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# **Liability for Carriage of Goods by Sea: Present and Future Regulation**

*A look at the UNCITRAL/CMI Draft Instrument as  
compared to the existing regime*

Extended handout

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# LIABILITY FOR CARRIAGE OF GOODS BY SEA: PRESENT AND FUTURE REGULATION

- I. Introduction and background
- II. Current international liability framework
  - Quid pro quo – existing balance
- III. UNCITRAL/CMI Draft Instrument
  - General considerations
  - Quid pro quo - balance

# I. Introduction and Background

Why have international liability regulation?

- Uniformity of law?
- Compare charterparty and bill of lading contracts
- Carriage of goods on liner terms: potential for abuse/unfair contract terms
- Role and function of transport documents in international trade
- Mandatory minimum standards of liability

From the Hague Rules 1924 to the Hague-Visby Rules 1968, ... the Hamburg Rules 1978 ...  
... the UNCITRAL/CMI Draft Instrument?

# Recent developments

- Increase in containerization and multimodal transportation
- Further concentration of the Liner Shipping Market
- Emergence of “Service Contracts” in some trades
- E-alternatives to traditional transport documents: inadequate legal infrastructure
- Increasing proliferation of national/regional laws  
= “de-unification”

# Features of a successful international liability regime

Clarity and transparency of rules:

- to increase likelihood of widespread adoption, provide certainty and ensure uniform application in different jurisdictions

Restrictive approach to changes (structure and terminology):

- to build on and preserve established rules / case law, and to minimise uncertainty and costly litigation

Acceptable quid pro quo in terms of substance:

- protection of third party consignee v. predictability of C's liability exposure
- rules appropriate to needs of modern practice

# DI on carriage of goods [wholly or partly] [by sea]

Clarity and transparency of rules?

- Complex and lengthy (89 Articles)

Restrictive approach to changes?

- Liability rules based on HVR (and HbgR) but with significant changes in structure, terminology, content

Acceptable quid pro quo?

- Liability regime + e-communication, freight, delivery, right of control and transfer of rights ... PP
- Designed to cover sea-carriage but extended to cover MT including a sea-leg
- Substantive balance between carrier and cargo interests?

# Liability: conflicting interests

## Cargo:

- one party is responsible throughout and can be sued on reasonable terms (liability/burden of proof)
- compensation for loss, damage or delay is adequate
- own liability exposure is acceptable

## Carrier:

- liability limited to fault of C (and its people)
- Liability exposure strictly limited in terms of time and extent

## II. Current liability framework: quid pro quo

**HR/HVR** (b/1) loading – discharge

- Seaworthiness (due diligence) – C liable for fault
- Care of cargo (tackle to tackle)
- Issue of b/1 (evidence)
- No contracting out

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- Time-bar (1 yr)
  - List of 17 exceptions (including fire and nautical fault)
  - Monetary limitation

- C presumed liable for multiple causes
- S liable for fault, misstatements and losses due to dangerous goods shipped without C's knowing consent

## II. Current liability framework: quid pro quo

**HbgR** (n/a to C/P) Receipt - delivery

- Presumption of fault
- Issue of b/l (evidence)
- Liability for delay
- No contracting out

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- Limitation period (2yr)
  - General clause
  - Monetary limitation (+25%)

- C presumed liable for multiple causes
- S liable for fault, misstatements and losses due to dangerous goods shipped without C's knowing consent

### III. Draft Instrument (DI): quid pro quo

Period of responsibility of C: receipt to delivery (Art. 7)

BUT: definition of receipt/delivery (9.1): time and location

(a) specified in contract

(b) custom/usage

(c) actual receipt – *discharge/unloading*

C may contractually limit period of responsibility

e.g. to tackle-to-tackle

## AND

C may contract out of responsibility by limiting scope of contract by “express agreement” (Art. 9)

“Express agreement”?

“Due diligence” in selecting other carrier?

## AND

C may contract out of responsibility for certain functions (Art. 11(2))

THEREFORE:

C may only be responsible

- during period as contractually defined
- for parts of transport and
- for some of a carrier's functions

Cargo may need to sue another C (on which terms?)  
or carry responsibility itself

= Particular problems for MT shipper/consignee

# Draft Instrument : Central Liability Provisions

## 1. Obligations of C (and Rights and Exceptions), chapter 4

- Duty to carry and deliver goods in accordance with DI and contract (10)
- Duty of care similar to HVR, *during period of responsibility* (11.1) (cf. 7)  
No reference to proper “*delivery*”

BUT

Carrier may contract out of certain functions “by agreement” (11.2)

- Exercise of due diligence in making vessel seaworthy (Art. 13), [*continuing* obligation]

similar to HVR (III.1) but

no reversed burden of proof regarding due diligence  
(cf. IV.1 HVR)

AND C may

- [Exercise broad rights to *sacrifice* goods (13.2)]
- Dispose of or refuse to load *potentially* dangerous or illegal goods irrespective of knowledge/consent of C  
(cf. IV.6 HVR) (12 Variant A)

“*notwithstanding*” duty of care and seaworthiness obligation

## 2. Basis of Liability and Exceptions (Presumptions)

Different variants now under discussion

Common factor:

- list of exceptions/presumptions similar to HVR but with some new events and without nautical fault defense

Central differences

- burden of proof : who needs to prove C complied with seaworthiness obligation?

*What is so important about burden of proof?*

## Original draft of DI:

- General rule: C presumed to be at fault, but
- If C proves loss due to one of the listed events, C presumed not liable, *notwithstanding* general rule
- If unseaworthiness contributory cause: S needs to prove unseaworthiness, causality and fault of C

Compare HVR and HbgR

*What happens if there are multiple causes for a loss?*

*e.g. perils of the sea and unseaworthiness*

If Cargo has proved combination of causes and fault of C

Alt. 1: C liable unless C proves extent to which "event" responsible for loss

Alt. 2: C liable 50% (subject to limitation) except if cargo also proves extent to which C's breach responsible

*i.e. in the absence of evidence, C liable 50%*

# Variants under discussion: Summary

Variants A, B, C plus further redrafts. Common feature:

- C needs to prove compliance with seaworthiness obligation, including absence of fault

But note: US Proposal

- No general rule, list of exceptions (HVR r. IV (c)-(p)), no adjustment of burden of proof
- Allocation of losses due to multiple causes: 50% rule.

Revised draft to reflect different views

### 3. Compensation (loss/damage/delay)

- Limits of liability likely to be at HVR levels
- Monetary limits for delay likely to be tied to freight
- Breaking the limits is more difficult than under HVR

## Other relevant issues: Time for suit

Art. 66: [one] year time bar

- time runs from “delivery” (as contractually defined)
- If cargo fails to accept delivery (45), time may still run

BUT

- C not subject to duty of reasonable care for goods
- C has wide-ranging rights regarding goods  
e.g. sale and right to deduct any costs / claims (46.3)

# Shipper's (Cargo's) liability exposure

N.B Shipper may be responsible for carrier's functions(11(2))

Detailed provisions on liability of Shipper (ch.7)

- Delivery of goods to C “*in accordance with contract*” and in such condition “*that they will not cause injury or damage*”
- Duty of S to provide accurate and *timely* information (handling & precautions, documentation, description of goods)
- Person "identified as shipper“ responsible *in addition to S*

# To which extent is the regime mandatory?

Art. 84: contractual clause "null and void" if it

- excludes
- limits
- [increases] liability of

C, Performing Party, S, controlling party, consignee

*Two-sided mandatory*

Are there any good arguments for this?

Big shippers and "Service contracts"

Art.85: C and Performing Party may exclude or limit liability for

- live animals
- special cargo

BUT: time bar and other provisions of DI apply

# Useful documents

**UNCITRAL working documents (including text of DI):**

**<http://www.uncitral.org>, WG Transport Law**

**UNCTAD Commentary on Draft Instrument on Transport Law (UNCTAD/SDTE/TLB/4):**

**<http://www.unctad.org/en/docs//posdtetlbd4.en.pdf>**