courts have developed a position not dissimilar to that provided by the Hague-Visby Rules. The debate has ranged across interlinked issues. First, as just noted, whether the word package is to be understood in the layman sense or as a term of art. Secondly, the extent to which the parties' own characterisation or intent was to be afforded weight. An approach which permits a technical meaning to be given to the word fits more with giving weight to the parties' intent. An early reflection of this came in *Standard Electrica SA* v. *Hamburg Supamerikanische Dampfschiff-farhts-Gesellschaft*[428] where the court held that, in a shipment of nine pallets, each of which contained six cardboard cartons, the pallets constituted the relevant package. The pallets had been made up by the shipper for reasons of greater convenience and safety in handling and the characterisation by the parties, evidenced by the dock receipt, bill of lading and claim letter was considered to be entitled to considerable weight. A major concern of the court was not to place on the carrier the burden of looking beyond the information contained in the bill of lading or the outer packing of the goods.[429] On the other hand the attempt by carriers to use the emphasis on intent by imposing their own characterisation through a clause in the bill of lading indicating a container as a package was rejected in *Leather's Best Inc* v. *S.S. Mormaclynx.*[430] The court held that a container furnished by the carrier is not to be considered a Hague Rules package where its contents are disclosed. In an oft quoted observation, Friendly CJ noted a belief that the purpose of COGSA was to set a reasonable figure below which the carrier should not be permitted to limit his liability and that the word package is more sensibly related to the unit in which the shipper packed the goods and described them than to a large metal object, functionally a part of the ship, in which the carrier caused them to be contained. The case did not provide a clear answer where the container was supplied by the shipper. An answer was supplied in *Royal Typewriter Co* v. *M.V. Kulmerland*,[431] where the container was supplied by the shipper and no indication was given as to the packaging inside the container by the bill of lading, the reference being generally to machinery. The container was held to be the relevant package. In affirming this decision the Second Circuit Court of Appeals[432] produced the "functional economics test" which involved presumptions either way depending upon the method of packaging adopted by the shipper, i.e. whether or not the contents of the container could have been carried separately from it. Clear evidence of the parties' contrary intent was possible to displace the relevant presumption. The test was heavily criticised not least for leading to a lack of

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428. 375 F. 2d. 943 (2d Cir. 1967). See Armstrong, "Packaging Trends and Implications in the Container Revolution" (1981) 12 JMLC 427.

429. See "The Container Revolution and the Per Package Limitation of Liability in Admiralty", by Frank M.K. Wijckmans (1987) 22 ETL 505 at p. 508.

430. 313 F. Supp 1373 (SDNY 1970), [1970] 1 Lloyd's Rep 527, aff'd, 451 F. 2d 800 (2d Cir. 1971), 1971 AMC 2383. See also *Mitsui & Co Ltd* v. *American Export Lines*, 636 F. 2d 807 (2d Cir. 1981). See further Wijckmans, previous footnote.

431. 346 F.Supp. 1019 (SDNY 1972), [1972] AMC 1995.

432. 483 F. 2d 645 (SDNY 1972), [1973] AMC 1784.

predictability and for over emphasis on intent.[433] It was roundly rejected in the Ninth Circuit by Beeks J in *Matsushita Elec Corp* v. *S.S. Aegis Spirit*.[434] There was a strong rejection of a test based on subjective intent and even if intent could be drawn from the bill of lading this was hardly an appropriate vehicle given the domination of the carrier in determining the terms. For the Second Circuit the case of *Mitsui & Co Ltd* v. *American Export Lines*[435] saw the abandonment of the "functional economics test".

4.136 So far the US decisions can be characterised as reflecting conflicting concerns. On the one hand there is reluctance to treat the container as a package especially where it has been supplied by the carrier and so reach a solution clearly at odds with the limitation policy behind the Rules. On the other hand there is a desire to provide a predictable rule that would enable a carrier to gauge the potential extent of liability which couples with the fact that the shipper, if given a fair opportunity to do so, has the means of avoiding the limitation by stating the nature and value of the goods. It is possible now to indicate a developed rule representing the more recent position in the US. It is not entirely seamless and the presentation here might not reflect varying lines of development that might be taken in particular circuits. It appears to represent an uneasy compromise between different possible positions.

4.137 This compromise is reflected in the Second Circuit decision in *Binladen BSB Landscaping* v. *M.V. Nedlloyd Rotterdam*,[436] and from this and other authority the general position can be summarised as in the following paragraphs:[437]

4.138 (i) If the bill of lading lists the number of packages in the container, the limitation has to be applied on the basis of this number and applied separately to each package in respect of the damage to each package as proved by the plaintiff.[438] It is clear that the starting point is the bill of lading. The court is likely to look especially at the column in the bill of lading marked "No. of Packages" which was the position taken in *Seguros "Illimani" SA* v. *M.V. Popi P*[439] where the rule was expressed that this is the starting point for determining the number of packages, and unless the significance of that number is plainly contradicted by contrary evidence of the parties' intent, or unless the number refers to items that cannot qualify as

433. DeOrchis, "The Container and the Package Limitation—The Search for Predictability", (1974) 5 JMLC 251, Simon, "The Law of Shipping Containers" (1974) 5 JMLC 507 at 522. See further Calamari, "The Container Revolution and the $500 Package Limitation—Conflicting Approaches and Unrealistic Solutions: A Proposed Alternative", (1977) 51 *St John's Law Review* 687.

434. 414 F.Supp. 894, [1976] AMC 779 (WD Wash), [1977] 1 Lloyd's Rep 93.

435. See fn. 430.

436. 759 F. 2d 1006, 1015, n. 10 (2d Cir. 1985), [1985] AMC 2113.

437. As outlined by Wijckmans, above, fn. 429, especially at p. 515 and see further Tetley, chs 30 and 41. See also the references cited in De Wit, para. 2.80. See also Gaskell *et al.*, s. 16B.8. For the position in Canada, see *Quebec Liquor Corp* v. *Dart Europe* [1979] AMC 2382 (Fed Ct), *International Factory Sales* v. *The Alexandr Serafimovich* [1976] 1 FC 35, *Carling O'Keefe Breweries* v. *C.N. Marine* [1987] AMC 954 (Fed Ct). For Australia see *P.S. Chellaram & Co Ltd* v. *China Ocean Shipping* [1989] 1 Lloyd's Rep 413 (NSW Sup Ct) reversed on appeal on different grounds, [1991] 1 Lloyd's Rep 493.

438. See *Servicios-Expoarma Cia,* v. *Industrial Maritime Carriers Inc* [1998] AMC 1453 (5th Cir.).

439. 929 F. 2d 89 (2d Cir. 1991). See further *Trotter & Co* v. *Delta S.S. Lines* [1985] AMC 2783 at p. 2793 (ED Pa 1982) and *Pyropower Corp* v. *M/V Alps Maru* [1993] AMC 1562 (ED Pa 1993), *Sentinel Enterprises* v. *Simo Matavulj* [1991] AMC 177. In *Pyropower* the bill of lading identified the cargo as "1 Lot 655, 282KGS (38 pkgs)" and the carrier received the cargo in boxes, steel cages, bundles and on skids. The court held that limitation should be based on 38 packages.

"packages", it is the ending point of the enquiry. In this case the goods were packed into a container which gave as the number of packages a number of tin ingots. However, since these were not packages the court considered as the next best indication of the parties' intent, the numbers reflected on the bills of lading that did refer to something that qualified as a "package", which was the number of bundles. The court accepted this as evidence of the parties' intent,[440] not simply because the number of bundles appeared somewhere on the bills of lading, but because the ingots were in fact strapped together in bundles.

4.139 However, for the Second Circuit, in *Monica Textile Corp* v. *S.S. Tana,*[441] the "*Seguros"* rule[442] was held inapposite in a container context.[443] The "no. of packages" column in the bill of lading gave way to the description of the goods in the "description of the goods column". The court emphasised the lower court's finding that it was clear that the container was not the appropriate "package" in the case. The court took the view that there were separate lines of authority in respect of container and non-container cases. Container cases recognise that, when a bill of lading refers to both containers and other units susceptible of being COGSA packages it is inherently ambiguous.[444] It should be noted that a non-container case is not simply a case where there is no container but rather where neither party contends that the container is a package.[445]

4.140 Similarly, for the Eleventh Circuit the inquiry does not end at a quick glance of the number of packages column on the bill of lading.[446] For the Ninth Circuit, when the bill of lading lists both the number of containers and the number of packages under the heading "No. of PKS or Containers", it is clear that the large shipping containers are not packages for COGSA purposes.[447]

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440. *Cf Perusahaan Pertambangan Minyak Dan* v. *Chainat Navee M/V,* 136 F. Supp. 2d 586 (FD Fla 2001), where the court took into account riders attached to the bill of lading which described each unit and whether it was crated or on skids.

441. (2d Cir. 1991) [1992] AMC 609, LMLN 323, adopted also on the 4th Circuit in *Universal Leaf Tobacco Co Inc* v. *Netumar* [1993] AMC 2439 (4th Cir. 1993). In *Continental Insurance Co* v. *CLX Services* [2003] AMC 2251 (California, Superior Court, County of Alameda, 2002), the court took from *Monica Textile* the view that the number in the number of packages column was to be taken in the absence of contrary intent and in reverse of the usual position decided that there was sufficient intent to contradict this number which reflected the contents of the container. This intent was reflected by the provision in the bill of lading that the container would be the package when stuffed by the shipper who paid freight on a container basis and declined the carriers insurance. It should be noted that COGSA did not apply *ex proprio vigore*.

442. See fn. 439.

443. See also *St. Paul Fire & Marine Ins. Co* v. *Sea-Land Service Inc (The Vermillion Bay)* [1990] AMC 2239 (SDNY 1990) and, in the context of pallets, *Bando Silk Co Ltd* v. *Hyundai Commander* [1995] AMC 516 (SDNY 1994). *Haemopharm Inc* v. *M/V MSC Indonesia* [2002] AMC 1297.

444. Whilst in *Smythgreyhound* v. *M/V Eurygenes* [1982] AMC 320 (2d Cir. 1981) there was some recognition that the parties might agree what is a package, boilerplate clauses are unlikely to persuade and the ambiguity on the face of the bill must be resolved against the carrier. See further 4.145.

445. *American Home Assurance Co* v. *Crowley Ambassador* [2003] AMC 510 (SDNY).

446. *Fishman and Tobin Inc* v. *Tropical Shipping and Construction Ltd* [2001] AMC 1663, at 1671 and *Groupe Chegaray/V De Chalus* v. *P&O Containers* [2001] AMC 1858 (11th Cir.), at p. 1867, *cf Fireman's Fund Insurance Co* v. *Tropical Shipping and Construction Co Ltd* [2001] AMC 2474 (11th Cir.), at p. 2485. See also *Haemopharm*, above, fn. 443.

447. *Tokio Marine and Fire Insurance Co Ltd* v. *Nippon Express USA (Illinois) Inc* [2001] AMC 1239 (CD Cal (Western Div) 2000) citing *All Pacific Trading Inc* v. *Hanjin Container Line Inc,* see below, fn. 464.

4.141 According to the court in *Binladen*,[448] the word package may not actually be used but it is enough to "describe objects that can reasonably be understood from the description as being packages". On this see especially, *Hayes-Leger Assocs.* v. *M.V. Oriental Knight*,[449] where the description of goods as "3,452 PCS" of baskets and furniture was held to be insufficient to indicate to the carrier that the goods were packaged.[450] In some cases, however, it has been considered possible for other means of describing the goods, apart from the bill of lading, to be considered so that indications elsewhere, for example in a shipping note may provide a sufficient indication of the number of packages.[451] Further, evidence that the goods were packed or wrapped in clear plastic was used to support the court's conclusion that a statement on the bill of lading of the number of pieces in a container reasonably indicated the number of COGSA "packages" in *Transatlantic Marine Claims Agency Inc* v. *M/V Mason Lykes*,[452] but not where there was no such evidence as in *Atlantic Glass Supplies* v. *M/V Nomzi*.[453] For the court in *Fishman and Tobin Inc* v. *Tropical Shipping and Construction Co Ltd*,[454] however, where the bill of lading description is clear, the court does not look beyond the documents to consider the actual packaging. In *InterAmerican Foods Inc* v. *Coordinated Caribbean Transport Inc*,[455] the bill of lading under the heading "no. of packages" stated "One trailer load said to contain" and under the column "description of packages and goods" stated "Shrimp product of Nicaragua, shipper's weight, load and count". Despite this, the court accepted from evidence regarding the knowledge of the carrier, who accepted and gave receipts for the cartons as they were loaded into the trailer and later made out the bill of lading, that the cartons within the trailer were the COGSA packages.

4.142 Whilst courts in the Ninth Circuit have indicated that the word "package" is to be given its plain, ordinary meaning,[456] the Second Circuit in *Aluminios Pozuelo* Ltd v. *S.S. Navigator* held that cargo is packaged where "some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods".[457] More particularly the

448. Above, fn. 436, at p. 1015 and p. 2125.

449. 765 F. 2d 1076 (11th Cir. 1985), [1986] AMC 1724.

450. See Tetley, p. 1538, *cf I.N.A.* v. *Frio Brazil* [1990] AMC 2506 (MD Fla.).

451. *Vegas* v. *Compania Anonima Venezolana*, 720 F. 2d 629 (11th Cir. 1983), [1984] AMC 1600 and *In Re complaint of Belize Trading* [1994] AMC 1210 (11th Cir. 1993), packing lists delivered to the carrier. *Cf Heamopharm*, above, fn. 443. See also *Maersk Line Ltd* v. *United States of America* [2008] AMC 278 (4th Cir.).

452. [1993] AMC 2448 (SDNY 1993).

453. [1999] AMC 1080 (SDNY). *Cf Orient Overseas Container Lines (UK) Ltd* v. *Sea-Land Service Inc* [2001] AMC 1005 (SDNY 2000), where failure to disclose on the bill of lading that engines had been stowed on racks by the shipper or to advise the carrier of this, meant that the engines could not be COGSA packages. The containers were the packages even though the bill of lading stated "1768 packages", i.e. the number of engines on its face.

454. [1999] AMC 1051 (SD Fla), decision affirmed [2001] AMC 1663.

455. 313 F. Supp. 1334 (SD Fla. 1970), Sorkin, para. 13.16(3).

456. *Hartford Fire Ins Co* v. *Pacific Far E. Line Inc* [1974] AMC 1475 (9th Cir. 1974).

457. [1968] AMC 2532, at p. 2536 (2d Cir. 1968). See also for the Eleventh Circuit, *Hayes-Leger Assocs*, above, and *F. A. Machinery Logistics Inc* v. *M/V Jebel Ali* [1998] AMC 2963 (SD Ga), *cf Orient Overseas Container Line (UK) Ltd* above, fn. 453. In *Fireman's fund Insurance Co* v. *Tropical Shipping and Construction Co Ltd* [2001] AMC 2474 (11th Cir.), where a mobile stage which could be pulled like a trailer on a highway, was held to constitute a single package where the bill of lading package column listed only one and the stage was designed to be transported without further packing. The "packaging" of the

Ninth Circuit has rejected that part of *Aluminios* that examines the subjective purpose of the package, i.e. whether it is for the purposes of transportation or protection. These courts prefer to treat as a central consideration whether the cargo is designed to stand freely.[458]

4.143 (ii) If the bill of lading lists the container as a package and fails to describe the contents as packages the container is deemed to be the package. Thus even as a functional part of the ship it is possible for there to be such a specification that enables the container to be deemed to be the package which appears to be the case whether or not the container is supplied by the carrier.[459] In the US, tank containers containing liquid have been regarded as packages.[460]

4.144 (iii) If no indication as to packages is given the shipment may be deemed to be one of goods not shipped in packages, for example, as in *Morris Graphics* v. *Trans Freight Lines*.[461] The position in the US is that in such a case the limit is to be applied on the basis of the "Customary Freight Unit"[462] which, as noted above, is a concept derived from the wording of COGSA 1936.

4.145 It appears from the above review that, in general, there is more or less regard to accepting the intention of the parties as determinative, so that their explicit agreement that each container shall constitute a package or that the shipment is one of goods not shipped in packages can take effect. This is despite the view that where COGSA applies *ex proprio vigore* "it is not the parties' characterisation of the shipment, but the court's interpretation of the statute, that controls".[463] The two

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stage was effectively incorporated into its design. *Cf* further the Australian decision in *Chapman Marine Pty* v. *Wilhelmsen Lines (The Tarago)* [1999] AMC 1221 (Fed Ct, NSW District Registry).

458. See *Travellers Indemnity Co* v. *The Vessel "Sam Houston" and Waterman Steamship Corp* [1994] AMC 2162 (9th Cir. 1994), *cf PT. Keraton Selaras* v. *M/V Cartagena de Indias* [1997] AMC 2218 (ED Penn).

459. See *Orion Insurance Co plc* v. *M/V Humacao* [1994] AMC 1922 (SDNY 1994), and *Granite State Insurance Co* v. *M/V Caraïbe* [1994] AMC 680 (DC Puerto Rico 1993).

460. *In re The Floreana* [1999] AMC 2930 (SD Tex). In *St. Paul Ttravelers Insurance Co Ltd* v. *Wallenius Wilhelmsen Logistics* A/S [2011] AMC 2701(2d Cir.), the court held that in the absence of any contrary evidence the bill of lading's unambiguous statements that the "No. of units or packages" is "1" and that the "Total no. of containers or packages received by the Carrier" was also "One" evidences the parties' intent that a yacht was to be treated as a single package.

461. [1990] AMC 2764.

462. *Watermill Export Inc* v. *M.V. Ponce*, 506 F. Supp. 612 (SDNY 1981), [1981] AMC 320. This refers not to the physical shipping unit but to the unit customarily used as the basis for calculation of the freight rate charged, *The Mormacoak*, 451 F. 2d. 24 (2d Cir. 1971), at p. 25, see Sorkin, para. 13(16)[4]. Some courts have emphasised the word "customary" and determined the applicable freight unit as the one "customarily" used (Sorkin, *ibid.*, citing *Brazil Oitica Ltd* v. *The Bill*, 55 F. Supp. 780 (D Md 1944) at p. 783). Others have taken the words to mean the actual freight unit used by the parties to calculate freight for the shipment in issue, by reference to the bill of lading and the tariff filed with the Federal Maritime Commission (Sorkin, *ibid.*, citing *F.M.C. Corp* v. *Marjorie Lykes*, 851 F. 2d 78 (2d Cir. 1988)). See further *Caterpillar Overseas SA* v. *Marine Transport Inc* 900 F. 2d. 714, [1991] AMC 75 (4th Cir. 1990) where the carrier's liability for a tractor was limited to $500 since the bill of lading defined a shipping unit as "each physical unit or piece of cargo not shipped in a package . . . , except goods shipped in bulk and irrespective of the weight or measurement unit employed in calculating freight charges". In *Cia Panamena de Seguros SA* v. *Prudential Lines Inc* 416 F. Supp. 641 (DCZ 1976), the court, having held that a container was not a package and that the goods inside it could not be regarded as packages, applied a limit based on the "measurement ton", each 40 cubic feet being considered a "freight ton".

463. Beeks J, *Matsushita Electric Corp* v. *S.S. Aegis Spirit*, 414 F. Supp. 894 at p. 905, (WD Wash 1976), [1976] AMC 779 at p. 793. See also *Yeramex International* v. *S.S. Tendo* [1977] AMC 1807 (ED Va 1977), *Crispin Co* v. *M.V. Morning Park*, 578 F. Supp. 359 at p. 360 (SD Tex 1984), [1985] AMC 766 at. p. 768 and *Gebr. Bellmer KG* v. *Terminal Services Houston*, 711 F. 2d 622 at p. 624 (5th Cir. 1983). *Cf*

views can be reconciled by requiring the parties' characterisation to be a genuine one, to be indicated on the face of the bill of lading in respect of the particular shipment and not imposed generally by means of a standardised definition contained in the printed clause of the bill of lading.[464]

4.146 Turning to the English position attention must be given to *The River Gurara* and a comparison made between the reasoning employed at first instance and in the Court of Appeal. At first instance,[465] Colman J held that where (i) separately packed items have been loaded into a container by the shipper or his agents and the carrier has had no opportunity to tally or verify the contents of the container, and (ii) the carrier or his agent signs a bill of lading which describes under the heading "container No. s" the identification numbers of the various containers received and states under the heading "Number and Kind of Packages; Description of Goods" words such as "1 × 20" container STC: 8 cases" of goods there are for the purposes of Article IV, rule 5, eight packages and not one. Further, if the contents of the container are described in the bill of lading as said to contain so many separately packed items which in turn are said to contain a specified number of separately packed items, the number of packages will be the smallest category of separately packed items so described, e.g., in the case itself, where a bill of lading bears the words "1 × 20" container STC: 8 pallets STC: 1855 bundles Ghana Makore and Sapele Veneer", the bundles are the packages and not the pallets.[466] He accepted however,[467] that if the contents of the container are described by words which leave it unclear whether they are separately packed for transportation, the container will be the package and not the individual items. In respect of the main question of whether or not a container can be regarded as a package, the judge clearly followed the approach taken in the US as outlined above. Even so he might have noted that the circumstances in which a court would necessarily be driven to a finding that the container was the relevant package must be rare indeed given that the Rules as applied in England base the limit on packages or units. Even if the goods inside the container are not described in terms of packages, unless they are purely bulk cargo, it might be possible to describe them in terms of units. This depends on the proper

where COGSA is incorporated as a matter of contract, *Pannell* v. *U.S. Lines*, 263 F. 2d 497 (2d Cir. 1959), [1959] AMC 935 and *Commonwealth Petrochemicals* v. *S.S. Puerto Rico*, 607 F. 2d 322 (4th Cir. 1979), [1979] AMC 2772. See further Tetley, p. 2168.

464. See *St. Paul Fire & Marine Insurance Co* v. *Sea-Land Service Inc (The Vermillion Bay)* [1990] AMC 2239 (SDNY 1990), LMLN 277. See also *Universal Leaf Tobacco Co Inc* v. *Netumar* [1993] AMC 2439 (USCA, 4th Cir. 1993) and *All Pacific Trading Inc* v. *Hanjin Container Line Inc* [1994] AMC 365 (USCA, 9th Cir. 1993). See also the explanation in *Monica Textile Corp*, above, 4.139. A mis-definition of a COGSA "package" in the bill of lading will merely result in the offending clause being void under Art. III, r. 8. It does not void the limitation of liability provision altogether and render COGSA inapplicable: *Vision Air Flight Service Inc* v. *M/V National Pride* [1999] AMC 1168 (9th Cir. 1998). In *Group Chegaray/V De Chalus* v. *P&O Containers* [2001] AMC 1858 (11th Cir.), distinguishing *Belize Trading Ltd* v. *Sun Insurance Co* [1994] AMC 1210 (11th Cir.), a shipowner's description in the bill of lading was treated as a reasonable interpretation of the information provided by the shipper where the shipper had failed to furnish a proper description of the packages and had accepted the bill of lading without protest.

465. [1996] 2 Lloyd's Rep 53. *Cf Center Optical (Hong Kong) Ltd* v. *Jardine Transport Services (China) Ltd* [2001] 2 Lloyd's Rep 678 (HK High Ct).

466. This aspect of the case is considered further below, 4.149.

467. At p. 62.

meaning of a unit and whether where the bill of lading describes packages, such as pallets, which contain a larger number of goods which could be described in terms of units it is possible to attach the limitation to the lowest unit. In *Bekol BV* v. *Terracina Shipping Corp*,[468] although Leggatt J thought that a piece of timber measuring typically two or three inches by four or five inches in cross-section and many feet in length, was capable when considered in isolation of being called a unit, if carried loose, this was not the case where a number of pieces are fastened together with steel straps to become a composite shipping unit. As he said: "In the bills of lading the timber was entered under the heading 'Number and kind of packages, description of goods' in the form 'x bundles stc (standing for "said to contain") y pieces'. The actual number of pieces which made up the gross tonnage in each bundle shipped was of no moment. The Oxford English Dictionary defines 'package' as 'a bundle of things packed up, whether in a box or receptacle, or merely compactly tied up'. It would be difficult to devise a more accurate or apt description of the bundles of wood here in question." Thus the making up of goods into a distinct package or unit would negate any further breaking down for this purpose. However, this may be distinguishable from where goods so made up are themselves made up or packaged into larger packages or units. The concept of "making up" or "separate packing for transport" has been elaborated further by the important majority decision of the Federal Court of Australia in *El Greco (Australia) Pty Ltd* v *Mediterranean Shipping Co SA*.[469] In the context of the Australian Amended Hague-Visby Rules, Allsop J emphasised the words "as packed" in Article IV rule 5(c) of these Rules so that the bill of lading should make clear the number of packages or units separately packed for transportation.[470] Thus, whilst a unit might be a single and even small item it will only be so if appropriately represented as such in the bill of lading. Allsop J accepted the approach of Colman J as to packages (or even units) within packages but, as with Leggatt J in *Bekol*,[471] this does not mean that every enumerated item represents a package or unit. Only if the unit is expressed as packed for transportation within the larger receptacle will it be significant for this part of the limitation rule. As he said "if the bill just says 10,000 pieces of engine parts one would not know from the bill whether there were 10, 50, 100 or 1,000 packages, or whether some parts were boxed and some packed as whole units . . . . A car may be packed as a unit. It may be carried completely knocked down in many pieces, ready for assembly. If completely knocked down it would be expected to be packaged or unitized in some way. If the shipper wants multiple unit or package limitations in respect of the knocked down pieces it should do what r5(c) requires—enumerate the packages or units as they are packed in the container".[472]

468. See above, fn. 427.
469. [2004] FCAFC 202, [2004] 2 Lloyd's Rep 537.
470. See paras 275–308. See further Carver, paras 9–262—9–264.
471. See above fn. 427.
472. For criticism, see F.M.B. Reynolds "The Package or Unit Limitation and the Visby Rules" [2005] LMCLQ 1 and M.A. Huybrechts, in Thomas, RR , ch. 7, pp. 119–139 at para. 7.66, who also notes (at 7.70–7.71) the decision in the *MV Elbe* of the *Cour d'appel, Rouen*, 28 February 2002, where it was held that an enumeration of 18,000 wristwatches contained in 38 cartons was an enumeration of 38 packages since the watches were not individually marked and numbered.

4.147 In the Court of Appeal[473] the decision of Colman J was upheld but the majority of the court adopted different reasons for the decision based on shortcomings, as indicated by Phillips LJ, of the traditional approach. Hirst LJ acknowledged these shortcomings but adopted the approach of Colman J because of the need for international uniformity. Phillips LJ rejected the search for intention based on the description adopted in the bill of lading as a back door means by which shipowners could impose on the shipper an unrealistically low limit of liability. He considered that the limit of liability is to be calculated by reference to the particulars of the cargo and its packaging as it is proved to have been on loading. He also agreed that to describe a container as a package was to strain the natural meaning of that word citing *Bekol BV* v. *Terracina Shipping Corp.*[474] A huge metal container stuffed with goods which will normally themselves be made up in individual packages is not naturally described as a package.[475] He rejected the argument, also rejected by Colman J, that a purpose of the rule was to enable the shipowner to verify the extent of his liability, but accepted that one of the main purposes of limitation was to benefit cargo owners by giving a liberal limit of liability so as to preclude shipowners from inserting clauses in their bills of lading purporting to limit liability to ridiculously low figures. In doing so he cited an article by A. Diamond.[476] At p. 228 of the cited article it is also noted that the objective was partly to protect shipowners in the case of packages of an unexpectedly high value. With respect, whilst the verification argument is misconceived in suggesting that the rule depends upon what the carrier can actually see or is in a position to verify,[477] it remains arguable that the protection for the shipowner is rather the ability to predict his liability, not necessarily to verify it. The focus on the particulars in the bill of lading reflects the means by which the shipowner is informed of his potential liability, information which can be brought to him by other means.[478] Phillips LJ was clearly much influenced by the decision in the *Aegis Spirit*. That decision both questioned the

473. [1998] QB 610, [1997] 4 All ER 498.

474. See above, fn. 427.

475. The judgment suggests, although without being explicit, that a container can never be a package. The decision leaves open the position where the goods inside the container cannot be said to have been packaged.

476. "The 'Hague-Visby' Rules" [1978] LMCLQ 225 at p. 229.

477. It is not without some support in the US, *cf*, Judge Miller's test in *Commonwealth Petrochemicals Inc* v. *S/S Puerto Rico,* 455 F. Supp. 310 (D Md 1978) *rev'd* 607 F. 2d. 322 (4th Cir. 1979, without reference to the test), which defines a package in terms of whether it was made up by the shipper in such a way as to preclude facile identification of the character, condition or quantity of the goods, see Sorkin, para. 13.16(3)(h).

478. See Glass, (1998) 1(1) *Shipping & Transport Lawyer International* 10. Phillips LJ suggests that the reservation "said to contain" indicates that the carrier does not accept the shipper's details so that the bills of lading manifestly do not indicate any agreement at all as to the description of what has been shipped (contrast the view of Allsop J in *El Greco* v. *MSC*, above, fn. 469, that "said to contain" is not relevant to Art. IV, r. 5(c) of the Hague-Visby Rules, since this deals with enumeration rather than binding representations). Thus, even if counsel were correct in contending that the American authorities should be followed, this would not lead to the conclusion that limitation fell to be calculated on the basis of the number of containers rather than the number of packages proved to have been lost. In general, however, the US decisions do not seem to turn on whether the bill of lading has been qualified, although sometimes the direct knowledge of the carrier has been taken into account, see Sorkin, para. 13.16(3)(g). Such knowledge would seem to be relevant to a test based on intention where no clear indication can be gathered from the documentation.

relevance of intention and saw the concept of a package in terms of its plain and ordinary meaning. Neither of these has had wholesale support in the subsequent development and as noted above the US courts seem able to reconcile an approach based on intention with a protection against dominance by the carrier.[479] Phillips LJ also noted that those decisions[480] which had formulated the rule that the container could be the package when the bill of lading does not indicate an alternative number of packages and the container is indicated as a package stated that this rule should be applied prospectively. For him the courts in these decisions were giving effect to the Visby amendments and legislating so that they do not bear on the interpretation of the Hague Rules. It can be said, however, that prior to these decisions and ever since *Leather's Best* the rule has always been expressed by reference initially to the disclosure made on the bill of lading.

Where the Hague-Visby Rules are applicable there is, in addition to the package limit, a weight limit which can be applied where it is not possible to identify the shipment as involving packages or units.[481] Furthermore, Article IV, rule 5(c), provides that 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 of the limitation, otherwise the article of transport shall be considered the package or unit. The word "consolidate" is presumably not meant to confine the application of the provision by reference to any technical meaning of the word.[482] In discovering what had been enumerated[483] Allsop J, in the *El Greco*,[484] took into account the whole of the face of the sea carriage document. Thus in respect of the Number of Packages column the number 1 was not to be taken as meaning that the container is the packages but rather that the container is one

4.148

479. See also the discussion in the Australian decision of the *El Greco*, fn. 469 at para. 469.

480. *Binladen BSB Landscaping* v. *M.V. Nedlloyd Rotterdam,* above, fn. 436 and *Hayes-Leger Assocs* v. *M.V. Oriental Knight,* above, fn. 449.

481. Where the Hague-Visby Rules are not controlling and the bill of lading itself seeks to incorporate both a package and a weight limit it is necessary to ensure that the drafting of the clause makes clear that they are alternative limits, otherwise the weight limit may be held to override the package limit as in *SPM Corp* v. *M/V Ming Moon*[1992] AMC 2409 (3d Cir. 1992). *Cf Amdahl Corp* v. *Profit Freight Systems* [1995] AMC 2694 (9th Cir. 1995). The concept of a "package" can also be relevant to limits expressed in terms of weight where there is a reference to the weight of a package, as in Art. 22(2)(b) of the Warsaw Convention as amended by the Hague Protocol (*cf* Art. 22(4) of the Montreal Convention). In *China Airlines* v. *Phillips HK*, Singapore Court of Appeal, 25 June 2002 (see www.onlinedmc.co.uk), the court considered a pallet to be the package for this purpose rather than the cartons packed within it.

482. A. Diamond, "The Hague-Visby Rules" [1978] LMCLQ 225 at p. 243. See further in respect of this provision and a similar provision in the Hamburg Rules, C.W. O'Hare, "Cargo Limitation and the Hamburg Rules" (1978) 6 ABLR 287. See further Carver, para. 9–266 and note also the definition of "consolidation" adopted in cl. 1 of NSFCC which includes stuffing, packing, loading or securing of goods on or within articles of transport.

483. The enumeration might not be an easy matter to discover. In the US decision of *Royal Insurance Co of America* v. *OOCL Ltd* [2008] AMC 337 (6th Cir.), where the court held the Hague-Visby Rules to be applicable, the court was faced with a total of 43 consecutive pages in the bill of lading which included "Quantity" columns with various numbers of units listed. An understanding of what exactly these numbers reference, where the pages duplicate and should not be counted twice, and ultimately how to calculate the total number of units listed required a factual understanding of the practices of the shipping industry and specifically of the bill of lading. This was for the fact-finder so the case was remanded back to the District Court.

484. See above, fn. 469.

package, not that it contains one package.[485] This was made clear by the contents of the clause commencing with the phrase "Received for shipment" above the signature box in the context of the clear statements that the shipper had stuffed the container. Nevertheless this number might, however, be of assistance in interpreting the part of the document under the heading "Description of Goods" which, since it referred only to a number of pieces, posters and prints was not a sufficiently clear enumeration of packages or units as packed.[486]

4.149 At this point it is useful to return to the further point made by Colman J in *The River Gurara* in respect of the Hague Rules that if the contents of the container are described in the bill of lading as said to contain so many separately packed items which in turn are said to contain a specified number of separately packed items, the number of packages will be the smallest category of separately packed items so described. The majority of the Court of Appeal, had it upheld the general approach of Colman J, at first instance, would have agreed with him on this point. This may well also be an appropriate interpretation of the Visby amendments as accepted by Allsop J in the *El Greco*,[487] but at this point it may be noted that in a US decision the court rejected argument that cartons which were contained within pallets placed in a container were the relevant packages as being too influenced by consideration of the Visby amendments.[488] The contention had been that because the bill of lading provided the carrier with notice of the number of cartons, the cartons are the COGSA packages. The court accepted that this argument would have been compelling if the Visby amendments were the sole basis for a decision. This is in line with an earlier decision from the Ninth Circuit in *Tokio Marine and Fire Insurance Co Ltd* v. *Nippon Express USA (Illinois) Inc*.[489] The court held that a skid consisting of a large cardboard sleeve enclosing contents and banded with plastic bands to a cardboard tray was a COGSA package, notwithstanding that the bill of lading listed a number of small items inside the skid under the column headed "kind of packages: description of goods". The number of skids appeared in the column "No. of Containers or pkgs". The court cited *Omark Industries* v. *Associated Container Transportation*[490] which noted that pallets are not analogous to large metal containers and that it is not usually the smallest package unit incorporated into a shipment that constitutes the COGSA packages. On the contrary these will generally be the largest individuated unit of packed cargo made up by or for the shipper.[491] Certainly

485. See para. 305.

486. See paras 306–307.

487. Discussed at 4.146 above.

488. *DCI Management Group Inc and Continental Insurance Co* v. *M.V. Miden Agan*, No. 03 Civ 448 (DLC) (Westlaw) SDNY 14 May 2004.

489. [2001] AMC 1239 (CD Cal (Western Div) 2000).

490. [1977] AMC 230 (D Ore 1976).

491. See also *Groupe Chegary/V De Chalus* v. *P&O Containers* [2001] AMC 1858 (11th Cir.) where the bill of lading referred to 42 packages STC 2268 cartons. This court noted that, in cases decided otherwise, the bill of lading was ambiguous, citing e.g. *Insurance Co of North America* v. *M/V Frio Brazil* [1990] AMC 2506 where the bill of lading described the goods as 160 pallets containing 12,000 cartons with 12 packages of 1,000ml each one containing frozen concentrated orange juice.

ever since *Standard Electrica*,[492] the US courts have been quite prepared to accept that pallets are capable of being COGSA packages.[493]

4.150 It has been suggested that the words "similar article of transport" in Article IV, rule 5(c) do not apply to ro-ro lorries and trailers.[494] It is hard to see why there should be any difference given that the possible reasons behind the clarification such as, for example, enabling the carrier to predict his potential liability from the indications on the bill of lading are likely to be the same whatever type of unit load system is utilised.[495] The Rotterdam Rules will make the position clearer in this respect (see next paragraph).

4.151 Article 6(2)(a) of the Hamburg Rules and Article 18(2)(a) express a package rule for containers, etc, in similar terms to Article IV, rule 5(c) of the Hague-Visby Rules.[496] The Rotterdam Rules provide similarly in Article 59(2) that when goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit. "Container" means any type of container, transportable tank or flat, swap-body, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.[497] "Vehicle" means a road or railroad cargo vehicle.[498] "Contract particulars" means any information relating to the contract of carriage or to the goods (including terms, notations, signatures, and endorsements) that is in a transport document or an electronic transport record.[499]

4.152 Article 6(2)(b) of the Hamburg Rules and Article 18(2)(b) of the MMTC, provide that where the article of transport itself is lost or damaged, and is not owned or supplied by the carrier, it is to be considered one separate shipping unit. This is not expressed in the Hague-Visby Rules or the Rotterdam Rules. The courts might take a similar approach to the Hamburg Rules and MMTC or apply the weight limit to the container separately from the goods unless, presumably, the bill of lading itself was clear in indicating that the parties considered the container to be a package.

4.153 Since the carrier will often be dependent on the indications given by the shipper the addition to them by the carrier of the words "said to contain" whilst affecting

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492. See above, 4.135.

493. *Du Pont de Nemours* v. *S.S. Mormacvega* (1974) 493 F. 2d 97, [1974] 1 Lloyd's Rep 296, *Cameco Inc* v. *S.S. American Legion* (1974) 514 F. 2d 1291. See Benjamin, para. 21–091. See further the recent decision in *Royal Insurance Co of America* v. *M/V MSC Dymphna*, [2004] AMC 785 (SDNY), where the goods were described as 2880 cartons packed on 40 pallets in the description of goods column. However, the number of packages column was left blank. The court felt unable to go to summary judgment on the issue of limitation and required further evidence of intent having noted the evidence available from copies of the invoice and packing list sent to the carrier after the loss.

494. *Scrutton*, p. 443, n. 272.

495. *Cf The European Enterprise* [1989] 2 Lloyd's Rep 185.

496. Apart from ensuring transport documents other than bills of lading are accommodated, such as in the case of MMTC, a multimodal transport document.

497. Article 1(26).

498. Article 1(27).

499. Article 1(23).

proof[500] need not affect application of paragraph (c) of Article IV, rule 5. The shipper should, however, be bound by his indications yet be subject to the consequences of the proof required of him. Thus the approach taken in the US by *Hayes-Leger Associates* v. *M.V. Oriental Knight*[501] would seem to commend itself. Accordingly, where the shipper understates the number of packages, the carrier's liability is limited on the basis of the number of packages stated in the bill of lading, but where the shipper overstates the number of packages, the actual number only is relevant.[502]

500. See above, 4.113.

501. 756 F. 2d 1076 (11th Cir. 1985). This approach, however, would seem to be precluded by the view taken by the majority of the Court of Appeal in *The River Gurara*, above, fn. 465. Phillips LJ suggested that the carrier can rely on Art. III, r. 5 in a case where a consignee recovers on proof of a greater quantity of packages than shown on the bill. It is not entirely obvious that a consignee should be able to make such a recovery, see Glass, above, fn. 478. See also the full discussion of this by Allsop J in the *El Greco*, above 469 paras 257–274, preferring the view of Colman J at first instance but noting the primacy given to the bill of lading by Art IV, r. 5(c) in the Hague-Visby Rules. See also Carver, para. 9–260.

502. See Wijckmans, (above, fn. 469) p. 515, and see also *Houlden & Co Ltd* v. *S.S. Red Jacket* [1977] AMC 1382 (SDNY 1977), affirmed 582 F. 2d 1271 (2d Cir.), cert denied 439 U.S. 1128, [1979] AMC 2018, [1978] 1 Lloyd's Rep 300 where the plaintiff was held bound by an indication on the bill of lading that the goods were packed in "bundles" in the container even though this was proved not to be the case.

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