

Mamadi TOURE
ID: UD86882MA96103

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INTRODUCTION

Since ancient times, the desire of men to exchange has been the basis of the evolution of our modern civilization. The exchange of goods has been and still is the main transmission belt of this global evolution from generation to generation. Thus, from the great trade routes such as the Silk Roads that connected the world between Asia, Europe and Asia before our era, through the domination of the mercantile doctrine from the 16th century to the end of the 18th century as well as the waves of imperialist and colonial expansion, the sea represents an important resource for transporting goods from distant lands to their destination. The Industrial Revolution of the 19th century with the invention of the steam engine profoundly transformed the commercial and industrial practices then in force. While production increased, the need for raw materials also increased as well as the need to transport said raw materials. The post-war economic boom, and in particular the period known as the "Thirty Glorious Years", was characterized by an intensification of global trade in goods and therefore of freight transport services.

Maritime transport has enabled the movement of goods and people across the globe. Indeed, thanks to merchant ships, international trade has experienced considerable progress that has led to the triumph of economic liberalism. The "maritimization of the world is both the cause and consequence of globalization. In a similar way to space with its satellite networks, the globalized ocean impacts upstream and downstream the economic and strategic globalization of the planet. From this marriage 'of the sea and the sky' another stage of human history opens", as François Thual, Professor at the *Ecole de guerre de Paris*, pointed out in the preface to Cyrille P. Coutansais' book, "Géopolitique des Océans. L'Eldorado maritime" which means "Geopolitics of Oceans, the Maritime Eldorado", published by *Éditions Ellipses*.¹ With about 70% of the globe surface covered by oceans, the sea remains one of the main resources which enables vessels to sail from remote areas to load or deliver cargoes. Due to their sizes, vessels engaged in the international carriage of goods can carry several hundred thousands of cargoes on board. No any other means of transportation exists which can move such quantities of cargoes. With the evolution of vessel, various kinds of special purpose vessels have been conceived and built. In our days, there are

¹ Cyrille P. Coutansais, "Géopolitique des Océans. L'Eldorado maritime", *ellipses editions*, 2012

various types of vessels such as bulk carriers, oil and chemical tankers, gas carriers, car carriers, reefer vessels, container vessels etc. With the container revolution in the carriage of goods by sea, numerous benefits and some challenges have been brought in the shipping industry in addition to the existing ones.

The development of the carriage of goods by sea is connected with the changes of our consumption habits and certain economic trends. Indeed, with globalization, most products produced in remote areas are highly demanded in the furthest areas from their production sites. Moreover, the outsourcing of production of industrial products and products of mass consumption in countries with cheaper labor (mainly in China and Asia in general) for export in developed countries in Europe and North America has been a development strategy for various companies. For instance, places such as China and Bangladesh have become the major textile and clothing production places for export in Western Europe and North America. This phenomenon is deeply analyzed by the French Senate in an information report on companies' relocation from the main industrial countries (Japan, Western Europe and the United States) to South-East Asia which started in 1965. This company strategy of relocation is not without consequences on the exchanges of goods from a country to another. Indeed, whereas the first wave of companies' relocation (1965 – 1980s) was motivated by the reduction of production costs and work market flexibility in less developed countries, the second wave was however based on the seeking of both “workshops” with low labor costs and new opportunities in neighboring countries: in Mexico for US companies, Morocco for France for instance. The last wave consisted for these companies in relocating or repatriating the manufacture of upmarket products and seeking opportunities in emerging markets.² These are among other facts which enhance the need of services for international carriage of goods by sea. This phenomenon comes after the establishment of the General Agreement on Trade and Tariffs of 1947, which laid the foundations for the transition from a protectionist economy to trade liberalization. Thus, in the period from 1950 to 2022, the WTO, successor to the GATT, notes a clear increase in world trade, with an increase in volumes of 4500%³.

² “Rapport d’information N°374” dated 23rd June 2004, by Francis GRIGON, French Senator, published on the website of the French Senate, <https://www.senat.fr/rap/r03-374/r03-3741.pdf>

³ “Evolution of trade under the WTO: handy statistics”, by the WTO, date unknown, https://www.wto.org/english/res_e/statis_e/trade_evolution_e/evolution_trade_wto_e.htm#nt-1



Figure 1: evolution of word trade volumes from 1950 - 2022

The resources available for carrying goods from place to place are essential to reach the above evolution.

With exchange of goods at an international level comes the meeting of different cultures, different approaches and different legislations. The carriage of goods by sea involves, by its nature, ports usually located in two or several countries. Unless appropriate and consensual measures are taken at the international level to lay the foundations for the sharing of common values, many difficulties may prove to be obstacles to the fluidity of maritime transport operations. These difficulties may arise at the commercial, security, environmental and even social levels. Thus, well before the advent of the creation of the UN specialized agency for navigation matter, the International Maritime Organization (IMO) in 1948, then name Inter-Governmental Maritime Consultative Organization (IMCO) or the rather recent Convention on the Law of the Sea of 1982, foundations were laid to achieve the ideal of uniformity of legislation in the field of shipping.

As far the carriage of goods by sea is concerned, since 1924, the first international convention aiming at unifying certain rules related to the carriage of goods by sea was enacted. At that period, where the number of countries in the world (before the waves of independence in Africa and Asia) was far less than in our days, the need to unify the rules governing the carriage of goods by sea was already expressed. In our days, new forms of challenges are faced by vessels and stakeholders in the international carriage of goods by sea including geopolitical challenges with various tensions, transnational

organized crime and terrorism, piracy and the impact of technological and electronic developments brought by the new technologies of information and communication. These new challenges further make it necessary to ensure a uniform approach to the international regulation of the shipping industry by the adoption of adapted international convention, the standardization and simplification of contracts and to understand how local courts can concur in implementing the international efforts for ensuring uniformity in the international carriage of goods by sea.

In this essay, the focus will be on the new challenges face by actors involved in shipping activities, the need of uniformity notably by the adoption of relevant conventions, standardization, the difference in interpretation of the convention by local courts, the review of the non-exhaustive claims which may be encountered with the carriage of goods by sea and the management of the said claims.

CHAPTER I – CHALLENGES ENCOUNTERED IN THE INTERNATIONAL CARRIAGE OF GOODS BY SEA

The international shipping evolves in a dynamic context which is subject to the various changes in the economic, political, environmental and social context. Any change in these situations is likely to affect the smooth and efficient operations of vessels and shippers and all parties involved in the process of transporting goods. The challenges so created are likely to find their origin in both loading and discharging ports but also in the routes vessels use to for their operations.

With the surge of various conflicts globally, the continuity and safety of carriage of goods by sea remain among the major concerns of the sector, whether vessels are transiting through the Red Sea or the Russia/Ukraine war zone. Changing times and practices induces by the digitalization and the related cyber risks are additional risks. Whereas the environmental risks brought by the changing climate expose vessels and the shipping sector in general to the effects of adverse and severe natural disasters, the pressure on ship owners for a transitional mutation towards greener impacts is one of the major challenges for the reduction of greenhouse gases and safer environment. These risks and challenges will be detailed in the next sections

SECTION I – GEOPOLITICAL CONTEXT

Geopolitics is defined by Britannica Encyclopedia as “the study of the geographic influences on power relationships in international relations”; the study of the geopolitics contexts aims at analyzing and understanding “. ⁴ Originally, in the period of 1918-1939, the aim of geopolitics study was described as follows:

Geopoliticians sought to understand how the new industrial capabilities of transportation, communication, and destruction—most notably railroads, steamships, airplanes, telegraphy, and explosives—interacting with the largest-scale geographic features of the Earth would shape the character, number, and location of viable security units in the emerging global international system. Most believed that the new era of world politics would be characterized by the closure of the frontier, territorial units of increased size, and intense interstate competition; most also thought that a great upheaval was imminent, that the balance-of-power system that helped to maintain order in Europe during most of the 19th

⁴ “Geopolitics” by Daniel H. Deudney, date unknown published on *Britannica* website, <https://www.britannica.com/topic/geopolitics>

century was obsolete, that the British Empire (the superpower of the 19th century) was ill-suited to the new material environment and would probably be dismembered, and that the United States and Russia were the two states best situated in size and location to survive in the new era. Geopoliticians vigorously disagreed, however, about the character, number, and location of the entities that would prove most viable.⁵

The issues of control of capabilities of transportation, power and interstate competition have been and remain the main areas of study for geopoliticians. The modern definition of State entities defines them as stable legal organizations of a territorial political community in a form which enables it, along with other similarly organised communities, to form part of the international community of States” and they “are the basic, primary components of the international community.”⁶ The nuclear dissuasion and the creation of international organizations are considered by specialists of international relations as instruments which enable to bring peace between States, reduce the re-surge of conflicts and create an opportunity of human community. However, conflicts, whether they are local, regional or they are latent or active conflicts, the tensions generated by actual or threatening peace disruption situations are extremely noxious for international carriage of goods by sea.

October 7, 2023 marked the reactivation of the latent war between Israel and Hamas in what is considered as its most violent sequence since decades. With the military activities in progress for nearly a year without any clear perspective on the end of the conflict, the tension got regionalized or even impacted the whole globe. With the Houthi movements and Hezbollah already active in this area, the passage of vessels and cargo through the Red Sea has become more and more unsafe for both the properties and humans i.e. the crews on board. This has several consequences in terms of route planning and thus deviation through the Cape of Good Hope; it implies elongated transit time and the resulting increased fuel consumption and gas emissions; other additional costs such as special insurance are made necessary and thus cost of insurance will also increase. By suddenly changing the normal course of operations, this situation created disruptions in some logistics chains. For instance, it notably negatively impacted the Asia-Europe supply chain synchronism.⁷ The below image

⁵ Op-cit

⁶ “State/Nation-State” by sir Arthur Wats, date unknown in Encyclopaedia Princetoniensis, <https://pesd.princeton.edu/node/676#:~:text=In%20modern%20international%20law%20the,components%20of%20the%20international%20community.>

⁷ “Routing Options between Shanghai, Rotterdam and New York”, author unknown, date unknown, published on the web site of *Port Economics, Management and Policy (PEMP)*, <https://porteconomicmanagement.org/pemp/contents/part1/interoceanic-passages/routing-options-shanghai-rotterdam/>

illustrates the routing options between Shanghai (the world largest container port), Rotterdam (the European largest container port) and New York put online by Port Economics, Management and Policy on their website.

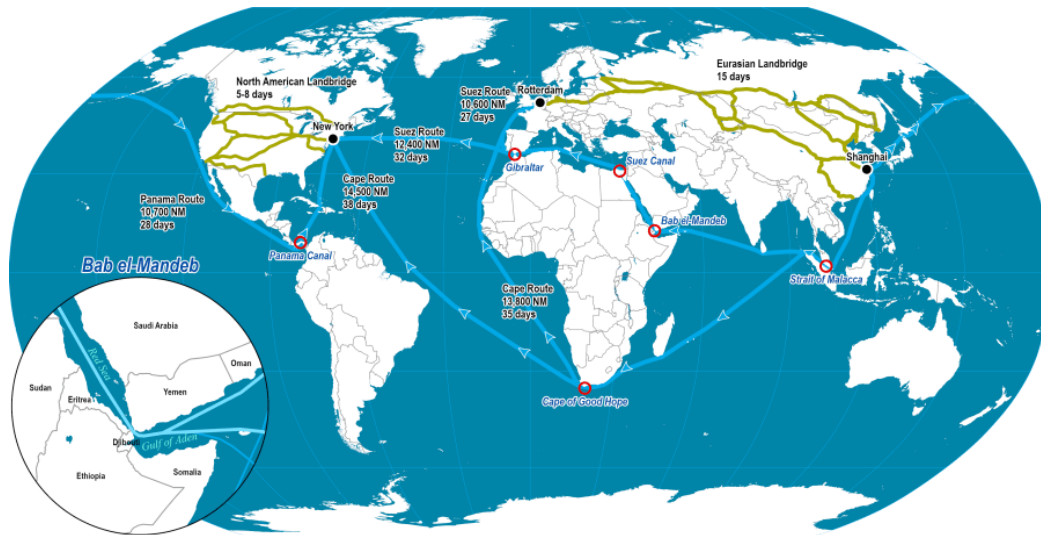


Figure 2 : Routing Options between Shanghai Rotterdam and New York

The above comments are confirmed by some masters I meet in my daily operations as P&I correspondents. In mid-September 2024, I discussed with a master of a RoRo vessel (cars carrier) operating between America, Europe and Africa, he reported that during one of his voyages, the Owners/operators of the vessel's decided to deviate the vessel from this route passing through the Red Sea because of security concerns. The following announcement of Wallenius Wilhelmsen, one of the leading world car carriage and logistics providers is an additional element showing how the tensions in sea routes affect the carriage of goods by sea:

In the coming months, service demand is unlikely to follow normal patterns and we will adjust trade routes, schedules and capacity accordingly, sometimes on short notice. These changes may impact cargo in transit, cargo booked and all other elements of our services to you, and the company must reserve its right under the terms of its bill of lading, tariffs, applicable contracts and/or at law.

The elongated transit times incurred as a result of deviation has also an impact on the integrity of certain types of cargoes such as fruits and vegetables. Indeed, even in the optimal conditions of carriage, some fruits and vegetables have very short shelf life limits and may deteriorate during carriage. The Russia/Ukraine War broke out shortly after the shipping has resisted the international Covid 19 unprecedented crisis.

It caused various logistics and cargo disruptions affecting various commodities such as the world supply of wheat from Ukraine and Russia. Also many operators involved in steel cargo operations from Odessa, Ukraine, have had no option to operate from that port.

In recent years, the policy of sanctions has been used among various international instruments to constrain non-compliant States to observe international law. The regime of sanctions is also used as an instrument against money laundering and for the promotion of transparency and business integrity. However, the application of the said sanctions may be source of tension affecting cargo transit from a country to another. For an instance, in July 2023, further to coup in Niger, the ECOWAS, the regional organization of West African countries, adopted severe sanctions on the country extending to the ban of any exchange with this landlocked country. The consequences affected not only the target of the sanctions but also the logistics operations in the port of Cotonou, one of the main passage of goods destined to Niger before the crisis. Landlocked States, also referred to as States with no sea-cost in accordance with the definition given by the United Nations Convention on the Transit and Trade of Land-Locked States, form about one fifth of the nations of the world; the principle of the recognition of the right of each land-locked State of free access to sea is considered by the United Nations Conference on Trade and Development (UNCTAD) as “an essential principle for the expansion of international trade and economic development”.⁸

Prior the adoption of the above mentioned convention on transit and trade with landlocked States, the United Nations Convention on High Seas on April 29, 1958, already set the principle of the “Freedom of the high seas” in its Article 2 in terms of freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines and freedom to fly over the high seas “with reasonable regard to the interests of other States in their exercise of the freedom of the high seas”.⁹ The same principle is reiterated in the United Nations Convention on the Law of the Sea of 1982 in its article 87. The freedom of navigation granted by these conventions are essential to the development of international carriage of goods by sea.

⁸ “Convention on Transit and Trade of Land-Locked States, adopted by the *United Nations Conference on Transit Trade of Land-Locked States* at New York, July 8, 1965, entered in force on June 9, 1967, https://treaties.un.org/doc/Treaties/1967/06/19670609%2002-19%20AM/Ch_X_03p.pdf

⁹ “United Nations Convention on the High Seas”, done at Geneva, Switzerland, on April 29, 1958

However, it is worth reminding that the theory of international relationships is based on some core principles among which the abstention of violence or the threat of violence, the respect of each State's independence and sovereignty and the non-interference of the States' internal affairs. The enforcement of international convention is frequently confronted with this reality. For the instance, the United Nations Convention on the Transit and Trade of Land-Locked States provides the freedom of transit and access to sea to States with no-sea coast and also reminded the principles adopted by the UNCTAD out of which the principle of "free and unrestricted transit" which the States with no-sea coast should be afforded subject to "reciprocity". However, it also reminded the coastal or "transit State" right to maintain "full sovereignty over its territory" and the right granted to them "to take all indispensable measures to ensure that the exercise of the right of free and unrestricted transit shall in no way infringe its legitimate interests of any kind." The definition of "legitimate interests" by each State may be enforced on subjective considerations which are likely to cause disruption of carriage of goods by sea. Indeed, it may reduce traffic in ports located in coastal States but also be an obstacle to efficient port management in terms of fluidity of traffic.

The land-lock transit or the so-called "hinterland service" is essential for the traffic in some ports. During the economic sanctions imposed to Mali by ECOWAS in 2022, the port of Dakar in Senegal, a bordering country with Mali, both ECOWAS members, have suffered a lot the consequences of these sanctions. Indeed, according to the Senegalese Council of Employers in an interview given to Jeune Afrique newspaper and published in the said weekly newspaper on July 11, 2022 after the lifting of the sanctions, deplored that "cargoes were blocked at the port of Dakar during several months leading to exorbitant costs of storage from ship owners. The traffic and transport of conventional and container products was reduced by 70% (translation from French to English is my translation)".¹⁰ Other forms of specific geopolitical context affect the international trade and thus the connected carriage of goods by sea.

SECTION II - TERRORISM, PIRACY AND ILLEGAL ACTIVITIES

¹⁰ "Sanctions économiques contre le Mali : 'L'embargo a grevé la trésorerie des entreprises sénégalaises' »

Vessels, cargoes and crews on board are subject of various types of risks related to international and transnational criminality. One of these risks is terrorism and transnational criminality. On September 9, 2001, terrorism presented itself to the world in its most inhuman form with the attacks on the World Trade Center. This opened years of high tensions on an international scale. It was also an opportunity to draw the attention of the global collective conscience to the threats posed by this scourge. Indeed, following the events of September 11, 2001, under pressure from the United States in particular, the Diplomatic Conference on Maritime Security adopted new measures to amend the SOLAS Convention (Security of Life at Sea) of 1974 and a code to enhance maritime security, particularly with regard to the security of ships and port facilities. The ISPS Code (International Code for the Security of Ships and Port Facilities) was adopted in December 2002 and entered into force on July 1, 2004. The ISPS Code applies to both passenger ships and cargo ships over 500 tons, mobile drilling units and port facilities. Among other obligations incumbent on port authorities, under the ISPS Code, port authorities must ensure the application of all security obligations of all port facilities, control access to port facilities, supervise port facilities including anchorages and berthing areas, control restricted areas to ensure that only authorized persons have access, supervise the handling of goods and provisions of ships and ensure that security communication is immediately available.¹¹ In consideration of the above and given the role and responsibility of ports, particularly in controlling access to port facilities, it appears that a rigorous implementation of security measures would otherwise make it possible to resolve or limit the problem of unauthorized access to sensitive facilities in ports, terminals and board merchant ships. These measures affect the whole cargo and vessel operations.

Another significant risk is piracy which is as old as the shipping industry itself. Indeed, the origins of piracy go back as far as Ancient Greece. Since ancient times, pirates have been a threat on maritime trade routes in search of treasures such as grain and olive oil that they seized from Roman ships. Piracy would experience its Golden Age with the great conquests of the 16th century brought by European explorers in search of new lands. At that time, attacks were particularly aimed at Spanish ships coming from the newly discovered Americas. With the Corsairs and buccaneers, a new form of piracy appeared with the kidnapping of crews who were

¹¹ "SOLAS/CONF.5/34 », by *International Maritime Organization*, December 17, 2002

either freed for ransom or reduced to slavery.¹² Piracy is defined by the United Nations as follows:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).¹³

Given the resurgence of piracy and armed robbery, the issue has become a matter of concern for the International Maritime Organization. UNCLOS definition of piracy is limited to acts committed on the high seas or on board ships beyond the jurisdiction of any State. However, IMO Resolution No. A 26/Res.1025 broadens this definition to include acts of armed robbery, which are increasingly common. According to the resolution, these include “any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State’s internal waters, archipelagic waters and territorial sea” and “any act of inciting or of intentionally facilitating” to commit such acts.¹⁴ This definition fits the modern form of piracy related acts which vessels, crews and cargo are subject to.

In the 1990s, the risk of piracy became one of the major preoccupation for international carriage of goods by sea. Piracy is nowadays encountered close to straits and strategic maritime routes such as the Gulf of Aden, the Gulf of Guinea from the coasts of Ghana to Gabon, from the coasts of Bissau Guinea to Angola, in the Indian Ocean, in South-East Asia and in Latin America. Piracy and armed robbery against vessels in these areas is analyzed as the consequence of weakness of public authorities in coastal states or the consequences of conflicts in the said areas. The

¹² “The Golden Age of Piracy”, date unknown, author unknown, published on the website of the Royal Museums Greenwich, <https://www.rmg.co.uk/stories/topics/golden-age-piracy>

¹³ Article 101 of the United Nations Convention on the Law of the Sea

¹⁴ “Piracy and armed robbery against ships”, published on the IMO website, <https://www.imo.org/en/OurWork/Security/Pages/PiracyArmedRobberydefault.aspx#:~:text=IMO%20Piracy%20reports,reports%20being%20published%20in%201982.>

lack of efficient control of a State of its territorial waters favors the proliferation of criminal activities including piracy and armed robbery. In areas where conflicts exist, various armed groups may form with limited or no control from the authorities. The Gulf of Aden has been one of the main hot spot of piracy and armed robbery from 2008 to 2012 making the zone highly risky for vessels and their crews, and thus to the normal transit for the carriage of goods by sea. Since 2012, the Gulf of Guinea has also experienced violent piracy attacks and has become on the riskiest piracy zone.

Whereas Nigerian had for a long time been among the nations of high piracy risk and robbery in international waters, other places in West Africa, in the Gulf of Guinea experienced various piracy attacked such as the Greek tanker ORFEAS in 2012, the Luxemburg flag tanker GASCOGNE (both of Abidjan during STS operations). These two vessels were directed to Nigeria where part of their cargo was pumped out and vessels' equipment robbed before they were released. At this period, where the risk was dawning, the coastal State involved were did not admit the existence of such risk in their waters. However, as the risk increased, several regional initiatives were taken notably during the Yaoundé Summit in Cameroon which have birth to the Yaoundé Code of Conduct.

The struggle against these risks requires a strong cooperation between coastal States confronted with the issue and the assistance from any other State with expertise and equipment which can concur to the resolution of the problem. In this respect, the EU action in the Gulf of Aden with "Operation Atalanta" has reduced the risk of piracy attacks in this area. Smartly, the Center of Interregional Coordination was set up in the framework of the Yaoundé Code of Conduct related to the prevention and the sanction of piracy and armed robbery acts and illegal activities in Central and West Africa.

As P&I correspondents in the Gulf of Guinea zone, we are more and more involved in matters related to kidnapping of crewmembers in the roads of Douala port's roads close to the river entrance of the port of Douala despite regular patrols of Cameroon's Rapid Intervention Battalion, a specialized battalion of Cameroon's Army from the entry of the channel of access to the port. Vessel trading in this zone usually require services of armed escorts. Other cases of vessel's hijacking were reported in Gabon. These are examples of illegal activities which have serious impacts on the safe conduct of vessels, their crew and the cargoes on board to the intended destinations. In order to control and monitor the risk of piracy and its impacts on the carriage of

goods by sea, international and regional cooperation is put in contribution as well as the implementation of updated national laws (case of Cameroon with a recent anti-piracy act). Technology is also used to assist masters, shipowners and all person involved in the industry (live maps, piracy incidents reporting but in place for instance by the International Maritime Bureau etc.).

There is another form of illegal activity which vessels are confronted with many vessels trading in West Africa which concerns the presence of stowaways on board. The FAL – Convention (Convention on Facilitation of Maritime Traffic) defines a “stowaway” as “a person who is secreted on a ship, or in cargo which is subsequently loaded on the ship, without the consent of the ship owner or the Master or any other responsible person and who is detected on board the ship after it has departed from a port, or in the cargo while unloading it in the port of arrival, and is reported as a stowaway by the Master to the appropriate authorities”¹⁵ The consequences of the presence of stowaways are very heavy with respect to humanitarian issues but also with respect to the costs and repercussions it implies for ship owners and charterers and their insurers, the P&I Clubs. There are no reliable statistics on stowaways in general, since many masters of ships and port authorities, in spite of IMO recommendation, are reluctant to report incidents involving stowaways because they are “fearful of being accused of ‘security breaches’”.¹⁶ Nevertheless, as per the IG P&I Club summary Data on stowaways from 2007 to 2017, the number of stowaway incidents goes down from nearly 800 hundred incidents involving about 2,000 stowaways in 2007 to about 450 incidents involving around 1,400 stowaways in 2017 for a total yearly cost going down from 14.3 million US Dollars to 9.5 million US Dollars.¹⁷

¹⁵ INFORMATION RESOURCES ON STOWAWAYS / ILLEGAL MIGRANTS / TREATMENT OF PERSONS RESCUED AT SEA,” March 20, 2009, published on the *IMO* website

¹⁶ “Deserters, stowaways and immigrants – agents beware,” by Roger Lewis, published in October 2004 in *Maritime Risk International*

¹⁷ “Stowaways and Refugees” by Capt. Simon Rapley, Michael Robertson and Ilka Beck published on *Britannia P&I Club* website, <https://britanniapandi.com/wp-content/uploads/2023/03/Britannia-Loss-Prevention-Webinar-Stowaways-and-Refugees-02-2023.pdf>

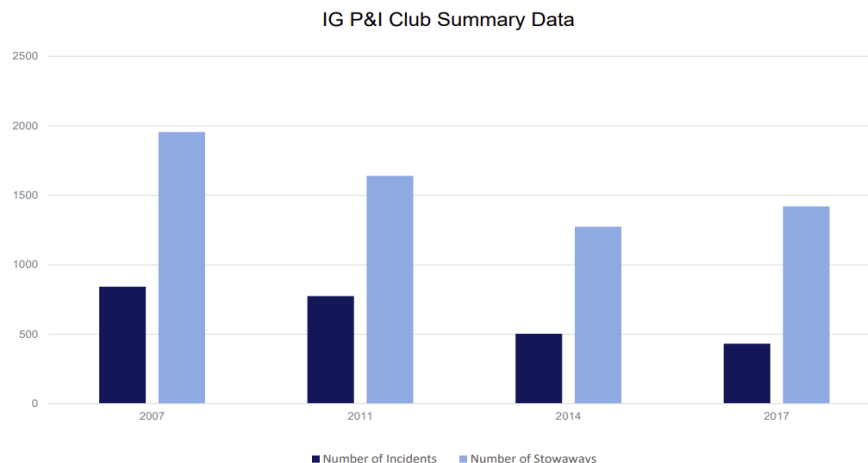


Figure 3: IG P&I Club Summary Data, presented by Britannia

The stowaways' presence on board a vessel may have various impacts on the transport of goods by sea. First of all, in the standard procedure, vessels calling in stowaway-sensitive ports are required to make a thorough search prior the sailing of the vessel. This require much loss of time and costs. Some companies require the use of search dogs to ensure that the search is efficient. In case of the presence of a stowaway despite the search, the consequences are multiple:

Indeed, further time is required for the stowaway's disembarkation procedure. The vessel may be delayed by Port State Control inspectors for possible breach of security measures. In case the intended place authorities of disembarkation does not accept the stowaway's disembarkation in their jurisdiction, the vessel may incur further delays; it even happens that vessels took decision to sail back to the port where the stowaway boarded for disembarkation purpose. In other cases, some ports may require the vessel to be in quarantine pending inspection. In certain circumstances, presence of stowaways on board completely disorganize the vessel's schedule with all consequences in terms of delay, costs and re-organization at the ports where the vessel was expected to load or discharge cargo.

From the above, it can be noted that terrorism, piracy and armed robbery and other related illegal activities are various phenomenon which represent an accrued risk and obstacles to the safe and normal transit of goods notably by sea. Whereas the presence of stowaways is covered by ship owners' P&I Clubs, piracy risks are not covered by standard insurance contracts but are covered by special insurance policies

with relatively high premiums (Hull War and P&I War risks, Kidnap & Ransom – K&R). The existence of these risks represents a non-negligible threat for vessels, their crew and the parties interested in the cargoes on board the said vessels.

SECTION III – TECHNOLOGICAL AND ELECTRONIC DEVELOPMENT – MARITIME DIGITALIZATION

Over the last two decades, the evolution of technology and digitalization have strongly transformed our daily lives notably in terms of communication, process management, automation among others. These changes also affect the logistics chains and international carriage of goods by sea. Whereas these developments have brought deep changes and improvement in the shipping industry, the risks it also creates are also among the major concerns of stakeholders.

In an interesting article published by the Lloyd's List Intelligence on how shipping has changed after 25 years of digitalization, the author Richard Clayton explains when digitalization started in the maritime industry in the 1990s and early 2000s as far as vessels and navigation are concerned. It started with the advent of Global Maritime Distress and Safety System (GMDSS), Immarsat C, Automatic Identification System (AIS) and (Electronic Chart and Display Information System (ECDIS). GMDSS was developed by the IMA and enables emergency signal communications for vessels at sea as part of the SOLAS Convention.¹⁸ Then with the advent of electronic engines and sensor technology, digitalization became more and more important as it enables to predict problems and anticipate maintenance. These technologies enabled to better monitor fuel consumption with efficient calculation of the effects of navigational conditions on fuel consumption. Thanks to ECDIS which most ocean going vessels are equipped marks the beginning of e-Navigation with precise prediction of arrival times and control of ship's speeds and operation.¹⁹ Richard Clayton's analysis is confirmed by Jan van Tiggelen, an expert at DNV in a video interview in which he situated the beginning of digitalization at the same period as the shift from analog system to digital system. Currently, with the digital acceleration and more and more requirement to reduce carbon emissions, it is more about digital transformation in the maritime

¹⁸ "How has shipping changed after 25 years of digitalisation?" by Richard Clayton, October 19, 2021, published on the *Lloyd's Intelligence List* website, <https://www.lloydslist.com/LL1138544/How-has-shipping-changed-after-25-years-of-digitalisation>

¹⁹ Op-cit.

industry. This transformation enables to centralize information available on administration, navigation and DP (designated person) networks, to connect vessels to shore and see what is happening on board. It also enables to spare time in time consuming reporting required in terms of emissions and to handle such reporting. With automation, the maritime digitalization enters a new phase of development.

In terms of booking and cargo management, modern logistic platforms and shipping lines make indispensable use of digitalization. The shift from traditional paper bills of lading to electronic bills of lading is more and more visible in the maritime industry notably in the containers liners thanks to digitalization. This not only simplifies the documentation process but also reduces the risk of loss, fraud or late arrival of documents to the consignees. Another transformation induced in the carriage of goods by sea is the cargo tracking and monitoring system. For instance, for cargoes carried under controlled temperature, there are usually disputes between carriers and shippers with respect to the maintenance of cargo temperature during transit. Reefer containers are equipped with data loggers which record the evolution of temperatures in a certain period; the data are downloadable by the shipping company or their authorized persons but sometimes access of shippers/consignees to these data is refused. Nowadays, with digitalization, most shipping companies like MAERSK or HAPAG LLOYD offer added services of remote access to temperature monitoring. It is undisputable that digitalization has brought efficiency, simplification and transparency in the maritime industry.

However, these positive aspects exist in parallel with risks to be controlled and monitored on top of which, cybersecurity issues. In 2017, the world leading container liner MAERSK incurred a cyber-attack by ransomware which affected the group from their office at Odessa reportedly. The attack affected Maersk's division of APM TERMINALS (container terminal management). The consequences of the attack spread to 17 port terminals in the world including major container ports like Rotterdam, Nhava Sheva and imposing shutdowns. The estimated pecuniary loss from this attack is estimated in the region of 10 billion US Dollars.²⁰ Seven years later, in January 2023, another ransomware attack against a major software supplier of ships was reported to have affected about 1,000 vessels. Similar attacks affected classification societies (DNV), oil companies, ports and different key players in the maritime industry. For its

²⁰ "Petya Ransomware Cyber-Attack on Maersk", published on *Port Economics, Management and Policy* website

consequences are exorbitantly costly and that it can cause most delicate disruptions, the cyber-criminality is the main concern for the maritime industry connected with the digitalization.

SECTION IV – ENVIRONMENTAL PROTECTION

Face with obvious changes in the environment, the world has gained awareness on the challenges set by this protection of the environment including from the some most severe climate-sceptic supporters. In order to promote an environment friendly policy, various measures had been taken at international level to protect the oceans from pollution from vessels. The main regulatory instrument against pollution from vessels is the International Convention for the Prevention of Pollution from Ships (MARPOL adopted in 1973 with amendment Protocol of 1978) which obliges vessels take necessary anti-pollution measures such as the use of cleaner fuels, installation of sewage treatment plants or holding tanks for instance. However, in consideration of the deterioration of the environment, other measures are needed to limit the consequences of unsustainable exploitation of the resources and human activities on the on future generations.

According to the Intergovernmental Panel on Climate Change (IPCC), “Continued greenhouse gas emissions will lead to increasing global warming, with the best estimate of reaching 1.5°C in the near term in considered scenarios and modelled pathways. Every increment of global warming will intensify multiple and concurrent hazards (high confidence). Deep, rapid, and sustained reductions in greenhouse gas emissions would lead to a discernible slowdown in global warming within around two decades, and also to discernible changes in atmospheric composition within a few years (high confidence).”²¹ Recently, various climate related occurrences have caused severe issues in the transport of goods through ports and terminals. For instance, in 2019 the Horn of Africa from was affected by intense rainfalls with hit by cyclone causing floods in Mozambique, Uganda, Tanzania. The road infrastructure became impracticable for a long period whereas the container terminal sustained various equipment damage and disruption for weeks. Various cargoes were affected by the

²¹ “CLIMATE CHANGE 2023 – Synthesis Report”, published on *IPCC* website

flooding. The repetition of such incident are likely to cause unpredicted disruption in the flows of cargoes and the resulting consequences on ports, terminal and vessels.

According to Transport & Energy, a European organization who advocates for clean transport and energy, the shipping industry represents 3% of the global emissions of greenhouse gases; its estimate rate could represent 10% at the current growth rate according to this organization.²² Facing the urgency of the situation, further measures have become necessary. Thus, in 2018, the IMO adopted resolution MEPC.304(72) which was designated to pave a “pathway of CO2 emissions reduction consistent with the Paris Agreement temperature goals” with the ambition to “peak and decline” GHG from international shipping consisting in the targeted reduction of carbon intensity of international shipping by at least 40% compared to 2008 level by 2030 and pursuing the efforts towards 70% by 2050 compared to 2008 level.²³ Compliance with the current environment requirement will oblige ship owners to take measures such the use of alternative fuels, power limitation, technical modification of existing vessels, wind assistance. The effect of such measures will impact the international carriage of goods by sea of the future.

CHAPTER II – UNIFORMITY IN THE LEGISLATION APPLICABLE TO CARRIAGE OF GOODS BY SEA

The international carriage of cargo by sea involves various jurisdictions by its nature. Indeed, any vessel is under the control of the country which flag she flies; this vessel is manned by a crew which may consist of various nationalities; her owners may be of different nationalities as her flag State; this vessel, in her regular operations, call at different ports located in various countries where she will be subject to the jurisdiction of the country of the port for instance for the prerogatives of the Port State Control. The cargoes carried on board may interest various shippers and consignees of multiple nationalities. In consideration of the particularity, the uniform application of legislation applicable to vessels and goods carried on board is an ideal to be met. In this respect,

²² “Climate impact of shipping” by *Transport & Energy*, <https://www.transportenvironment.org/topics/ships/climate-impact-shipping>

²³ “Resolution MEPC.304(72) by the *IMO*

the *Comité Maritime International* played a leading role in the efforts of uniformity of international maritime law since the end of the 19th century.

Indeed, in the early 1880s, the Comité Maritime International felt the need to verify the functioning of the laws in the various countries where its twenty-one national maritime law associations operated. After the associations responded to the questionnaires sent to them by the CMI, a conference was held in Lisbon in 1885. The Comité Maritime International was officially created in 1897 and is considered the first international organization to devote itself exclusively to maritime law. " Its origins lie in the efforts of a group led by Belgian commercial and political persons who came together in the early 1880's to discuss and to put before the ILA a proposal to codify the whole body of maritime international law." The partnership between CMI and the Belgian government resulted in a series of "Brussels Diplomatic Conferences" and the adoption of numerous international conventions intended to settle international maritime disputes prior the advent of the IMO, including:

- International Convention for the Unification of Certain Rules of Law with respect to Collision between Vessels, Brussels, 23 September 1910
- International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 25 August 1924
- International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels, 10 April 1926
- International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, Brussels, 10 April 1926
- International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision, Brussels, 10 May 1952
- International Convention for the Unification of Certain Rules Relating to Penal jurisdiction in matters of collision and other incidents of navigation, Brussels, 10 May 1952
- International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, Brussels, 10 May 1952
- International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships, Brussels, 10 October 1957
- International Convention relating to Stowaways, Brussels, 10 October 1957

- International Convention for the Unification of Certain Rules relating to the Carriage of Passengers by Sea, Brussels, 29 April 1961
- International Convention on the Liability of Operators of Nuclear Ships, (Brussels, 25 May 1962
- International Convention for the Unification of Certain Rules relating to Carriage of Passenger Luggage by Sea, Brussels, 27 May 1967
- Convention relating to Registration of Rights in respect of Vessels under Construction, Brussels, 27 May 1967
- International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels, 27 May 1967

One of these convention which will be of interest in this study is the Convention for the Unification of Certain Rules of Law relating to Bills of Lading. The action aimed at implementing the uniformity in the application of law in the sector of international carriage of goods passes through other processes other than international conventions such as the standardization and the use of commonly accepted or recognized standard forms of contracts and practices forces by the uses. Nevertheless, the enforcement of the rule of international law before local jurisdictions may still be different from a jurisdiction to another for their adoption and interpretation can vary by country.

SECTION I – INTERNATIONAL CONVENTIONS

International conventions are adopted with the purpose of setting the rules governing the carriage of goods by sea. The role and responsibilities of each parties are clearly defined as well as the conditions of exercising actions arising from the contract of carriage as well as the limitations of liability and time afforded to each party to claim. At the international level, three main conventions govern the carriage of goods by sea. The third convention, the Rotterdam Rules, has not yet entered in force as the ratification process is in progress.

I.1 - HAGUE RULES, HAGUE-VISBY RULES

The Convention for the Unification of Certain Rules of Law relating to Bills of Lading commonly known as The Hague Rules is the first international convention applicable

to the carriage of goods by sea under bills of lading. The Convention was adopted in 1924 with aim to set minimum standards related to carriers' liability, exceptions of liability and defenses and limitation of liability. Under this Convention, the carrier is under the obligation to exercise due diligence to ensure the vessel's seaworthiness before and at the beginning of the voyage (article 3 of the Convention). Whereas article 3 of the Convention provides that the bill of lading is the *prima facie* evidence of the receipt of the goods, article 4 of the Convention relieves the carrier from any liability unless a notice of loss or damage is given to the carrier or his representative before or at the time of removal of the goods; the period of notice is extended to three days in case the loss or damage is not apparent at the time of removal. Furthermore, any claim against the carrier is time barred one year after the delivery of the goods if no suit is brought against the carrier within this period.

In terms of defenses and limitation of liability, The Hague Rules provide that the carrier's liability is limited to 100 pounds sterling per package or unit. Various cases (17) of exemptions of liability are also provided in article 4 of the Convention such as the destruction or damage to cargo by fire, perils of the sea, Act of God and act of war. In respect to the competence of jurisdiction, The Hague Rules do not contain any specific provision in this respect. The Hague Rules were subject to two successive amendment protocols in 1968 (Brussels Protocol) and 1979 (Visby Protocol) which are known as The Hague-Visby Rules.

The first amendment introduced by the Visby protocol refers to the period of action. Whereas the time of action is still maintained at one year, the protocol offers the parties the possibility of agreeing on time extensions above the one-year period provided under The Hague Rules. However, the main amendment concerns the limit of liability which was amended from 100 pounds sterling per package in The Hague Rules to 666.67 Special Drawing Rights (SDRs) per package or 2 SDRs per unit of gross weight "unless the nature and the value of the cargo have been declared by the shippers before shipment and inserted in the bill of lading". The highest limit is applicable. Despite these amendments to The Hague Rules, the evolution of the world (adopted prior the waves of independence in Africa and Asia), The Hague Rules were judged to be at the advantage of carriers mainly by developing countries.

I.II – HAMBURG RULES

In consideration of the changing transport practices and also the evolution of the equipment involved in the carriage of goods from warehouse to warehouse, some provisions of The Hague Rules were given attention in various aspects. Under the auspices of the UNCTAD, a Working Group on International Shipping Legislation was established to work mainly in the following issues: unit limitation of liability, transshipment, deviation, the period of limitation, definitions under article 1 of The Hague Rules and the elimination of invalid clauses in bills of lading.

It is worth noting that when the Brussels Convention was adopted in 1924, containers were not used for the carriage of goods. Indeed, containers were invented by the Owner of an American trucking company Malcom McLean in 1956 with the purpose of speeding up the process of loading and discharging cargo on piece-by-piece basis. In other words, containers were initially used for road transport whereas currently it is one of the standard equipment used for the carriage of goods by sea on board giant containers vessel which can carry up to 26,000 TEU (Twenty-foot equivalent units). Thus, whether a container was considered as a package or a unit was subject of debate. This issue was raised in the report of the UNCTAD Working Group on Shipping Legislation in these terms:

The report also discussed problems presented in containerized transport under the "package or unit" standard. The basic question was whether the container constituted a single package or unit regardless of the number of items inside, or whether each item of cargo inside the container constituted a package or unit (*id.*, para. 18). Attention was drawn to the provision of article 2 (c) of the Brussels Protocol which states:

"(c) 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 this paragraph as far as these packages or units are concerned; except as aforesaid such article of transport shall be considered the package or unit."²⁴

The advent of the Hamburg Rules took into account both legal and economic and shipping trade aspects and aimed at removing certain ambiguities and uncertainties which exist in The Hague Rules. The United Convention on the Carriage of Goods by

²⁴ "Yearbook of the United Nations Commission on International Trade Law, 1975, Volume VI", published on <https://documents.un.org/doc/undoc/gen/n17/603/58/pdf/n1760358.pdf>

Sea ("Hamburg Rules") were adopted in Hamburg on March 31, 1978. They apply to carriage of goods by sea between two contacting States as provided under the scope in article 2 of the Convention. Certain changes in the Hamburg Rules in comparison with The Hague Rules in terms of carrier's responsibility include the fact that Hamburg Rules apply to carriage whether a bill of lading is issued or not as long as the carriage is within the scope provided at article 2 of the Convention. Most importantly, the period of coverage is extended in the Hamburg Rules. Whereas The Hague Rules apply from "tackle to tackle", the period of Coverage under the Hamburg Rules is extended from "the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge" according to Article 4 -1 of the Convention. Another inovaton in the Hamburg Rules in comparison with The Hague Rules concerns the scope of carrier's liability which includes delay of the goods. The list of liability exemption which carrier benefits under the regime of The Hague Rules is not provided under the Hamburg Rules. The carrier's liability is incurred under the Hamburg Rules "unless the carriers oves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences". The exemption of this liability is provided however provided in case of general average or from measure to save life or property at sea. As far limitation of liability is concerned, it is provided that the carriage liability "is limited at 835 SDRs per unit of account of package or other shipping unit or 2.5 SDRs per kilogram of gross weight loss or damage, whichever is the higher." In contrary to The Hague Rules, clarification is given on the definition of package or shipping unit in Article 7-2 of the Convention:

- a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, 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.²⁵

Lastly, another notable change of the Hamburg rules is that it introduces a two-year limitation of actions against the carrier commencing the day on which the carrier has delivered the cargo. The notice of claim for apparent loss or damage is one working

²⁵ United Nations Convention on the Carriage of Goods by Sea ("Hamburg Rules")

day whereas the period is extended to 15 consecutive days for non-apparent loss or damage.

Despite the innovation brought by the Hamburg Rules and its ratification by several countries, an obvious fracture was noted between developing countries and developed countries. The uniformity sought by the adoption of uniform international law applicable to carriage of goods by sea was not met; some countries still apply The Hague Rules, others The Hague Rules with the successive amendment protocols, still other the Hamburg Rules. A new adapted and most consensual convention was then necessary.

I.III – ROTTERDAM RULES

Resolution no. 63/122 adopted by the United Nations' General Assembly during its 67th plenary meeting on December 2008 related to United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea outlines the motivations which supported the necessity of reinventing international conventions on the international carriage of goods which is mainly performed by sea. Indeed, it was established that the existing convention failed to promote the desired uniformity but also failed in taking into account "modern transport practices including containerization, door-to-door transport contracts and the use of electronic transport documents".²⁶ As previously mentioned, containers have gained much greater importance in the carriage of goods by sea. The container use is not limited to speeding up loading and discharging by the use of an aluminum box. Containers have modernized shipping practices with various types of containers depending the nature of the goods: reefer containers, containers fitted with flexitanks for bulk liquids, open top containers, flat-rack containers etc. With the use of container, a very significant part of goods shipped on board vessels are containerized with pre- or post-carriage by road or railways. Goods are packed and conditioned in containers, sealed and approached to the port terminals by road or railway infrastructure. The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea or Rotterdam Rules is designed to meet this new face of the international shipping of goods by sea

²⁶ UN General Assembly Resolution no. 63/122. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, adopted on December 11, 2008.

with the continuous efforts in promoting the progressive harmonization and unification of the law of international trades for all and enhancing the trade and economic development at both domestic and international levels. In a position paper from the International Chamber of Shipping an emphasis was made the necessity of a new adapted convention by the growing efficiency of shipping with faster ships, the use of electronic communications and quicker port calls, the unexpected raise in containerization which enables notably an operator to undertake the entire carriage from shippers' premises to the final place of delivery whereby liability and documentary challenges. The provisions of The Hague, Hague-Visby or Hamburg Rules on "tackle to tackle" or "port to port" basis have become obsolete to regulate these new practices.²⁷

The Rotterdam Rules are adopted in view of taking into consideration the above with international carriage marked by multimodal transport with carrier's liability extended from door to door to fit the multimodal transport systems. The carriers, under the Rotterdam Rules are under the obligation to exercise due diligence to ensure the ship's seaworthiness throughout the voyage. Whereas the previous regimes were rather ambiguous with regards to carriers' liability for loading and discharging, the Rotterdam Rules provides that the carrier is responsible for these operations unless otherwise specified by the contract of carriage or the trade customs. The carrier's duty of care of the cargo shall be exercised including during transshipments during transit. In accordance with the principle of door to door liability, the carrier responsibility is extended to the delivery of the goods at the final place of destination even if the place is located inland. In the Rotterdam Rules, consideration is also given to the period of notification which shall be done at the time delivery of the goods for apparent loss or damage and seven working days for non-apparent loss or damage. This seems a compromise between The Hague regimes and the Hamburg Rules: time of delivery and three days after delivery respectively or non-apparent and apparent loss or damage under The Hague regimes; one working day and 15 days after delivery respectively or non-apparent and apparent loss or damage under the Hamburg Rules. However, the Rotterdam Rules keep the same two-year period from the day the goods are delivered or should have been delivered in terms of time of action against the

²⁷ "THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA (THE "ROTTERDAM RULES") A POSITION PAPER BY THE INTERNATIONAL CHAMBER OF SHIPPING", https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ics_positionpaper.pdf

carrier as provided under the Hamburg Rules against one year under The Hague regimes. Another remarkable change of the Rotterdam Rules concerns an increase in the limit of liability which is 875 SDRs per package or unit, or 3 SDRs per kilogram, whichever is higher.

In terms of modernization, the Rotterdam Rules provide for the recognition of electronic transport documents as having the same legal equivalence as the traditional paper documents. This is one of the key measures which was expected in the industry in consideration of the increasing use of electronic transport documents and the digitalization in the shipping industry.

The Rotterdam Rules have not yet entered in force. According to the Convention, it will enter in force after 20 States have adopted it through binding signature, ratification or accession. After this condition is met, the Convention will enter in force one year later. Article 94 of the Convention provides that it “enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession”.²⁸ Whereas Benin, Cameroon, Congo, Spain and Togo have already ratified/acceded the convention, the 20 States requires is not yet met. However, the rules derived from the Rotterdam Rules are already enacted in the national legislation of the member States of the Economic Community of Central African States by the adoption of a new region Code of Merchant Marine in July 2012. This code which is directly applicable in Cameroon, Congo, Chad, Gabon, Equatorial Guinea and Central African Republic, provides similar provisions as the Rotterdam Rules in its sections related to the carriage of goods.

In addition to international convention, the practices in the international carriage of goods by sea is dominantly marked by the use and customs as well as the applications of standard forms of contracts in view of simplifying the process and procedures.

SECTION II – STANDARD TERMS OF CONTRACTS

²⁸ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

The standard terms of contracts are encountered in various stages in international trade whether it concerns the contract of sale (Incoterms for instance) or the carriage of goods exchanged.

II.1 – INCOTERMS

Incoterms (International commerce terms) are standard terms of contracts of sale published by the International Chamber of Commerce between a buyer and a seller which are widely used in international trade. They have the advantage of clearly defining the allocation of costs, risks and liabilities between the parties to the contract. In the international carriage of goods by sea, the most common Incoterms encountered are FOB (free on board), CIF (cost, freight and insurance), CFR (cost and freight) and FAS (free alongside). The Incoterms clearly define the responsibility of each party in terms of delivering the goods for shipping, the payment of freight and responsibilities in a way that each party is fully aware of their respective obligations. In such, the Incoterms participate in simplifying the international trade contracts while ensuring a common uniform framework. Carriers are not directly concerned by the Incoterms but the Incoterms are important for the carriers because the Incoterms serve as the rules of transaction between carriers' contract partners, the shippers and the consignees. The following image shows a common circuit in a carriage of goods by sea.

International trade transaction

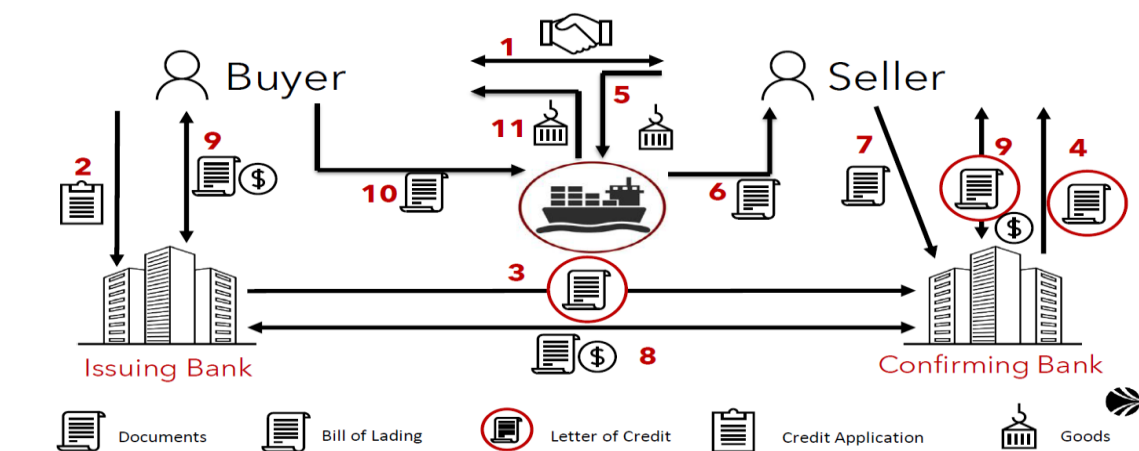


Figure 4: Contract of Sale, contracts of carriage and bills of lading, presentation during North of England Residential Training, June 2022 by Roma Williams, Senior Executive (Claims) at NORTHSTANDARD P&I CLUB

II.II – STANDARD SHIPPING FORMS

Apart from Incoterms, other forms of contracts are commonly encountered in the shipping industry. For instance, the BIMCO (Baltic International Maritime Council) is one of the major non-governmental shipping organization which is greatly involved in the shipping industry with membership covering 62% of the world's tonnage.²⁹ The BIMCO produces various standard form of charter-parties and bills of lading as well as other standard contract clauses.

II.III – APPLICATION OF THE CONVENTION BY LOCAL COURTS

The international shipping legislation is forged by the use and customs with the search of uniformity and harmonization. However, the interpretation and the enforcement of shipping legislation may differ from a jurisdiction to another. This gives rise to conflicts of laws but also conflicts of jurisdictions. The conflict of laws occurs when there exist “worldwide, and within individual countries, [of] different legal traditions, different specific rules of private law, and different systems of private law, all of which are administered by court systems similarly subject to different rules and traditions of procedure”³⁰ Considering the international nature of the carriage of goods by sea, these situations occur frequently. In addition to conflict of laws, conflicts of jurisdictions also occur when different jurisdictions in different countries may be competent for a specific case.

Concretely, most contracts of carriage include clauses providing the application of The Hague – Hague-Visby Rules with reference to an applicable charter-party, which charter-party may be a voyage charter concluded between time charterer and sub charterer. Each of these contract may provide different terms including different jurisdiction clauses. For instance, if the cargo loading under such a BL is carried to Senegal which ratified the Hamburg Rules, the lawful holder of the bill of lading is entitled to claim under the regime of Hamburg Rules according to the laws of Senegal

²⁹ “About us and our members”, <https://www.bimco.org/about-us-and-our-members>

³⁰ “conflict of laws” written by Ulrich M. Drobing, Peter Hay, put on line on the website of *Encyclopædia Britannica*

and Senegalese jurisdictions are be competent. If a claim arises under this bill of lading, it may give rise to the above mentioned conflicts as frequently encountered.

CHAPTER III – CLAIMS AND CLAIMS MANAGEMENT

The imbrication of various applicable jurisdictions and different legislation make the claims management in international shipping of goods more complicated. A knowledge of the typology of claims and the role of key players in this process is necessary in view of taking loss prevention measures or better handling of claims where and when they arise.

SECTION I – LOSS PREVENTION MEASURES

The vessel trade through rough oceans and are confronted with different hazards. These risks expose vessels and cargoes to various types of claims. During the course of a voyage, vessel may encounter situations which may be source of claims such as delay, deviation, voyage interruption or damage to cargo. Sometimes the damage is caused by the nature of the cargo itself known as the inherent vice of cargo. It is therefore important to take loss prevention measures in view of reducing the risks of damage.

Some of these loss prevention measures concern the vessel and her owners. Indeed, prior the voyage, the carrier shall ensure that the vessel has all certification up to date and that regular mandatory or routine maintenance are duly performed. In a context of tense geopolitical situation, the route planning shall be well prepared in order to make sure that safety and security are preserved. In terms of documentation, care should be born to the issuance of the contracts of carriage. To give an example, in some trades, the shippers may request from the carrier to issue bills of lading which contain reference to information such as the letter of credit references. In some jurisdictions, including the reference of a letter of credit may be interpreted as an *ad valorem* declaration, which would deprive the carrier of his right to limit liability as per the provisions of the governing conventions. Prior loading of cargoes, the vessel's condition may be checked by a survey company. For most trade which involve cargoes

sensitive to water ingress, it is very common that a preloading inspection is carried out and that the ship's holds are also inspected for water tightness (hose test or ultrasonic test).

The condition of some cargoes require greater attention prior loading and during transit. Liquefaction of cargo has been one of the many risks of vessel capsizing during voyage. Indeed, some cargoes like ores tend to liquefy during transit and create issues to vessel's stability; they are subject to a specific classification and measures to be taken (moisture test, transportable moisture limit certification for IMDG class A products for instance). Grain cargoes are prone to self-heating and auto combustion; fertilizers are prone to caking; steel cargoes to shifting... A relevant inspection pre-loading and loading inspection is recommended while carrying these cargoes.

With the containerization, other forms of cargo loss or damage occur during transit. In order to avoid theft of cargo from containers, when carried, containers are sealed and the seal is reported on the bill of lading. Any break or hampering of the container door seal is an indication of theft or attempted theft of cargo contained therein. During transit, most container liners provide container tracking system from their websites which enables to track the container location. With multimodal carriage, many containers are released empty to shippers for stuffing and return at loading terminal for loading. It happens that containers disappear during this road phase of transit. To control this risk, some shipping line like Africa Express Line equip their containers with remote control system which shows not only the location of the containers but also certain information on the container reefer functioning. The safety issue is also valid for container traffic notably the weight of the cargo. To avoid excessive loading of containers, the SOLAS convention (safety of life at sea) was amended with effect from July 1, 2016 to include the Verified Gross Mass declaration requirement for shippers.

The loss prevention is determinant in the management of the risks involved in the carriage of goods by sea for it enables to monitor the risk before it materializes and to take relevant anticipated and timely measures. Insurance companies provide valuable assistance to their insured. The networks of P&I Clubs correspondents and Lloyd's agents, among others, provide extensive loss prevention advice to ship owners and shippers.

SECTION II – THE ROLE OF INSURANCE COMPANIES

The marine insurance industry is a driving force of the international carriage of goods by sea. Whether they are P&I Club (mutual ship owners' liability mutual insurance clubs), hull and machinery insurers or cargo underwriters, they are involved in every step of the development of international trade and international carriage of goods by sea.

P&I Clubs are summarily mutual insurance clubs which cover the ship owners against third party liabilities related to the vessel's operations. The P&I cover includes cargo claims, crew claims, personal injuries, pollution, stowaways, collusion claims, damage to fixed and floating objects. More importantly, with correspondents in practically all ports of the globe who assist clubs' members at any time, P&I clubs are one of the guarantors of keeping the port activities in motion. It happens that during a vessel's operations, damage or loss is discovered and receivers decide to interrupt the discharge operations until a representative of the P&I Club is in attendance. With the credibility of their network, P&I Clubs ensure the continuity of shipping activity where there are obstacles. For instance, vessels may be detained or arrested in port as a result of action brought by cargo claimants or authorities. P&I Clubs have standard types of securities issued to the claimants in order to release the vessel and continue her route whereas the claim will be handled at a later stage.

Hull and machinery insurers instead cover the vessel against risks that may occur during the sea voyage and damaging the vessel herself. These risks refer to the damage to or the loss of the vessel arising, among others, from natural disasters, shipwreck, collision, fire and explosion, and plundering. Some Hull and Machinery insurance policies include the coverage of liabilities arising from the use of the vessel notably in case of collisions. Depending on the policy, collision liabilities are covered by hull and machinery insurance at a proportion of three fourth or totally.

Cargo insurers cover the cargo carried against damage or loss which may affect the cargo during transit. They protect the insured against the financial loss incurred with respect to loss or physical damage to cargo from occurrences such as fire or explosion, grounding or capsizing of the vessel, collision, general average. The cover offered by the cargo insurance policy can be extended to all risks subject to listed exclusions. The extent of coverage, the level of deductible and the cargo particulars

are among other consideration by insurers to fix the amount of the insurance premium. Deductible are the limit of loss under which the insurer does not cover the claim; deductibles are considered to “moralize” the risk; for the same risk considered on objective basis, the higher the deductible, the lower the premium. Among policy, the insurer may impose vessels below certain limit of age or vessel only classified by an IACS member (international classification society in charge of inspecting vessels for seaworthiness).

SECTION III – CLAIMS MANAGEMENT

Cargo claims arising from the carriage of goods are usually handled between the claimants and their cargo underwriters at a first instance. After the insurer/cargo underwriters indemnify the claimants i.e. the insured under the cargo insurance policy, they are subrogated in the rights of the insured and are entitled to claim against the carrier in lieu and place of the insured. The claim is either handled by the carrier internally (case for claims under deductible) or it involves the carriers’ liability insurer/P&I Club. So, the claim management involves both carriers and shippers and their respective insurers.

In order to preserve their rights under the contract of carriage and also under their insurance policy, it is the claimants’ task to ensure that timely notification is sent to the carrier within the period of notification as detailed in the previous sections dealing with international conventions. In the insurance contract it is usually stipulated also that the insured shall take appropriate measure to preserve the insurer’s right of recourse action. Institute cargo clauses are one of the main standard insurance policy forms used for marine cargo insurance. In its article 16 related to the duty of the assured, the ICC A form stipulated that “it is the duty of the Assured and their employees and agents in respect of loss recoverable hereunder 16.1 to take such measures as may be reasonable for the purpose of averting or minimising such loss, and 16.2 to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised and the Insurers will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance

of these duties.”³¹ Once the claim is settled by the insurers, the recourse is presented to the carriers’ interests as mentioned above. There are also situations where the claim is directly brought by uninsured claimants.

The handling of claims under the contract of carriage are processed in consideration the following aspects need to be clarified: is the claimant entitled to claim under the contract of carriage, is the claim time barred, is the claim grounded, is the jurisdiction competent, legal action versus amicable settlement or alternative dispute resolutions. The claim process is rather long and costly depending on the interests and amounts involved. Thus, it is very frequent that claims arising from the carriage of goods by sea are settled amicably without involvement of courts.

CONCLUSION

International carriage of goods by sea is subject to constant change in practices and customs taking into account the dynamic environment and the actors involved. The boom of the international transport is before all related to the increasing development of international trade. Over the past two centuries, organizations involved in the international carriage of goods by sea took measures in order to regulate the industry with consideration given to the objective of uniformity. The world has changed a lot since whether in terms of geopolitics, industrial or technological development. The introduction of containerization in the shipping industry has deeply transformed the use and practices in terms of carriage of goods by sea. Whereas the carriage of goods by sea was conceived to be from port to port, it is more and more multimodal and the service of carriage is very often performed from door to door. With the container, the notion of package or unit became more and more ambiguous.

In the 1960s, many States acceded to international sovereignty with the waves of independence in Asia and Africa. The number of States who acceded the international conventions in force increased making regulation paradoxically necessary but also challenging in terms of finding compromise within the international organization. The fracture between developed countries on the one hand and developing countries and their respective economic realities made appear the existence of two regimes of carriers’ liability after the entry in force of the Hamburg

³¹ Institute Cargo Clauses (A); CL382 01/01/2009

Rules. Whereas both these conventions are “port-to-port” convention, one is deemed favorable to carriers in other words to developed countries whereas the other was rightly or wrongly perceived to be favorable to shippers.

Considering the international character of the carriage of goods by sea, it is easily understandable that the industry is contingent on the increasing tensions shaking the world. New threats appearing appeared with international impacts and power of nuisance. transnational organized crime, terrorism and piracy in its modern form became permanent threat to the normal operations of ships carrying the goods at sea. Their effects on the shipping costs affected stakeholders in the shipping industry. At the same time, in some places of the word, disruptions in ports and logistics platforms interfere in the vessels and cargo planning. The fight against these problems requires strong cooperation between States notably the coastal States. Economic hardship is a compost for criminality. It appears that transnational maritime crimes such as piracy thrives along the costs of States with less economic perspectives for the young.

The changing climate is also one of the challenges of our days at various levels; sea carriage is not spared. Unsustainable exploitation of the resources will deteriorate our environment and expose the mankind to severe rebellion from mother nature. Vessels are put in contribution to reduce the GHG emissions and to promote greener shipping activities. Technology and digitalization is considered to be one of the promising solutions to play a role in decarbonization of ships. However, whereas technological development and digitalization has very positively impacted the practices with acceleration over the past two decades, new risks are created in a context of cyber criminality. In any case, it is undoubtable that changing practices induced by containerization and digitalization have inspired and motivated the tidying up of the international conventions applicable to the carriage of goods by sea.

This was made possible with the advent of the Rotterdam Rules and the taking into account of the transforming practices and their impact in terms of documentation, scope of liability among other advancements. However, with various jurisdictions involved in the international carriage of goods, differences of cultures, interpretation and practices will still prevail. Consequently, the enforcement of the convention by national jurisdictions will still be influenced by notional practices. Insurers who are involved in the process namely when claims arise are also concerned by this evolution

and bring valuable assistance in terms of market recommendation, technical expertise, loss prevention advice and financial support in case claim occur.

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