The Rotterdam Rules and modern transport practices: a successful marriage?

1. Philosophy of the Rotterdam Rules

UNCITRAL devised in cooperation with CMI the Convention because a new convention seemed necessary to achieve greater uniformity of rules and to accommodate new transport practices which were largely ignored by the previous international conventions. Further, there is a need for one international convention which harmonises all the legal aspects of contracts of carriage by sea. Maritime legislation is still regionalised and the ensuing complexity is burdensome for international trade.

The raison d’être of the Convention is the ambition of the US to make a new US Carriage of Goods by Sea Act. The current US COGSA dates from 1924. It is not suited to present-day trade. The US asked UNCITRAL to initiate the project of a convention rather than to come up with law of its own which would only fragment the transport legislation even more. UNCITRAL agreed and wrote a preliminary working document. In 1996, UNCITRAL requested CMI to collaborate. The result was a draft convention. The US seems satisfied with the outcome. The American Bar Association urges to ratify. If the US does ratify, then other countries will undoubtedly follow in their wake.

2. Efficiency of the Convention for multimodal transport

2.1. Multimodal transport under the Convention

The Convention is often called a ‘wet multimodal’, ‘maritime plus’ or a ‘limited multimodal’ convention. These terms indicate the scope of application. Consideration will be given to door-to-door contracts, multimodal transport and the requirement of a sea leg in order to understand why these terms are used.

2.1.1 Door-to-door contracts

Door-to-door carriage is the carriage of goods which involves plural modes of transport from a place located outside the port of loading to another place outside the port of destination. The UNCITRAL Commission decided at its 54th session that the scope should be port-to-port operations but the working group was free to consider the possibility of a

1. For example: door-to-door transport, containerization and the use of electronic transport documents.
5. For example, the US only offers a per-package limitation of liability and not a per-weight limitation.
7. They signed the Rotterdam Rules on 25 September 2009
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door-to-door convention. The Convention does now have an international door-to-door transport scope.

At present, there are no international conventions which such a wide scope. Although the industry has filled this vacuum with its own rules, it is better to have one predictable set of rules. There are various other reasons for an international door-to-door scope such as the increase of door-to-door carriage for the transport of goods (for example, the containerisation), the lack of a harmonized legal regime and the gaps between mandatory regimes applying to various modes of transport involved. It also provides simplicity by replacing a series of contracts with various carriers by a contract between a consignor and one carrier under one contract. Finally, a door-to-door scope acknowledges the fact that the actual carriage of goods by sea often represents only a relatively small part of an international transport of goods. Even receipt and delivery of goods different from loading onto and discharge from a vessel is common in container transport where a port-to-door bill of lading is used.

The Convention extends the scope of application in comparison with previous maritime conventions. The Hague and Hague-Visby Rules are mandatory applicable tackle-to-tackle. This means that the carrier is responsible from the moment the goods are put on board till the moment they leave the ship. He is liable before and after this period under general law except when there is a ‘period of responsibility’ clause. Such clause can limit or extend the liability of the carrier for the period before loading or after discharge. The Hamburg Rules extend the scope of application of the Hague-Visby Rules in that it is a ‘port-to-port’ convention. This means that the Hamburg Rules operate from the moment that the carrier is in charge of the goods at the port of loading until the port of discharge.

The Convention is not always a door-to-door convention because the period of responsibility can be contractually limited. Article 12 determines that the period of responsibility of the carrier begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered. The parties are allowed to agree on the time and location of receipt and delivery when two conditions are fulfilled: the time of receipt is not subsequent to the beginning of the initial loading and the time of delivery is not before the final unloading. The terms ‘loading’ and ‘unloading’ refer to the loading or unloading not only on a ship but also on a train, aircraft or vehicle. Thus, if the only mode of transport is sea carriage, then the parties will be able to limit the period of responsibility to ‘tackle-to-tackle’ or ‘port-to-port’ transport by determining in the contract of carriage the time of loading as the time of receipt and the time unloading as the time of delivery. This is in line with article 11 which applies the Convention to single mode sea transport. The WG II has inserted the possibility to limit the period of responsibility to avoid that the responsibility of the carrier goes beyond tackle when ‘tackle-to-tackle’ transport is agreed (as will often be the case in bulk trades).

It also has to be noted that article 26 emphasizes the possibility of a port-to-port or tackle-to-tackle transport as the provisions of liability, limitation of liability and time for suit of the Convention may be set aside for mandatory provisions of another transport convention when loss, damage to the goods or delay in delivery do not occur during the sea carriage.

2 1 2 Multimodal transport

International multimodal transport refers to the carriage of goods performed by a carrier, called the multimodal transport operator (hereafter: MTO), who uses at least two different modes of transport from a place where the goods are taken...
Multimodal transport differs from 'door-to-door' in that multimodal transport requires only one contract, one transport document and one carrier who is responsible from the moment he takes over the goods from the shipper till the moment he delivers the goods to the consignee. He is responsible for the entire transit even if he sub-contacts the whole or a part of the carriage. This responsibility is the essence of a multimodal transport 28 while the kend in a door-to-door transport is the transport from a place located inland outside the port of loading of loading to another place inland outside the port destination. 29 A multimodal transport always requires minimal two modes of transport while a door-to-door transport is not necessary performed by different means of transport. 30 A multimodal transport will often be a door-to-door transport.

Similar to the US Senate Draft COGSA 1999 31, the Convention covers both because the Convention can be used as a unimodal convention and as a multimodal convention for door-to-door transport. The Convention operates as a unimodal convention when the contract of carriage only provides sea transport. It operates as a multimodal convention when the contract of carriage provides for sea carriage and carriage by other modes of transport. This results from the wording 'shall' and 'may' in the definition of contracts of carriage since carriage by sea is mandatory while transport by other modes of transport is not. However, the Convention was not initially meant to be a multimodal convention as the bracketing of the words 'wholly or partly' and 'by sea' in earlier draft conventions 32 indicate that the starting point was to make a new unimodal regime. 33

The importance of a multimodal convention should not be underestimated. Containerization of the transport has accelerated multimodal transport. The use of containers is still growing rapidly. The world port container throughput has grown from zero in 1965 to 225 3 million moves in 2001. It is expected to double to around 500 million moves by 2010. That is a 9% growth per year. 34 Antwerp has an annual growth of 10 to 15% 35 of the containers carried worldwide are transported on a multimodal basis. This was even higher in the US where 50 to 80% were carried on a multimodal basis. 36 Multimodal transport is also stimulated by the growing need for consumer and industrial goods and the globalization of the production process which requires the use of a complex chain of modes of transport. 37 Finally, a multimodal convention is important for the industry because multimodal transport reduces transit time and handling costs and transport capacity is increased.

2.1.3 Wet multimodal transport

For the Convention to apply, the contract of carriage must provide for carriage by sea. It is irrelevant whether or not the mode of transport other than by sea is subsidiary to the sea leg 38 nor is it important whether or not the other modes

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29 R. de Wit, o.c. para 1.2 p. 3; J. M. Aleckmana l.c. at 600
30 R. de Wit, o.c. para 1.2 p. 3
31 J. M. Aleckmana l.c. at 600
32 J. M. Aleckmana l.c. at 600
33 US Senate COGSA 1999 applies to carriage of goods either by sea or partly by sea and partially by one or other modes of transportation
35 Article 1.1.
38 M. Hooks, Multimodal carriage with a pinch of sea salt: door-to-door under the UNCTAD Draft instrument' 33 (2008) 3 ETL 257, at 267
39 This means the summation of all containers handled by ports, either as imports, exports or transshipment
43 D.G. Jasturek, M. Beuth, 'Globalisation and research issues in transportation', 3 (97) 3 Journal of Transport Geography 199, at 202; O. Dobyko and P.K. Mukherjee, 'Multimodal maritime plus some European perspectives on law and policy' paper given on ISIL 15th European Colloquium on Maritime Law Research, Swansea, May 2010, at 3
44 Article 1.1. Only 15% of all respondents to a UNCTAD survey in 2003 responded in favour of a maritime plus approach. See UNCTAD Doc UNCTD/DST/EB/L.262/5 of 13 January 2003, Multimodal transport: the feasibility of an international legal instrument, para 34. at 14, available at [http://www.unctad.org/en/commission/working_groups/3Transport.html]
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of transport are prior to or after the sea transport. It was suggested to apply the Convention to multimodal carriage where the importance of the maritime leg is predominant. The Working Group III rejected this on the ground that sea transport is nowadays often a small part of the overall transport.

It is worth noting that the definition of a contract of carriage requires carriage by 'sea' and not by 'water'. Thus, transport by an inland waterway will not be sufficient except if there is prior or subsequent sea carriage. Different interpretations of 'sea' may cause conflicts. It also has to be remarked that it is only required that the contract provides for sea carriage. This implies that the Contract will be applicable when the contract of carriage stipulates sea carriage even if there is in fact no actual sea transport. A contract of carriage offering an option to carry the goods by sea is in our opinion not a contract which shall provide for carriage by sea. It has then to be found in a unimodal contract.

The Convention is a step forward in comparison with the Hague-/Visby Rules and the Hamburg Rules. It is the first convention to apply to the whole carriage by sea and carriage by other modes of transport (subject to articles 26 and 28). However, the Convention cannot be considered as a 'true' multimodal convention as combined transport by other means than carriage by sea is excluded. Nevertheless, it is a step forward as there is currently no international convention for multimodal transport. The Hamburg Rules have some elements of multimodal transport in that the contract of carriage may provide for separate transport and in that the carrier might be responsible for the carriage by other means as long as that transport happens within the port of loading or discharge. It is, however, a unimodal convention as it only applies to sea transport. The European Commission wants to solve this problem by creating a European multimodal law. They will face the same problem as UNCITRAL had, namely the pressure of countries to preserve the unimodal conventions and their domestic law regulating transport by other modes than sea transport. This was probably the reason for the requirement of a maritime leg in the Convention.

2.2 Conflicts of law

The broad scope of application of the Convention gives rise to conflicts with other legislation (in particular with unimodal regimes such as CMI, CMN, COTIF/CIM). There are three articles (articles 26, 82 and 89) to solve potential conflicts of law. They basically determine in which situations some or all the provisions of the Convention must give way to provisions of other instruments. There was a French proposal to merge these articles into one but this was not accepted. It is regrettable as it would simplify the existing system.

The following paragraphs consider conflicts involving:

1. an international instrument regulating non-sea carriage and applying to carriage preceding or subsequent to sea carriage;
2. a convention regulating non-maritime modes of transport but applying to a sea leg.

2.2.1 International instruments regulating non-sea carriage and applying to carriage preceding or subsequent to sea carriage

Article 26 offers a solution for conflicts of the applicable liability regime when there is a loss, damage or delay in delivery. Different liability systems are possible to resolve the question of liability and limitation of liability. The system used in article 26 is called a 'limited network system'. It is distinguished from the 'uniform system' and the 'pure network system'.

A. Uniform system

A uniform system in the Convention would mean that the liability regime of the Convention applies irrespective of the moment when the loss, damage or delay of delivery occurs.

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45 H. Staniland, i.e., para 5-01, at 15-16
47 H. Staniland, i.e., para 5-01 at 15
48 Ibid, para 5-02, p 16
49 This view is supported by H. Staniland, see ibid, para 5-02, at 16
50 Article 11
52 Article 1.6
53 Article 4.2 Hamburg Rules
59 Article 26
60 Article 82.
61 48% of all respondents to a UNCTAD questionnaire considered a uniform system as the appropriate system. See UNCTAD Doc UNCTAD/SDTE/11/2003/1 of 13 January 2003. 'Multimodal transport: the feasibility of an international legal instrument', para 19 at 19. available at http://www.unctad.org/unctad/en/commission/commission/working_groups/transport.html

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as long as it happened during the period of responsibility of the carrier. 62

It is a system which provides uniformity and clarity. Another advantage is that the cargo-claimant does not have to be worried about proving when the delay in delivery, damage or loss occurred. The carrier can only be subject to one liability regime irrespective of at what stage the loss or damage happened. Thus, contrary to the network system, gradual occurrence or unlocalized damage or loss will not cause a liability gap. 63

Nevertheless, it is not an advisable system because liability regimes in maritime transport are generally based on principles different than those used in other transport modes. 64 Another disadvantage concerns the MTO. His recourse to the sub-contractor, as performing carrier, is not back-to-back. This means that the liability of the MTO to the cargo owner does not correspond with the liability of the sub-contractor to the MTO. This is possible as the liability regime of the Convention can be different from the liability regime of the unimodal convention applying to the sub-contractor. 65 As a result, the insurance and litigation costs of the MTO will be higher. 66 Moreover, a uniform liability system in the Convention will not avoid all conflicts of law in that unimodal conventions have mandatory liability provisions which apply to the transport leg where also the liability rules of the Convention apply. 67

B. Pure network system

Under a pure network system the liability rules are determined by the rules which normally apply to the leg where the loss, damage or delay occurred as if that leg was the only mode of transport used. 68

The advantage of such a system is the back-to-back liability. Thus, the MTO will be able to recover from his sub-contractor the same amount of money he was liable for to the cargo claimant. 69 A pure network system also avoids conflicts which still exist in a limited network system (see infra). Nevertheless, it is not an option for the Convention because it does not provide uniformity and harmonization. 70

The position of the cargo claimant is less positive. The burden of higher insurance and litigation costs will shift to him because he will be faced with the hardship of proving at what stage the delay in delivery, damage or loss occurred. This burden of proof is certainly difficult when sealed containers are used to carry goods because damage or loss is noticed only when the container is opened at arrival. Moreover, the damage or loss might happen gradually. 71 As a consequence, the applicable convention might not be determined. This can cause a liability gap. 72 The severity of the liability gap should not be underestimated as the damage of goods in a container is in the majority of cases concealed. 73 The problem can be solved with a fall-back provision which provides a supplementary instrument or alternative liability regime. 74

C. Limited or modified network system

The Convention has chosen for a limited or modified network system. The drafters opted for a limited network approach because it is already used by the industry by way of contractual provision. 75 It is also more acceptable in that it preserves some principles of the existing liability regimes while at the same time it provides a certain degree of uniformity.

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63 CMJ, 'Door to door transport', CMJ Yearbook (2002) 118, para. 5.1, at 119; C. Hancock QC o.c., at 41; R. de Wit o.c. para. 2159, pp 143-144.
64 C. Hancock QC, o.c. pp. 40-41.
66 C. Hancock QC, o.c. p. 41.
68 28% of all respondents to a UNCIMAT questionnaire preferred a network system as the appropriate system. UNCIMAT Doc UNCIATD/SID1/F/LB/2003/1 of 13 January 2003, 'Multimodal transport: the feasibility of an international legal instrument', para. 57, at 19, available at http://www.unicitral.org/unicial/en/commission/working_groups/3Transport.html.
70 CMJ, 'Door to door transport', CMJ Yearbook (2003) 118, para. 5.1, at 119; C. Hancock QC o.c. p. 40.
71 Preamble of the Convention.
74 CMJ, 'Door to door transport', CMJ Yearbook (2000) 118, para. 5.1, at 119; C. Hancock QC, o.c. p. 41; R. de Wit, o.c. para. 2146-2149, pp 139-140.
75 J.M. Alldor, l.c., at 609; R. de Wit, o.c. para. 2147, p. 139.
76 CMJ, 'Door to door transport', CMJ Yearbook (2000) 118, para. 5.1, at 119; C. Hancock QC, o.c. p. 41.
77 For example: rule 5.1 UNCIMAT/ICC Rules for Multimodal Transport Documents (1991); a typical carrier's responsibility clause in a multimodal bill of lading.
Article 26 is limited in a double sense. First, only mandatory provisions of international instruments can set aside the Convention. Thus, national legislation cannot prevail over the Convention. This was decided because it would otherwise dilute uniformity. Second, the network system is only confined to issues of liability, limitation of liability and time for suit.

A unimodal convention is applicable if the loss, damage or delay in delivery can be localized 'solely' during the stage before loading or after discharge from the ship. The Convention is applicable in all other situations as long as the loss or damage occurred during the period of responsibility. This fall-back rule avoids the problems of liability gaps and of the localization of damage, loss or delay. However, problems when there is gradual loss or damage still exist as the Convention will conflict with the mandatory provisions of the unimodal convention which might apply (e.g. both the CMR and the Convention are applicable if there is gradual damage, loss, or delay in delivery). Article 82 might offer a solution for this problem as the application of the Convention for all issues might be excluded under certain conditions.

A limited network liability regime has other downsides. As in a pure network liability regime, it is not possible to predict the applicable liability regime. Another problem is that article 26 does not lay down rules for two criteria to determine whether the provisions of the Convention should be set aside:

- There are no rules regulating the burden of proof nor does it say how the question of causation has to be resolved.

It is also a complicated system which brings only limited uniformity. As mentioned before, only conflicts relating to matters of liability, time for suit and limitations of liability are solved. Thus, conflicts over other issues (e.g. jurisdiction, required transport document, etc.) remain. The drafters were maybe of the opinion that the remaining conflicts are less common. An extended scope would also decrease uniformity.

For the conflicts with other issues than those of article 26, a solution might be found in international law. In international law, obligations of parties to a treaty are in the same way binding as obligations of a contract between individuals. This is known as the principle 'pacta sunt servanda'. Thus, a problem arises when a state is member to more than one convention which has incompatible provisions as states have to fulfill their obligations under the conventions. The Vienna Convention offers a solution. Article 3094 of the Vienna Convention determines that if one of the parties is a member of a later treaty but the other is not, then the treaty to which the parties are both members will apply. The draft convention of 2005 had an article 26 which pronounces the prevalence of the draft convention over other treaties to which the parties to the draft convention might also be a party. WYG III explained that, in line with article 3094 of the Vienna Convention, article 91 does not affect those states which are not a party to the draft convention. Article 91 was later left out.

Article 3093 of the Vienna Convention provides that if both
parties are members of a later treaty, that treaty will apply but if the older treaty is not suspended or determined, the provisions of the older treaty will still apply if they are not in conflict with the most recent treaty. Using this rule in the Convention, this would mean that the provisions of the Convention must be used if the contract of carriage provides that both the place of receipt and delivery of the cargo are located in contracting states 16; however, not both states are contracting states to the Convention but both are members of another international convention which applies to the transport, than that convention will prevail over the Convention. This solution provides certainly and predictability but it does not solve all conflicts in situations when both states are not both members of a Convention. The forum state will then determine which convention applies. 16

2.2.2 International conventions governing the carriage of goods by other modes of transport

Article 82 sets aside all the provisions of the Convention to give way to international conventions regulating carriage of goods by air, road and rail which extend their scope of application to carriage by sea (for transport by air: extend to any part of the contract of carriage; for road transport: the goods must remain loaded on a road cargo vehicle carried on board) 17. The conventions referred to in paragraphs a-d are unimodal conventions regulating transport by air, rail, road and inland waterways (Montreal, COTIF-CIM, CMR and CMI).

Both articles 26 and 82 are articles to solve conflicts of law. When there is a conflict, first article 82 has to be considered because all provisions of another convention can then prevail over the Convention. If the Convention is still applicable, then consideration has to be given to article 26 to decide which liability regime has to be used.

The wording of article 82 is not quite clear. At first sight, the article would seem to set aside the Convention for issues of carrier’s liability for loss and damage. However, it is submitted that this is only a method to identify the applicable convention. Article 82 can give way to all the provisions of another convention 94. Another difficulty is the wording to the extent that it suggests that a convention only prevails over the Convention in relation to the sea leg 27. It is submitted that this is also a method to identify the convention.

Contrary to article 26, article 82 is limited to conventions already in force at the time the Convention enters into force. Article 26 can be used for conflicts with future conventions and international instruments such as EU law on multimodal transport of goods 95.

3. Containerization

3.1. Containers carried on deck

Approximately 65% of the container-carrying capacity of a vessel is usually on deck 99. Certain containers require under deck carriage (e.g. refrigerated containers) 100, while others on deck. 101. On deck carriage brings with it greater risks such as moisture damage or danger to be swept overboard 102. The stowage of containers is also important for the seaworthiness of the ship as the trim of the vessel is influenced by its cargo 103.

Particular rules for deck cargo are required to guarantee a safe carriage. Too many or detailed rules form a hurdle for international trade. Therefore, the carrier should maintain a certain liberty to determine where to stow the cargo. The drafter of the Convention are of the opinion that article 251 b reflects a good balance 104. It has to be remarked that the Convention not only envisages container ships but every ship used to transport containers 105.

3.1.1. Container carriage on deck expressly allowed

The Convention is the first international convention expressly allowing carriage of containers on deck. The Hague-Visby Rules only state that their rules do not apply on carriage stowed on deck if the fact of such carriage is stated on the bill of lading 106. The Hamburg Rules have a special pro-

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94 M. Hoeks, I., at p 276.
97 Ibid.
100 W. Tiley, P, p 1575.
103 T. Russell, The operational realities of containerisation and their effect on the “package” limitation and the “on-deck prohibition: review and suggestions”, 45 (1975-76) TLR 909 at p 918.
104 Ibid, para 79, at p 25.
106 Article 13
vision for allowing deck cargo but container carriage is not expressly included.107

Article 25.1 contains three categories which allow the carriage of goods on the deck of the ship. One of those categories expressly allows deck carriage of containers.108 Two conditions have to be fulfilled: the container must be suitable for deck carriage and the deck has to be specially fitted to carry the containers.

The other two categories allow general deck cargo when carriage is required by law and when the carriage on deck is in accordance with the contract of carriage, customs, usages or practices.109 The carrier does not have to invoke article 25.1 b if one of those categories are applicable. This may be important in relation to his liability.

As there are three distinct categories, it could be argued that the condition under article 25.1 b to make the ship "deck-cargoworthy" must not be fulfilled as long as one of the other conditions applies. Nonetheless, this duty is included in two other obligations of the carrier. First, the carrier has a duty to exercise due diligence before, at the beginning of and during the voyage by sea to make and keep the vessel seaworthy110 and to make and keep the holds and parts of the ship safe for reception, carriage and preservation of the goods.111 Concerning the former, it is customary to draw up a cargo or storage plan. The contents and weight of each container have to be taken into account when drafting such a plan. Therefore, the carrier relies on the information, instructions and documents relating to the goods furnished by the shipper.112 Article 40 regulates how the information relating to the goods in the contract particulars of the transport or electronic transport record as referred to in article 36.1 must or may be qualified by the carrier but the Convention is silent to which extend due diligence is required to verify the information given by the shipper in other ways than those provided in article 36.1. Physical verification of the content of a container cannot be required but he must presumably take minimum steps to control the information furnished by the shipper.113 Concerning the latter, a container is by some authors considered as a part of the ship when other containers are stowed above or alongside it and thus support these containers.114 A container is not considered as a part of the ship in Belgium.115 It has to be noted that carriage of containers also has consequences for the carrier's duty to exercise due diligence to properly equip the ship.116 Transport technologies such as the lashing of containers with a lashing bridge117 are a part of the equipment of the ship and have an influence on the seaworthiness of the ship.118 Secondly, the carrier has an express duty to supply containers which are fit and safe for reception, carriage and preservation.119 This is an important provision as most containers are owned by or leased to the carrier.120

3.1.2 Liability
Contrary to the Hamburg Rules121 the Convention has a lex specialis for the carrier's liability not only when deck carriage is not permitted122 but also when it is allowed.123 There is also a special provision for the loss of the benefit of limitation of liability.124

A. Permissible deck carriage
Article 25.2 regulates the liability of the carrier for deck carriage. The article is divided in two parts. The first part states that the liability provisions of the Convention (viz article 17) apply to the liability of the carrier when delay in delivery, loss, damage to goods carried by one of the three categories provided for in article 25.1 occurs. The second part determines that the carrier is not liable if special risks of the deck carriage have caused the delay in delivery, loss or damage. Thus, article 17 determines the liability of the carrier except liability for special risks.125 A literal reading of the article makes the second part only applicable to the categories under article 25.1 a and c. This means that the carrier is liable for special risks of the deck carriage when the goods are carried

107 Article 9.
108 Article 25.1 b.
109 Article 25.1 a.
110 Article 25.1 c.
111 Article 14 a.
112 Article 14 c.
113 Articles 25.31 and 32.
115 Ibid.
117 Article 14 b.
118 A construction used to securely lash the containers loaded on the bottom layer on deck.
119 P.M. Badgen and S. Lamont-Black, op. cit. para 18-09, p 375 (discusses article III 1 Hague-Viiby Rules).
120 Article 14 c.
121 P.M. Badgen and S. Lamont-Black, op. cit. para 18-09, p 374.
122 Article 9.3.
123 Article 25.2.
124 Article 25.5.
125 Article 25.5.
in accordance with article 25 1 b. Why does a different regime apply to deck carriage of containers? The carrier does not bear the risk if the category under article 25 1 a applies because the law denies him free choice of allocation of the container. The rationale for article 25 1 c could be the agreement (per analogiam custom, usage or practice) made by the shipper. But what about the carriage of containers? The answer cannot be found in the nature of special risks. Special risks are not defined. It presumably includes seawater damage or washing overboard. They cause delay in delivery, loss or damage to goods without the fault of the carrier or shipper. The carrier presumably has to bear the risk because he can avoid liability by making an agreement with the shipper so to fall under the category of article 25 1 c.

B. Not permissible deck carriage

Article 25 3 does not permit deck carriage of containerized cargo if they are carried on deck in cases other than those permitted under article 25 1. The carrier is liable for delay in delivery, loss or damage to the goods that is 'exclusively' caused by the deck carriage. He cannot invoke the defences provided in article 17. The cargo claimant has the burden of proving that the loss is caused exclusively by the carriage on deck.

Some authors see a contradiction between articles 25 2 and 25 3; article 25 2 a contrario would mean that the carrier who carries cargo in accordance with article 25 1 is not liable for delay in delivery, loss or damage to the goods that is exclusively caused by the deck carriage while article 25 2 provides that the carrier is liable for special risks in case of article 25 1 b. There is no such contradiction. A division has to be made between the situation where deck carriage is done pursuant to article 25 1 and where it is not. Concerning the former, the general liability provisions (article 17) apply to the three categories of article 25 1 but with an additional liability exception for two categories (article 25 1 a nd b), namely special risks. Concerning the latter, there is no additional liability exemption. The general liability provisions apply to all three categories.

3.1.3 Limitation of liability

Article 25 5 regulates the situation where the shipper and the carrier expressly agree to carry the cargo under deck and there is a delay in delivery, loss or damage to the goods that is expressly caused by the carriage on deck. The carrier then loses his right to limit his liability. In other words, if the cargo claimant is able to prove that the loss, damage, or delay in delivery resulted from the deck carriage, he will be entitled to get compensation from the carrier in excess of the limitation amounts. If the situation as described in article 25 5 does not apply, then the carrier can limit his liability under the general limitation provisions.

It was suggested in WG III to delete article 25 5 as it was desirable not to create exceptions. This suggestion was rejected because the limitation of liability is only not permitted when there is an intentional breach of contract regarding where to carry the cargo. Article 9 4 of the Hamburg Rules is in this regard better worded as it refers directly to the general article of loss of right to limit liability. Article 61 of the Convention is based on article 9 4 of the Hamburg Rules. Considering this and the fact that article 25 of the Convention is based on article 9 of the Hamburg Rules, it is submitted that article 25 5 must be seen as an application of article 61.

3.2 Care of cargo and seaworthiness

3.2.1 Care of cargo

A. Obligations of the carrier

The carrier has a general duty to carry the goods to the place of destination and deliver them to the consignee. This is not an absolute duty. The carrier has the right to decline to receive or load the goods and to take other measures as are reasonable (e.g. destroying the goods) when the goods become an actual danger to life, property or environment during the carrier's period of responsibility. The general duty is further subject to the terms of the contract of carriage and the provisions of the Convention such as article 13, which implements a specific obligation for the care of cargo.

Article 13 is based on article III 2 of the Hague-Visby Rules that requires the carrier to propely and carefully load, handle, stow, carry, keep, care for and unload the goods carried. The Convention adds two operations: receipt and delivery of the goods. These additional obligations result from the door-to-door scope. These obligations apply always from loading to the ship until discharge from the ship and
The duty under article 13.1 is the bailee’s minimum duty of care to ensure the safety of the property. The term ‘properly and carefully’ is not defined. The term can be interpreted by using the interpretation under the Hague/Visby Rules as the obligations are similar. The words ‘carefully refers to reasonable care’ Lord Reid in *Albacora vs Westcott and Lawrence Line* explained ‘properly’ It means the ‘obligation for a system which is sound in light of all the knowledge which the carrier has or ought to have about the nature of the goods’. Lord Peacock added: ‘A sound system does not mean a system suited to all the weaknesses and idiosyncrasies of a particular cargo, but a sound system under all the circumstances in relation to the general practice of carriage of goods by sea. It is tantamount, I think, to efficiency’. Thus, the required care depends on various factors such as the type of cargo, voyage, vessel and the knowledge of those factors which the carrier has or ought to have. The carriage of goods in containers makes it more difficult for the carrier to know the particularities of the cargo. As a consequence, it would be logic to require a lower standard of care. However, several provisions of the Convention guarantee that the carrier has knowledge of the particularities of the goods. As a result, a carrier who stores a container next to an apparently defective container or a container containing declared dangerous goods is liable for damage or loss. A term of the contract of carriage which excludes this liability is void.

The carrier does not have to perform those operations which are transferred to the shipper, documentary shipper or consignee. This has to be agreed between the carrier and the shipper in the contract of carriage. An agreement to perform these operations by a third party who is not acting on behalf of the shipper, documentary shipper or consignee is not allowed. The sanction for this appears to be the responsibility of the carrier under article 13.1 except when the third party is obliged by law or regulation of the place of delivery to perform these operations and from which the consignee can collect the goods. In that case the period of responsibility of the carrier under article 12 ends. The carrier will also be responsible when the contract of carriage states that the shipper, the documentary shipper, the consignee, or a third party performs the receipt or delivery of the goods.

B. Obligations of the shipper

Articles 27.1 and 27.2 are the counterpart of articles 13 and 14. It imposes three obligations on the shipper regarding the delivery of the cargo for carriage. First, the shipper has a duty to deliver goods ‘ready for carriage’ unless the contract of carriage stipulates otherwise. Secondly, the shipper has a duty to deliver goods which are in such a condition that they will withstand the intended carriage. Thirdly, the carrier must deliver goods which will not cause harm to other property and persons. It seems that the latter two duties are minimum requirements as these obligations are preceded with the wording ‘in any event’. Thus, the contract of carriage can only add more strict obligations. Terms in the contract of carriage limiting these obligations will be void.

Additional obligations are possible when the shipper and the carrier agree that certain operations which are normally done by the carrier (viz. loading, handling, stowing or unloading of the goods) are performed by the shipper (e.g. PROST...
The shipper has to perform these operations properly and carefully. Article 27.3 is a special provision for the delivery of containers. The Hague-Visby Rules and Hamburg Rules do not have such express provision. Under the Convention, the shipper is required to properly and carefully stow, lash and secure the contents in or on the container or vehicle, and in such a way that they will not cause harm to persons or property. Any clause limiting this duty is void. This duty only exists when the shipper has packed the container. If not, article 27.1 applies.

Article 27.1 has a different wording from article 27.3. Article 27.3 determines the standard of care for storing, lashing and securing the contents while article 27.1 adds three categories, namely loading, handling and unloading. The required standard is also different. The standard in the situation of containers, namely 'properly and carefully', seems to be lower than the general standard, namely 'withstand the intended carriage'. However, both provisions have the same effect.

Article 27.3 is not a lex specialis but only clarifies the general duty for the situation of containerized duty. The opposite would not be logic (viz delivery of containerized goods which must not withstand the intended carriage). This view is supported in WGI where it was suggested to delete the special provision for containers because 'goods' also includes containers not supplied by the carrier. This suggestion was rejected because an express provision was thought to be necessary to avoid doubts as to the shipper’s obligation to provide proper stowage of cargo in a container and to acknowledge the importance of security matters when containers are involved.

3.2.2 Containerworthiness
Article 13 requires the carrier to exercise reasonable care during the whole transport. The particular characteristics of sea transport require an additional provision to guarantee the exercise of reasonable care during the sea voyage. This additional guarantee is offered by article 14: the carrier must before, at the beginning of, and during the voyage by sea exercise due diligence to provide a seaworthy ship.

Sea worthiness has three aspects in the Hague-Visby Rules. Namely the physical state of the vessel, the crew and equipment and the cargo worthiness. The Convention adds a fourth one: containerworthiness. Containerworthiness means that the carrier has to supply containers which are fit and safe for the reception, carriage and preservation of the goods. This duty cannot be avoided by inserting a clause in the contract of carriage which shifts liability for a defective container to the cargo interests.

The wording of article 14 is similar to article III.1 of the Hague-Visby Rules. Thus, 'due diligence' has presumably the same meaning as under the Hague-Visby Rules. There is, however, an important difference between article 14 and article III.1 of Hague/Hague-Visby Rules and the position in common law is the addition of the phrase 'during the voyage' and 'keep'. As a result, the duty of seaworthiness has become a continuing obligation. The reason for the continuing obligation is to bring the Convention in line with the ISM Code and safe shipping requirements.

Another reason is the development of telecommunication technologies. Communication between the vessel and the offshore operator is now possible. It enables the offshore operator to be up-to-date and to give instructions. Finally, the situation of the cargo interest is now more just as it is logical for a cargo interest to be protected not only before and at the beginning of the voyage.

The extended duty is important in particular two situations. First, a container becomes unfit or unsafe during the voyage. The carrier has a due diligence duty rather than an absolute obligation. Thus, there is no breach if he took all reasonable steps during the voyage and repair of the container.

159 Article 13.2
160 Article 27.3
161 Article 4.2 in stipulates that the carrier, subject to article IV.1, is exonerated of liability when there is insufficiency of packing. Article 27 of the Convention expressly puts an obligation on the shipper. Article 27 of the Convention is also more sophisticated.
162 Contrary to the Hague-Visby Rules, the Hamburg Rules have presumed fault regime without a list of exonerations.
163 Article 79.3 b.
164 Mentioned in article 27.1 and defined in article 1.24.
166 Article III.1.
167 J F Wilson, p. 186
168 Article 79.3 b.
170 McTaiden v Blue Star Line (1998) 1 KB 697 at 703 per J Channel (voyage charter); The Verdiens (1999) p 140 at 157 per J Smith (conservative voyage charter).

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is not possible until the ship calls a port. The situation is different if the carrier should have been aware of the problem before or at the beginning of the voyage. The following test must then be used: "would a prudent shipowner, if he had known of the defect, have continued the voyage without effecting any possible repair?" 174 This test is derived from the test used in article III.1 of Hague/Hague-Visby rules. 175 The reshipment of the cargo might be necessary to avoid liability for delay 176 and to accomplish his general duty to carry the goods to the place of destination 177.

Secondly, a container vessel calls at an intermediate port and becomes uncontainerworthy. The situation under the Hague/Visby Rules is odd because the carrier might be liable when a defective container is loaded at the initial port while he will not be liable when he loads a defective container at an intermediate port. 178 The Convention removes this unfair situation. This is an important improvement for the container trade as most container ships sail on container trade routes calling at a number of intermediate ports. 179

The Convention does not clarify when the sea voyage is ended. As a consequence, it is not clear when the duties under article 14.1 are no longer due. There are two possibilities, namely the voyage is ended when:

1. the ship enters the port of discharge;
or
2. when the discharge of the containers is finished

It is submitted that the obligation ends when the cargo is completely discharged because it was the aim of the drafters to extend the obligation. 180 It is also more logical as 'at the beginning of the voyage' is interpreted as starting from the loading of the vessel. 181

There was some discussion in WG III whether article 14.1 covers containers leased or provided by the carrier under a contract. One of the views was that the Convention applies not only to the contracts of carriage but also to related contracts for the execution of the contract of carriage and thus article 14.1 covers also containers leased or provided by the carrier under a contract. 182 This is the right interpretation as article 14.1 is drafted to stay in line with the position of most courts, namely that containers provided by the carrier are a part of the ship's hold. 183 It must also be noted that article 14.1 is limited to containers supplied by the carrier to continue the logic of the definition of goods of article 1.24.

3.2.3 Liability

A Carrier

Contrary to the Hague/Visby 184 and Hamburg Rules, 185 limitation of liability in the Convention is not limited to liability for delay in delivery, loss or damage to the goods but is possible for breaches of the carrier's obligations in general. 186 The liability system in the Convention is a presumed qualified fault system. 187 We need to go through different stages to determine whether the carrier is liable.

Stage 1: The claimant has to prove that the loss, damage or delay, or the event or circumstance which caused or contributed took place during the period of responsibility. 188 The carrier's fault is then presumed. The same principle applies in the Hamburg Rules. 189

Stage 2: The carrier can rebut the fault presumption in two ways. First, he proves that the cause of the loss, damage or delay is not attributable to his fault or the fault of any person for whom he bears responsibility. 189 Second, similarly to the Hague-Visby Rules, 189, he proves that the loss, damage or delay is caused by one of the perils enumerated in article 17.3.

Stage 3: The burden of proof shifts again to the claimant. He has three potential recourses:

1. he may prove that the fault of the carrier or a person for whom he vicariously responsible caused or contributed

174 A. Nicholas, The Duties of Carriers under the Conventions - Care and Seaworthiness, paper given on 1ST II 5th European Colloquium on Maritime Law Research, Swansea, May 2009, at 4.
175 "Would a prudent shipowner, if he had known of the defect, have continued the voyage in that condition? See MCD Ltd v NV Zeerijp Moordrecht [1962] 2 Lloyd's Rep 160; Kaffi Group Ltd v Rogers Express Lines Pty Ltd (The Kielia) [1996] 2 Lloyd's Rep 171; UBC Chartering Ltd v Lepage Shipping Co Ltd [The Lepage] [1999] 1 Lloyd's Rep 649.
176 Article 17.1
177 Article 11
179 A. Nicholas, The Duties of Carriers under the Conventions - Care and Seaworthiness, paper given on 1ST II 5th European Colloquium on Maritime Law Research, Swansea, May 2009, at 4.
183 Ibid
184 Article IV.5.a: 'loss or damage to or in connection with goods'.
185 Article 6.1.a: 'loss or damage to goods': article 6.1.b: 'delay in delivery'.
186 Article 40.4.
188 Article 17.1
189 Article 5.1
190 Article 17.2
191 Article IV.2

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to the event or circumstance on which the carrier relies.\textsuperscript{192}

2 he may prove that an event or circumstance not listed in article 173 contributed to the loss, damage or delay.\textsuperscript{193}

or

3 he may prove that the loss, damage or delay was caused or was probably caused or contributed by the cargo-worthiness.\textsuperscript{194}

Stage 4: The drafters did not find this system complicated enough to give the carrier the possibility to rebut the claimant's proof of stage 3 and 3. With regard to stage 3 2, the carrier may prove that the event or circumstance not listed in article 173 is not attributable to its fault or of a person for whom it is vicariously responsible.\textsuperscript{195} With regard to stage 3 3, the carrier can prove either that none of the events referred to in article 175 a.\textsuperscript{196} is a cause of the loss, damage or delay or he can either prove that he did not breach his obligation to exercise due diligence under article 14.

If finally the carrier is held liable and the two-year time bar for suit is not exceeded,\textsuperscript{197} he might try to limit his liability by apportioning the damage\textsuperscript{198} or by applying the concept of general limitation of liability.\textsuperscript{199} The carrier cannot ex- punge or limit his liability by way of a clause in the contract of carriage.\textsuperscript{200} The liability of the carrier is also a personal obligation which can not be delegated.\textsuperscript{201}

This liability regime is complicated. There are many other problems with the liability regime. To mention one, there is the problem of the standard of burden of proof. Concepts of evidence and proof are treated differently from country to country. It is important to agree on this to guarantee certainty and predictability. Nevertheless, article 17 4 does not define the standard of proof. Article 17 5 1 only states that the claimant must prove it was 'probably' caused. The burden of proof is presumably based on a balance of probabilities rather than a concept of strict proof.\textsuperscript{202}

B. Shipper
The shipper is liable for loss or damage sustained by the carrier if the carrier can prove that the loss or damage is caused by a breach of the shipper's obligations.\textsuperscript{203} This is consistent with article 17 2. A breach can also be an exclusion ground for the liability of the carrier under the general liability system.\textsuperscript{200} The shipper's liability can be enormous considering that the average cargo value per TEU is between 25 000 and 250 000 USD.\textsuperscript{205} Moreover, the shipper is also liable for the breach of its obligations caused by a person to which the shipper entrusted the performance of any of its obligations (except if they are working on behalf of the carrier).\textsuperscript{206}

The shipper's strict liability is also apparent from his duty to provide the carrier 'reasonably necessary' information, instructions and documents 'relating to' the goods that are not otherwise 'reasonably available' to the carrier.\textsuperscript{207} This duty is very widely worded. It will cause many interpretation problems (e.g. when is information related to the goods, when is it reasonable necessary to give information, etc.).

3.2.4 Limitation of liability

A. Carrier
The carrier's liability is in principle calculated per package or other shipping unit or per kilogram of the gross weight.\textsuperscript{208} Article 59 2 specifies what a package unit or shipping unit is when there is containerized cargo: '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'. This article is based on the Hague-/Visby Rules\textsuperscript{209} and the Hamburg Rules.\textsuperscript{210} As a consequence, the same problems as under those conventions remain:

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\textsuperscript{192} Article 17 4 a

\textsuperscript{193} Article 17 4 b

\textsuperscript{194} Article 17 5 a

\textsuperscript{195} Article 17 5 b

\textsuperscript{196} Viz (1) the seaworthiness of the ship; (2) the improper crewing, equipping, and supplying of the ship and (3) the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage and preservation of the goods

\textsuperscript{197} Article 62

\textsuperscript{198} Article 17 6

\textsuperscript{199} Article 59-61

\textsuperscript{200} Article 79 1

\textsuperscript{201} Article 18. The same principle applies in the Hague-/Visby Rules, but not in common law. See: Stood Al v The State Line Steamship Company (1877-78) LR 3 App Cas 72 for the Hague-Visby Rules and Union of India v NV Rederi Amsterdam (The ANGUSTA) [1963] 2 Lloyd's Rep 225.

\textsuperscript{202}槟州 General Mercantile Co Ltd v Lancashire Shipping Co Ltd (The Moneypenny Castle) [1964] A.C. 807 for the common law.


\textsuperscript{204} Article 92 1

\textsuperscript{205} Article 17 5 h. article 17 5 j; article 17 3 k

\textsuperscript{206} Different figures are given in the literature E.g: J Wang, D. Olivier. A Nooteboom and B. Slack, Ports, cities and global supply chains (2007). Ashgate Publishing limited: Aldershot. p 85

\textsuperscript{207} Article 34

\textsuperscript{208} Article 27 1 juncto article 30

\textsuperscript{209} Article 59 1

\textsuperscript{210} Article IV 4 c

\textsuperscript{211} Article 6 2 a


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1. What is a 'package' or 'shipping unit'?
The Convention does not define what a 'package' or 'shipping unit' is. Case-law of the Hague Rules can be used at that case-law is presumably applicable to the Hague-Visby Rules to interpret a 'package or shipping unit'. The English Court of Appeal held that the unqualified description of the goods in the bill of lading is only prima facie evidence as long as the bill of lading is not in the hands of a 'lawful holder'. It is not prima facie evidence when the bill of lading is qualified (e.g. 'weight unknown'). However, things are unclear after the judgement of the Federal Court of Australia in *El Greco* where the court held that we must look to 'what the sea carriage document enumerated (if anything) by way of packages or units as packed in the container'. As a consequence, the container is the package if the bill of lading does not enumerate the number of packages. The court did not take into account the actual packed packages. It seems that the Australian court considers the bill of lading as being conclusive evidence.

2. What is meant by 'enumerated'?
A number of questions arise. Does 'enumerated' refer to the packages or shipping units as recorded by the shipper or does it only refer to the contract particulars as defined in article 26.1 and which the carrier can qualify? How is a general reservation clause (e.g. 'quantity unknown') qualified? Should we adopt the view of the English text book writers who do not qualify general reservation clauses as an enumeration or do we need to support the view of *El Greco* which qualifies it as an enumeration?

3. What is meant by 'as packed'?
The Convention does not define what it means. Do we have to apply *El Greco* which says 'as packed does not refer to the articles contained within the container, rather to packages or units as packed'. As packed is a part of the rule's description of what is to be enumerated in the carriage document. Thus, the transport document must describe how the goods are packed in the container. Or is it sufficient to describe the 'packages or units'?

The exact position of a container under the limitation provision is clarified neither by the English courts nor by the law. This is probably caused by the limited liability of the carrier. It is not worth it for a cargo claimant to start costly litigation. Although the limits can hardly be qualified as 'up to date', the limits in the Convention are higher. As a consequence, a cargo claimant will be more inclined to recover its damage and the mentioned problems will become important. It is incomprehensible why the drafters of the Convention ignored the warning of the *El Greco* case in deciding not to solve the problems we experienced with the Hague-Visby Rules.

B. Shipper
The shipper can never limit his liability. He can be relieved of his liability when the loss or damage is not caused by its fault or the fault of a person for whom he is responsible. However, the shipper will remain liable when he has breached his obligation to provide certain information.

The Convention provides a fault regime for the shipper and very strict conditions to limit his liability while there is a qualified presumed fault regime and an extended provision for the carrier’s limitation of liability. This imbalance is odd considering that only a minority of the cases concern the liability of the carrier. W.G. III gives the following explanation: 'the obligations placed on the shipper might not be in total balance with those imposed upon the carrier'. It was agreed that, whilst the obligations of the shipper and carrier should be properly balanced, this balance should be assessed from a global perspective rather than by an article-by-article or obligation-by-obligation analysis. In that regard, it was noted that the carrier had the benefit of defences and limitations that were not available to the shipper. I do not see how the 'global perspective' can justify this imbalance. A better explanation would be that the shipper is in the best position to know the goods and its aptness for the concerned method of transport. This is, however, a reasoning which still does not respond to the economical reality. It is a fact that merchants go bankrupt when faced with huge claims.

212 J.F. Wilson, *et al.*, pp 199-199
213 The River Guerra, [1998] QB 610, at 625 per J Phillips
214 Ibid., at 626
216 Ibid., para 305.
218 J.F. Wilson, *et al.*, p 199
219 E.g. Ibid., p 199
221 Ibid., para 282-286.
223 The limitation per package or unit increased with 23.81% in comparison with the Hague-Visby Rules and the limitation per kilogram rose with 33.4% in comparison with the Hague-Visby Rules while there is an annual inflation of 4.5% since 1968
224 Article 30.2
225 Information about dangerous goods and information required for the compilation of the contract particulars and for the issuance of the transport documents or electronic transport record. See article 30.2
3.3 Right of the carrier to qualify the information relating to the goods carried in containers

The shipper is in principle entitled to demand from the carrier a transport document or electronic transport record upon delivery of the goods for carriage to the carrier. The transport document or electronic transport records gives information related to the cargo. The carrier has the right (or duty in certain circumstances) to qualify that information if he is not convinced that it accurately represent the goods. Such qualifications have as a result that the carrier does not assume responsibility for the accuracy of the information provided by the shipper. The principle of the carrier who can not be obliged to support incorrect contract particulars furnished by the shipper is also to be found in the Hague/Visby and Hamburg Rules.

Similar to the Hague/Visby and Hamburg Rules, article 40 of the Convention has a limited scope as only the particulars referred to in article 36 1 (the description of the goods, necessary leading marks to identify the goods, number of quantity of the goods, weight of the goods) can be qualified by the carrier. The structure, however, is made complicated. A division has to be made between particulars which the carrier must qualify and particulars which may be qualified. The latter is again divided into two categories, namely containerized and non-containerized carriage of goods. This division is made to give reality to the different treatment in practice of containerized and non-containerized goods. It also acknowledges the presumption that the carrier does not open a container to inspect the goods.

3.3.1 Duty to qualify particulars of containerized goods

The carrier must make a qualification if he has actual knowledge or reasonable grounds to believe that the particulars are false or misleading. The Convention does not define ‘false’ nor ‘misleading’. Whereas ‘false’ is a clear term, ‘misleading’ is not. The ordinary meaning of ‘misleading’ is a cause to have a wrong impression about something. An impression is a subjective notion and depends on the facts. The wording of the Hamburg Rules is better and more precise.

3.3.2 Right to qualify particulars of containerized goods

Two situations must be distinguished, namely the situation where the carrier or performing carrier has inspected the cargo in the container and where he has not. The carrier has in both situations a right to qualify the particulars. The evidentiary matters of the reason to qualify are left to national law. This is regrettable as it prevents a harmonized application of article 40.

A Inspected cargo of a container

The carrier may qualify all particulars of article 36 1 if he has no physically practicable or commercially reasonable means of checking information or if he has reasonable grounds to doubt the accuracy of the information. In the latter, the carrier may qualify by including a clause providing what it reasonably considers accurate information. In the former, the carrier may indicate which information he was unable to verify.

B Not inspected cargo of a container

A distinction must be made between two situations. First, the carrier may qualify particulars relating to description, leading marks and quantity of the goods if the carrier has no ‘actual knowledge of its contents before issuing the transport document’. It is unclear whether ‘knowledge’ requires general knowledge or specific knowledge of the description, leading marks and quantity of the goods. Secondly, the carrier may qualify particulars relating to the weight if there are no physically practicable or commercially reasonable means of checking weight or if the container is not weighed and there is no agreement to weigh and include the weight in the contract particulars.

227 Article 35
228 Article 35.1
229 Articles 40 1 and article 40 2
230 Article 40 1 and 40 2
231 Article IV.5 The carrier has a right to not sign an inaccurate bill of lading unless he is bounded
232 Article 16 1 The carrier has a duty to qualify an inaccurate bill of lading
233 Article 40 1
234 Article 40 2
237 Oxford English dictionary
238 Article 40 1
239 Article 40 1
240 Article 40 3
241 Article 40 4
242 Article 40 5 a
243 Article 40 5 b
244 Article 40 a
245 Article 40 b

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3.3.3 Quantity unknown clauses

It is customary for the carrier to use a general reservation clause\textsuperscript{245} to avoid the evidentiary rules of the contract particulars\textsuperscript{247}. Such clause is under certain conditions allowed under English law\textsuperscript{248}. As under the Hamburg Rules,\textsuperscript{249} the situation under the Convention is not clear. Article 40 1 does not require any specific wording of the qualification clause. Article 40 3 states that the carrier 'may indicate which information it was unable to check' and article 40 3 b says the carrier 'may include a clause providing what it reasonably considers accurate information'. A part of the fact that it is not clear why the quoted phrases are not present in the other paragraphs, it is clear that there are no mandatory conditions as to the wording of the qualification clause. As a result, general reservation clauses are allowed. This view is supported by the CMI\textsuperscript{250} and WG III. At the 36\textsuperscript{th} session of WG III, a suggestion was made to require the carrier to give reason for the qualification. WG III is of the opinion that the effect of such obligation would be to avoid the use of general reservation clauses\textsuperscript{251}. Article 40 does not contain the made suggestion.

It is not clear what the qualifying clauses must say. The wording is left to the parties. It is presumably sufficient to have a clause from which it is apparent that the carrier does not accept responsibility (e.g. 'condition unknown').

4. Electronic transport record

New technologies make electronic communication possible. This has many advantages (e.g. less time consuming procedures). However, the existing international conventions and national law do not offer a complete solution. Under English law, the use of electronic transport records is not prohibited but there is also no framework although it is possible under section 1.5 and 1.6 COGSA 1992 to take regulations which would bring to an end the silence of COGSA 1971 on the issue of electronic communication. It is the aim of UNCITRAL to facilitate and harmonize electronic communication\textsuperscript{252} by making a technology neutral convention\textsuperscript{253} and by establishing functional equivalence between paper and electronic transport documents\textsuperscript{254}. This resulted in detailed articles. On the one hand, there are articles which have elements common to both the 'transport document' (viz. paper transport document) and to the electronic transport record (viz. electronic transport document)\textsuperscript{255}. On the other hand, there are articles which specify electronic features\textsuperscript{256}. I will consider those articles which provide functional equivalence and the article which allows the use of an electronic product which produces the electronic transport record.

4.1 Functional equivalence

Functional equivalence means that it does not matter whether an electronic or a paper transport document is used\textsuperscript{257}. The functional equivalence is in particular guaranteed by three terms. First, communication in writing can be done by 'electronic communication'\textsuperscript{258}. This term has a wide definition. It is used to give the greatest possible scope to all non-paper based systems\textsuperscript{259}. The requirements for electronic communication are basically to guarantee the memorising and displaying of information\textsuperscript{260}. Second, the definition of 'electronic transport record'\textsuperscript{261}, which includes negotiable\textsuperscript{262} and non-negotiable electronic transport records,\textsuperscript{263} has the same two functions as the paper counterpart\textsuperscript{264}. Namely evidence of the carrier's or a performing party's receipt of the goods and evidence of the contract of carriage. A negotiable transport document (e.g. bill of lading to order) has traditionally a third function, namely document of title. A document of title enables the cargo owner to sell the goods during
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4.2 Possibilities for the development of products generating electronic transport records

The Convention does not determine which products must be used to generate electronic transport records. With regard to procedures for the use of negotiable electronic transport records, the Convention only lists the essential particulars the parties have to agree on. These minimum requirements protect the holder of the transport record to whom a negotiable electronic record is transferred. There are no procedural rules at all for non-negotiable electronic records because it was thought that there was no existing practice of using the electronic equivalent of a straight bill of lading. Thus, the parties have contractual freedom to choose the electronic platform (e.g., Bolero). This freedom is deliberately created by the drafters as to guarantee the implementation of new technologies. It is good to leave this open so that the products are also up-to-date. This is important as electronic safety issues are always developing.

The electronic product which has today the most chance of being used for negotiable electronic transport is Bolero. It is submitted that a Bolero Bill of Lading accords with the requirements of the Convention (e.g., consent of both the carrier and the shipper to agree with the issuance of use of an electronic transport document which is compiled and issued under Bolero and the agreement of both to the Rule Book). There are different solutions for non-negotiable electronic transport records such as @GlobalTrade and GlobalITTrade gives the carrier the possibility to create an electronic sea bill of lading which the shipper accepts. A sea bill of lading is not a document of title. This can be a problem (e.g., a shipper who needs financing for the transaction) to GlobalTrade solves this problem by a clause which facilitates the transfer of the control of the goods to a bank which finances the transaction. The Convention goes a step further by allowing the controlling party (vice the party in principle initially the shipper) to give the carrier instructions in respect to the goods. The right to designate another person as the controlling party. As a consequence, most of the problems due to the lack of a document of title are solved. This will stimulate the use of non-negotiable documents in trades other than traditional ones where sea waybills are used. A sea waybill has many advantages over a negotiable document such as the avoidance of the situation where the carrier is reluctant to deliver the goods when the goods arrive before the bill of lading.

5. Some general remarks to conclude

The aim of the Convention, establishing a uniform legal regime which takes into account modern transport practices, does only seem to be partly achieved. The Convention has a door-to-door scope but it allows parties to agree to limit the scope to port-to-port or even tackle-to-tackle. Another problem is the wet multimodal scope. The industry demands a true multimodal convention but they are offered a light rule.

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265 J.R. Wilson, op. cit., p. 130.
266 See Chapter 10 of the Convention.
267 Article 61.3.
268 Article 38.
269 Air transport documents: article 23 a i; Charterparty bills of lading: article 22 a i; Bills of lading: article 20 a i; Multimodal transport documents: article 19 a i. Non-negotiable sea waybills: article 21 a i.
270 S 4 b.
271 See article 1 19 for definition of electronic record.
272 Article 9.
277 Full name: @GlobalTrade Secure Payment and Trade Management System.
279 Ibid.
280 Article 51 a.
281 Article 1.12.
282 Article 51 b.
284 At present, a sea waybill is mainly used in the container trade as there is no need to sell the goods during transit in the container trade.
version because of the condition of sea carriage. An unconditional harmonization is further prevented by the conflict of law provisions. The network system is limited to three issues. As a consequence, different legislation can be applicable to the same problem. The Vienna Convention offers an alternative system. A pure network system can solve this problem but such system brings less uniformity. A pure uniform system could be a solution if the Convention is a true multimodal convention and if all countries agree to use only the Convention. Utopia is yet to come. However, there are also positive elements. The fall-back rule in article 26 provides a solution for unlocalized damage or loss. The wet multi-modal and the door-to-door scope are also a step in harmonizing the legal regime but it is only a first step. A real harmonizing effect can be expected for carriage of goods by sea although it can also be doubted if countries will be willing to denounce their membership of other conventions.

The Convention has given great attention to the effect of containers in transport. Some of the provisions relating to container carriage are not necessary because they are implied in other provisions. Nevertheless, it provides clarity. However, some of the provisions are confusing. An example of such provision is the provision allowing deck carriage of containers under certain conditions. There is a special liability regime for such carriage. The regime is not logic as there are contradictions in provision. Further, it not clear why there is a different liability regime for the carriage of containers on deck then for deck carriage. It is recommended to delete the contradictions of the article and to specify who should bear the residual risks from the carriage of containers on deck. It is arguable to let the carrier bear such risks as he has the possibility to avoid liability for such risks by making an agreement with the shipper to carry the goods on deck.

The Convention offers a good system to make electronic communication possible. There are no detailed rules but this can only be welcomed as it opens the doors for technological developments.