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Identification of the Parties Under the Rotterdam Rules

By

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ABSTRACT

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The Rotterdam Rules were created to provide uniformity, modernise the law governing the international carriage of goods wholly or party by sea and answer the industry's needs. As international carriage of goods by sea no longer simply involves the shipper and the carrier, the Rotterdam Rules furthermore focus on the other actors involved in the carriage process either by the carrier, such as maritime performing parties, or the shipper such as the consignee. In addition to regulating the rights, obligations and liabilities of the carrier and the shipper, the Rotterdam Rules also contain provisions related to the obligations and liabilities of the maritime performing parties, and the rights, obligations and liabilities of the documentary shipper and the consignee. Therefore the binding character of the new Convention will be broader and if it enters into force the issue of identification will arise regarding to the parties included its scope.

For the purpose of this thesis, the word "parties" refers to the carrier (Article 1(5)), maritime performing party (Article 1(7)), shipper/documentary shipper (Articles 1(8)-1(9)) and consignee (Article 1(11). And, the main objective of this thesis is to analyse how these parties will be identified under the Rotterdam Rules when the applicable law is English law. The Convention includes provisions on the definition of these parties and provides specific provisions related to identification of some of these parties. To shed some light on the issue of identification of the parties, the thesis comprehensively examines these provisions with the aid of applicable law.

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DECLARATION OF AUTHORSHIP

I, Belma Bulut, declare that this thesis and the work presented in it are my own and have been generated by me as the result of my own original research.

"Identification of the Parties Under the Rotterdam Rules"

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
7. Either none of this work has been published before submission, or parts of this work have been published as:

    - B. Bulut, 'Position of the Shipowner as a Maritime Performing Party under the Rotterdam Rules' (Submitted to EJCCL)

    - B. Bulut, 'Identification of the Carrier in Cases of Inconsistencies: The Starsin and Article 37(1) of the Rotterdam Rules' European Transport Law Journal, (2014) No.4 pp 381-391

    - B. Bulut, 'Being An f.o.b. Seller under the Rotterdam Rules: Better or Worse?' European Transport Law Journal, (2014) No.3, pp 291-299

    - B. Bulut, 'The Evidentiary Effect of the Contract of Particulars under The Rotterdam Rules' Ankara Bar Review, (2012) Vol. 5, Issue 1, pp 25-41

Signed: ……

Date: ……

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CHAPTER 1: INTRODUCTION

1.1- Background

On 11th December 2008, the United Nations General Assembly formally adopted a new Convention; the "United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea", known as the Rotterdam Rules. The Rotterdam Rules are not in force yet; they will enter 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." [1] Although the Convention has been opened for signature since September 2009, as at the submission of this work only Spain in 2011, Togo in 2012, and Congo in 2014 have ratified them.[2]

The Rotterdam Rules were created to provide uniformity, modernise the law governing the international carriage of goods wholly or partly by sea and answer the industry's needs.[3] Currently, the law governing international carriage of goods by sea is a patchwork of the three different carriage of goods by sea Conventions in force: the Hague Rules,[4] the Hague-Visby Rules,[5] and the Hamburg Rules;[6] and there are

[1] Art 94 of the Rotterdam Rules.
[2] http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html accessed 02.09.2015. Related to ratification of the Rotterdam Rules, the "wait and see" attitude has adopted thus most nations are waiting for the ratification of the US. See MH Carlson, 'US Participation in Private International Law Negotiations: Why the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea Is Important to the United States' (2009) 44 Tex. Int'l L. J. 269, 273; CD Hooper, 'Ratification of the Rotterdam Rules and Their Implications for International Shipping' http://www.skuld.com/documents/library/beacon/beacon_2_2012_rotterdam_rules.pdf accessed 16.07.2015. For the position of signatories see http://www.rotterdamrules.com/content/introduction accessed 16.07.2015. Although, in 2010, American Bar Association prepared a report to support the ratification of the Rotterdam Rules until now the US has not taken any further step for the ratification. http://www.americanbar.org/content/dam/aba/migrated/UN_Rotterdam_Rules_2.authcheckdam.pdf accessed 16.07.2015.
[3] Opening clauses of the General Assembly Resolution 63/122 (11 Dec. 2008).
[4] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924 (hereinafter the Hague Rules).
[5] Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968 (hereinafter the Hague-Visby Rules), entered into force June 23, 1977.
[6] United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978 (hereinafter the Hamburg Rules), entered into force Feb. 14, 1984.

also national regimes[7] and regional regimes[8] as well. The Hague Rules were adopted in 1924 and they reflected the conditions of that time, therefore the recent changes in technology, particularly the container revolution,[9] made them out-dated and inadequate to satisfy the needs of modern trade.[10] The container revolution triggered the emergence of multimodal carriage, and ever since the mid-1950s multimodal carriage has increased dramatically.[11]

In the early days of the container revolution, in 1968, the Visby Protocol was created to meet the industry's needs. However, the Visby Protocol only amended the Hague Rules in a limited respect.[12] The new development in technology, multimodal transport and developing interests of third world countries in international transport led to the creation of the Hamburg Rules in 1978.[13] Although the Hamburg Rules introduced some innovations, such as the extended scope of application (Article 2(1)), special rules for jurisdiction and arbitration (Articles 21-22), the major commercial nations, such as the US, have not showed any interest in adopting them.[14] The existence of three different Conventions on the same issue at the same time, has caused fragmentation, and whilst the Hague and Hague-Visby Rules are popular among major commercial nations, such as the US, the UK, Germany, the Hamburg

[7] As an example Sturley gives Chinese law. See MF Sturley, 'Transport Law for the Twenty-First Century: An Introduction to the Preparation, Philosophy, and Potential Impact of the Rotterdam Rules' (2008) 14(6) JIML 461, 463 n 15.
[8] Such as New Scandinavian Maritime Code 1994 applied in Nordic countries.
[9] The use of containers began in the mid-1950s. See M Levinson, *The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger* (Princeton University Press 2006) 1 *et seq*.; B J Cudahy, *Box boats: How Container Ships Changed the World* (Fordham University Press 2006) 27 *et seq*.
[10] G van der Ziel, 'The UNCITRAL/CMI Draft for a New Convention Relating to the Contract of Carriage by Sea' (2002) 25 Transportrecht 265, 265-266; MF Sturley, 'The History of COGSA and the Hague Rules, (1991) 22(1) JMLC 1; Sturley, 'Transport Law for the Twenty-First Century' (n 7) 469; MF Sturley, 'General Principles of Transport Law and the Rotterdam Rules' in MD Güner-Özbek (ed), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the Rotterdam Rules* (Springer 2011) 78 *et seq*.
[11] UN Doc., A/CN.9/WG.III/WP.29 paras 18, 25. For the statistics on the growth of container trade see http://unctadstat.unctad.org/wds/TableViewer/tableView.aspx accessed 05.07.2015; D Bernhofen and others, 'Estimating the Effects of the Container Revolution on World Trade' (Feb 2013) CESifo Working Paper No. 4136 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2228625 accessed 05.07.2015
[12] Such as the scope of application was slightly extended (Art X of the Hague-Visby Rules), limits of limitation were increased (Art IV(5)(a) of the Hague-Visby Rules), the container clause was inserted in the Rules (Art IV(5)(c) of the Hague-Visby Rules).
[13] DC Frederick, 'Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules' (1991) 22(1) JMLC 81, 99-103; JAE Faria, 'Uniform Law for International Transport at UNCITRAL: New Times, New Player, and New Rules' (2009) 44 Tex. Int'l L.J. 277, 298 *et seq*.
[14] Faria (n 13) 301-302; Sturley, 'Transport Law for the Twenty-First Century' (n 7) 469.

Rules are popular among the countries that represent very small portion of world trade.[15]

As a result of this background, the Rotterdam Rules were created. In order to achieve their aim to modernise the law governing international carriage of goods by sea and answer the industry's needs, they contain comprehensive and inclusive provisions. To embrace all in precise detail and provide clarity and certainty, the Convention contains 96 extremely long and complex provisions, as well as a long list of definitions, which also contains provisions for the definitions of the parties. The table below shows how the parties are defined under each Convention.

The Hague and Hague Visby Rules	**The Hamburg Rules**	**The Rotterdam Rules**
Art 1(a): ""Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper"	***Art 1(1):*** ""Carrier" means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper."	***Art 1(5):*** ""Carrier" means a person that enters into a contract of carriage with a shipper."
	Art 1(2): ""Actual carrier" means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted."	***Art 1(7):*** ""Maritime performing party" means a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship."
	Art 1(3): ""Shipper" means any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the	***Art 1(8):*** ""Shipper" means a person that enters into a contract of carriage with a carrier." ***Art 1(9):*** ""Documentary shipper" means a person, other than the shipper, that accepts to be named as "shipper" in the transport document or

[15] MF Sturley, 'Uniformity in the Law Governing the Carriage of Goods by Sea' (1995) 26(4) JMLC 553, 560 *et seq;* Sturley, 'General Principles of Transport Law and the Rotterdam Rules' (n 10) 69. For the list of the countries that parties to the Hague, Hague-Visby and Hamburg Rules see CMI Yearbook 2009, http://www.comitemaritime.org/Uploads/pdf/CMI-SRMC.pdf accessed 30.03.2015.

	carrier in relation to the contract of carriage by sea."	electronic transport record."
	Art 1(4): ""Consignee" means the person entitled to take delivery of the goods."	***Art 1(11):*** ""Consignee" means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record."

As seen from the table, while the Hague and Hague-Visby Rules only define the carrier, the Hamburg Rules define the carrier, shipper and consignee, and further introduce the notion of actual carrier. However, the Rotterdam Rules take a further step and in addition to defining the carrier, shipper and consignee, they introduce the concept of maritime performing party, which is a broadened version of the notion of actual carrier, and the concept of documentary shipper. More importantly, the Rotterdam Rules contain a specific provision, Article 37, for the issue of identification of the carrier and a chapter, Chapter 9, on delivery of the goods, which is closely related to the identification of the consignee.

If the Rotterdam Rules enter into force, these new definitions, concepts and other provisions related to identification of the parties, could trigger the question "how will the parties be identified under the new regime?" This thesis will use this question as its base, and will analyse all provisions related to identification, in order to postulate a method for how the carrier, maritime performing party, shipper/documentary shipper and consignee will be identified under the Rotterdam Rules.

1.2- Aims of the Thesis

The identification issue potentially has a crucial impact on the following matters:

- **Bringing an Action[16]:** In order to recover its damages by bringing an action, the claimant needs to know whom to sue, therefore identification of the person to be sued is the first essential step for bringing an action.

- **Applying as a Defence[17]:** The claimant who brings the action must have title to sue, otherwise the defendant can raise a defence on the basis of lack of title to sue. For instance, the chapeau of Chapter 7 of the Rotterdam Rules makes it clear that the shipper's obligations arise only against the carrier.[18] Accordingly when an action is brought against the shipper, in order to raise a valid defence on the basis of lack of title to sue, the shipper needs to identify whether the claimant is the carrier or not.

- **Performance of Some Obligations[19]:** The identification issue may also be important for the performance of some obligations. For example, the carrier is obliged to deliver the goods to the consignee and to perform its delivery obligation, the carrier needs to know who the consignee is.[20]

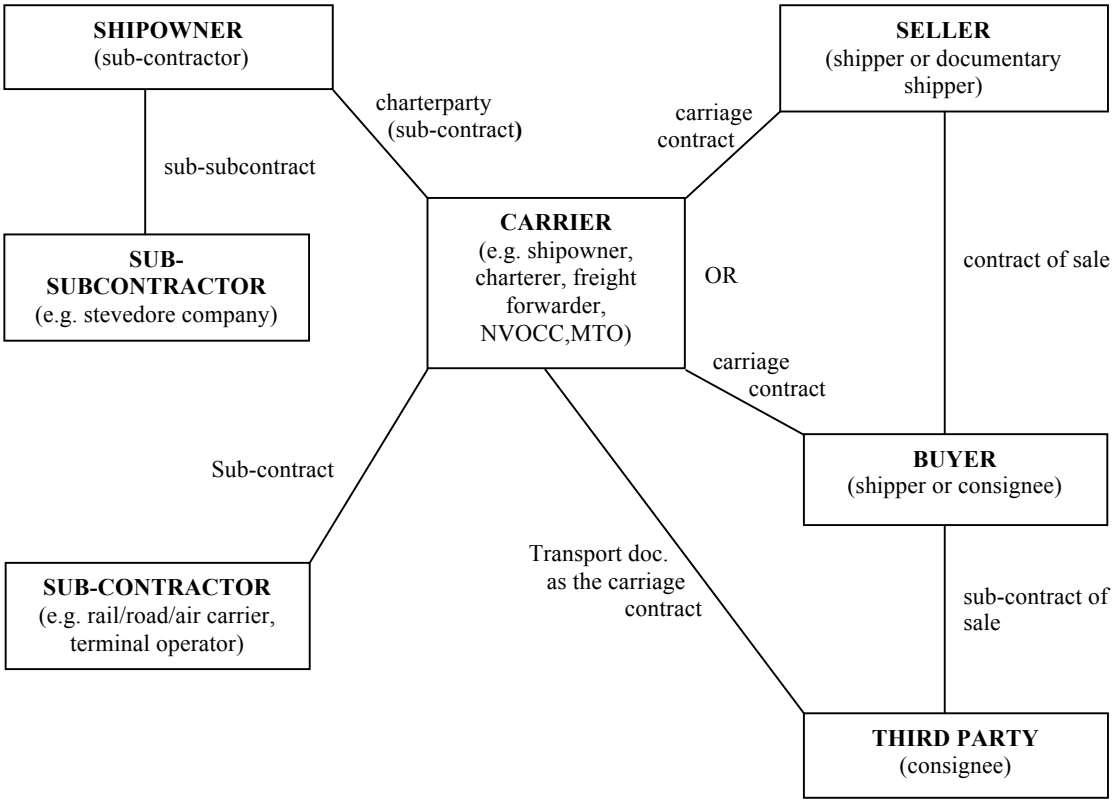
- **Determination of Place of Jurisdiction and Arbitration[21]:** Depending on the identification of the defendant, the place of jurisdiction and arbitration may vary, thereby in order to determine the right and most advantageous place for jurisdiction or arbitration the claimant needs to identify whom to sue first.

Considering the importance of identification, the main objective of this thesis is to analyse how the parties will be identified under the Rotterdam Rules. For the purpose of this thesis, the word "parties" refers to the carrier (Article 1(5)), maritime performing party (Article 1(7)), shipper/documentary shipper (Articles 1(8)-1(9)) and consignee (Article 1(11). As international carriage of goods by sea not longer involves just the shipper and the carrier the Rotterdam Rules furthermore focus on the other actors involved in the carriage process either by the carrier, such as maritime

[16] Chapter 2.1.
[17] Chapter 2.2.
[18] The chapeau of Chapter 7 of the Rotterdam Rules; Chapter 2.2.1.
[19] Chapter 2.3.
[20] Arts 11 and 13(1) of the Rotterdam Rules; Chapter 2.3.4.
[21] Chapter 2.4.

performing parties, or the shipper such as the consignee.[22] In addition to regulating the rights, obligations and liabilities of the carrier and the shipper, the Rotterdam Rules also contain provisions related to the obligations and liabilities of the maritime performing parties, and the rights, obligations and liabilities of the documentary shipper and the consignee. [23]

As an example, the parties involved in international carriage of goods would be schematically as follows:



As the scheme above shows, in addition to the original parties to the contact of carriage, i.e. the carrier and the shipper, there are other actors involved in the carriage process, through sub-contracts concluded with either the carrier or the shipper. The sub-contract chain particularly creates contractual and non-contractual relationships among the actors, making the issue of identification of the parties more complicated.

[22] S Beare, "*The Need for Change and the Preparatory Work of the CMI*" http://www.comitemaritime.org/Rotterdam-Rules/0,2748,14832,00.html accessed 29.03.2015.
[23] For example, for obligations and liabilities of the maritime performing party see Article 19; for obligations, liability and rights of the documentary shipper see Article 33; for rights and liabilities of the consignee of a negotiable transport document see Articles 57-58.

In practice, even more actors may be involved in the process, thus the issue of identification of the parties would inevitably arise. The binding character of the new Convention will be broader and more complicated, regulating not only the carrier-shipper relationship but also the role of various intermediaries involved in the carriage process. Therefore, if the Rotterdam Rules enter into force, the identification of the maritime performing party, documentary shipper and consignee will become as important as the identification of the carrier and shipper, and it is hoped that this thesis will shed some light on the issue of identification of the parties.

The aims of the thesis are summarised as follows:

- The issue of identification of the carrier has been one of the major problems that cargo claimants come across in practice.[24] In order to provide a solution to the issue of identification of the carrier, the Rotterdam Rules contain a definition for the word "carrier" and more importantly, they introduce a specific provision, Article 37, to indicate how the carrier can be identified.[25] By analysing the definition of carrier and Article 37 in detail, this thesis aims to evaluate whether the rules regulated in Article 37 will provide a proper solution to the issue of identification of the carrier, whether the current identification of the carrier situation in English law will remain the same or change in a better or worse way. Article 37 is usually considered a step in the right direction on the issue of identification of the carrier, and as such, other than in a few academic works,[26] it is not usually examined or analysed in detail. However, this thesis will provide detailed critical analysis on the provision.

[24] W Tetley, *Marine Cargo Claims* (4th edn, Thomson Reuters 2008) 565; *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet & Maxwell 2011) para 6-036.
[25] Arts 1(5) and 37 of the Rotterdam Rules; Chapter 5.
[26] Article 37 is examined in detail in the following academic works; K Atamer, C Süzel, 'Construction Problems in the Rotterdam Rules Regarding the Identity of the Carrier' in MD Güner-Özbek (ed), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the Rotterdam Rules* (Springer 2011) 155 *et seq*.; A Kozubovskaya-Pelle, Y Wang, 'Who is the Carrier in the Carriage of Goods by Sea? Rotterdam Rules Response from A French and English Perspective' (2011) 17(5) JIML 382; S Zunarelli, 'The Carrier and The Maritime Performing Party in the Rotterdam Rules' (2009) 14(4) Unif. L.Rev. 1011; MF Sturley, T Fujita, G van der Ziel, *Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Sweet & Maxwell 2010) para 7.044 *et seq*.

- The Rotterdam Rules introduce the concept of "maritime performing party", and impose significant obligations upon such party.[27] If maritime performing parties fail to perform their obligations, they will be held jointly and severally liable with the carrier, against the cargo interests.[28] Due to the effect of the provisions related to obligations and liabilities, the maritime performing party can be sued under the Rotterdam Rules and if the Convention enters into force, the issue of identification of the maritime performing party under the Convention will arise. By analysing the definition of maritime performing party in detail, this thesis aims to present the extent of the notion of maritime performing party, which actors would fall within this notion and how the maritime performing party will be identified under the Rotterdam Rules. There are some academic works that examine the notion of maritime performing party and they are critically used in the thesis to assist with the analysis for the identification of the maritime performing party.[29]

- The Rotterdam Rules contain a definition for the word "shipper" and a particular chapter, Chapter 7, for the shipper's obligations.[30] Furthermore, they introduce the concept of "documentary shipper" and impose the same obligations and liabilities as imposed on the shipper in Chapter 7, upon the documentary shipper.[31] The documentary shipper can be sued in addition to the shipper, therefore if the Rotterdam Rules enter into force, not only will the issue of identification of the shipper arise, but also will the issue of identification of the documentary shipper under the Convention. By analysing the definitions of the shipper and documentary shipper, this thesis aims to present the circumstances under which a person can be qualified as the shipper and documentary shipper, and how these parties will be identified under the Rotterdam Rules. There are some academic works on the obligations and

[27] Arts 1(7), 19 of the Rotterdam Rules; Chapter 6.
[28] Art 20 of the Rotterdam Rules.
[29] K Atamer, 'Construction Problems in the Rotterdam Rules Regarding the Performing Party and Maritime Performing Parties' (2010) 41(4) JMLC 469; Zunarelli, 'The Carrier and The Maritime Performing Party in the Rotterdam Rules' (n 26) 1011 *et seq*.; F Smeele, 'The Maritime Performing Party in the Rotterdam Rules 2009' 14-15 http://repub.eur.nl/res/pub/23175/maritime_performing.pdf accessed 20.01.2013; Sturley and others (n 26) para 5.139 *et seq*.; T Fujita, 'The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implications' (2009) 44 Tex. Int'l L. J 349.
[30] Art 1(8) and Chapter 7 of the Rotterdam Rules; Chapter 7.
[31] Arts 1(9), 33(1) of the Rotterdam Rules; Chapter 7.

liabilities of the shipper and documentary shipper,[32] but to the best of the author's knowledge, this thesis will be the first study to examine the identification of the shipper and documentary shipper.

- The Rotterdam Rules contain a provision for the definition of the word "consignee", they regulate the transfer of the rights and obligations to the consignee when there is a negotiable transport document, and furthermore they introduce a chapter, Chapter 9, on the issue of delivery of the goods, which imposes obligations and confers rights to the consignees.[33] As the consignee is given rights and has obligations imposed, it can sue and be sued under the Rotterdam Rules and if the Convention enters into force, the issue of identification of the consignee under the Convention would arise. Some of the provisions on the issue of delivery of the goods regulated in Chapter 9, Articles 45-47, are directly related to identification of the consignee, therefore by analysing those provisions along with the definition of consignee, this thesis aims to evaluate how the consignee can be identified through applying those provisions; whether those provisions would be sufficient for identification of the consignee; and how the current situation under English law related to identification of the consignee would change. There are some detailed academic works on the issue of delivery of the goods and this thesis frequently uses them to analyse how the consignee can be identified under the Rotterdam Rules.[34] To the best of the author's knowledge, this research is

[32] For instance, see F Lorenzon, 'Obligations of the Shipper to the Carrier' in Y Baatz and others, *The Rotterdam Rules: A Practical Annotation* (Informa, 2009) para 27-01 *et seq,*; S Baughen, 'Obligations Owed by the Shipper to the Carrier' in R Thomas (ed), *A New Convention for the Carriage of Goods by Sea- the Rotterdam Rules: An analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Lawtext 2009) 169 *et seq*.; CD Hooper, 'Obligations of the Shipper to the Carrier under the Rotterdam Rules' (2009) 14 Unif.L.Rev. 885; T Fujita, 'Shipper Obligations and Liabilities under the Rotterdam Rules' http://www.gcoe.j.u-tokyo.ac.jp/pdf/GCOESOFTLAW-2010-3.pdf accessed 30.03.2013; F Stevens, 'Duties of Shippers and Dangerous Cargoes' in R Thomas (ed), *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa 2010) para 11.1 *et seq*.; Sturley and others (n 26) para 6.001 *et seq*.

[33] Arts 1(11), 57-58, and Chapter 9 of the Rotterdam Rules; Chapter 8.

[34] S Lamont-Black, 'Transferee Liability under the Rotterdam Rules: A Dance between Flexibility and Foreseeability?' (2013) 19(5) JIML 387; S Baughen, 'Misdelivery Claims under Bills of Lading and International Conventions for the Carriage of Goods by Sea' in R Thomas (ed), *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa 2010) para 9.1 *et seq*.; C Debattista, 'Delivery of the Goods' in Y Baatz and others, *The Rotterdam Rules: A Practical Annotation* (Informa 2009) para 43-01 *et seq*.; G van der Ziel, 'Delivery of the Goods' in A Von Ziegler, J Schelin, S Zunarelli, *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the*

unique in respect of presenting a joint analysis of identification of the carrier, maritime performing party, shipper/documentary shipper and consignee.

This thesis is not a comparative study, therefore other than presenting the differences in the definitions of the parties, it will not make any comparison with the other previous carriage of goods by sea conventions. This thesis does not aim to focus on the current problems related to identification or make a comparison with English law, but uses English law as a tool to show how the new definitions and rules related to identification of the parties in the Rotterdam Rules could be integrated within English law, and what possible changes would occur. As indicated above,[35] the main question is how the parties will be identified under the new regime, thus this thesis focuses on the definitions of the parties and the provisions related to identification of the parties, to achieve its aim of presenting the possible effects of those provisions on the identification issue. Lastly, it must be noted that obligations and liabilities of the parties are not the subject of this thesis but will be briefly mentioned as one of the reasons for the importance of the issue of identification of the parties.

1.3- Legal Methodology Used for the Interpretation of the Rotterdam Rules

As a result of the international treaty nature of the Rotterdam Rules,[36] it is necessary to indicate how English courts will interpret them. Under English law, the determination of interpretation rules depends on which of the following methods is used to implement the treaty:

"(a) legislation, the effect of which is to translate into terms of English law the substantive provisions of the treaty, or so to amend English law as to enable effect to be given to the treaty; (b) legislation (or subordinate legislation), the effect of which is to apply the treaty within the framework of a general law designed to form the basis for the conclusion of the treaty in question; (c) legislation (or subordinate legislation),

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International Carriage of Goods Wholly or Partly by Sea (Wolters Kluwer 2010) 189 *et seq*.; Sturley and others (n 26) para 8.001 *et seq*.

[35] Above part 1.2.

[36] Pursuant to Article 2(a) of the Vienna Convention on the Law of Treaties (hereinafter the Vienna Convention), " 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

the effect of which is to enact directly as part of English law the substantive provisions of a treaty." [37]

The Hague and Hague-Visby Rules were implemented by appending them to the Carriage of Goods by Sea Act 1924 and Carriage of Goods by Sea Act 1971 respectively and giving them force of law.[38] The UK has not signed or ratified the Rotterdam Rules but if they are adopted in future, Rainey states that the same method applied to previous sea Conventions will most probably apply to implement the Rules.[39]

The English courts have interpreted the Hague and Hague-Visby Rules on the basis of broad principles of general acceptation, which consider the international character of the treaties i.e. not interpreting the Rules narrowly as with national law, but by considering international spirit, and uniformity with the other jurisdictions.[40] It is stated that broad principles of general acceptance are formulated in Articles 31-32 of the Vienna Convention, which has been applied in the UK since 1980. [41] Therefore, although Article 4 of the Vienna Convention states that the Convention applies "only to the treaties which are concluded by States after the entry into force of the present Convention with regard to such States" ,[42] English courts have been applying Articles 31-32 of the Vienna Convention to interpret the Hague-Visby Rules. In the case of the Rotterdam Rules, if they are adopted by the UK, they will be interpreted in accordance with the rules expresses in Articles 31-33 of the Vienna Convention.[43] Analysing these interpretation rules in detail is beyond the scope of this thesis;

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[37] S Rainey, 'Interpreting the International Sea Carriage Conventions: Old and New' in R Thomas (ed), *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa 2010) para 3.5; M Harakis, 'From Treaty to Trial: the Implementation of the Rotterdam Rules' in R Thomas (ed), *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa 2010) para 2.21.

[38] Carriage of Goods by Sea Act 1924 was repealed by Carriage of Goods by Sea Act 1971(hereinafter COGSA 1971). See s. 1 of COGSA 1971.

[39] Rainey (n 37) para 3.6.

[40] *Stag Line Ltd v Foscolo, Mango & Co* [1932] AC 328, 359; *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402, 416; *Fothergill v Monarch Airlines* [1981] AC 251, 281-282; *Morris v KLM Royal Dutch Airlines Ltd* [2002] 2 AC 628, 656; *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] 2 AC 423 (HL), 456; *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 AC 495, 513-514.

[41] *Fothergill v Monarch Airlines* [1981] AC 251, 282; *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 AC 495, 514. The UK ratified the Vienna Convention on 25 June 1971 and the Convention came into force on 27 January 1980 when the required number of signatories was satisfied.

[42] Art 4 of the Vienna Convention.

[43] Rainey (n 37) para 3.21.

however in order to show how the Rotterdam Rules will be interpreted if they are applied by an English court, the relevant rules set out in Articles 31-33 will briefly be explained.

❖ Article 31: General Rule of Interpretation

The general rules listed in Article 31 of the Vienna Convention are all equivalent sources of interpretation and must be applied in interpreting the Rotterdam Rules. They are as follows;

- **Good Faith:** Article 31(1) of the Vienna Convention requires that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[44] Also, for the application of the rules expressed in Articles 31(2)(b) and 31(3)(b), interpreting the treaty on the basis of good faith is essential.[45] Good faith as regulated in the Vienna Convention shows how the duty of interpretation will be undertaken; it requires the parties to a treaty to interpret the treaty honestly, fairly, neutrally and reasonably, and applies to the whole process of interpreting a treaty, instead of applying merely to particular term. [46]

It should be pointed out that the Rotterdam Rules contain a specific provision related to interpretation of the Rules, and it provides that "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade"[47]. Interpreting a treaty on the basis of its international character and the need to promote uniformity is already the position adopted by English courts,[48] thus these rules do not seem to add anything new to interpretation rules currently applied. However, the concept of "good faith" in

[44] Art 31(1) of the Vienna Convention.
[45] Arts 31(2)(b), 31(3)(b) of the Vienna Convention; ME Villiger, 'The Rules on Interpretation: Misgivings, Misunderstanding, Miscarriage? The 'Crucible' Intended by the International Law Commission' in E Cannizzaro, *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 109-110.
[46] Ibid; RK Gardiner, *Treaty Interpretation* (OUP 2008) 207; Rainey (n 37) para 3.51.
[47] Art 2 of the Rotterdam Rules.
[48] n 40.

Article 2 of the Rotterdam Rules presents a novel perspective and it differs from the concept of "good faith" regulated by Article 31 of the Vienna Convention. As Harakis states, the former refers to rules governed in international trade between private legal persons, while the latter refers to the state's obligations;[49] that is, the concept of "good faith" set out in Article 2 is only an interpretative tool, and judges are expected to interpret the Rotterdam Rules by considering the need to promote the observance of good faith in international trade.[50]

• **Ordinary Meaning of a Term:** This refers to normal, regular and usual meanings of terms, deemed to express the intentions of parties to a treaty.[51] The ordinary meaning is to be given to the terms of the treaty by the interpreter, who ought to interpret the treaty in good faith, consistent with the context, object and purpose of the treaty for it to be determinative.[52] Under English law, as a result of broad principle of general acceptance in determining the ordinary meaning of a term used, the international nature of Conventions is taken into account and instead of giving particular legal meaning to the terms purely on the basis of English law, international spirit and the intention of the states that attended the international conference are considered.[53] However, English courts have stated that the Hague-Visby Rules were created with an English law influence, therefore unlike non-maritime Conventions, the predominant effect of English law is considered to determine the legal meaning of the terms.[54] When considering the Rotterdam Rules it will be seen that in comparison to former sea Conventions, a

[49] Harakis (n 37) para 2.28; Rainey (n 37) para 3.122.
[50] Rainey (n 37) paras 3.127-129; C Debattista, 'General Provisions' in Y Baatz and others, *The Rotterdam Rules: A Practical Annotation* (Informa 2009) para 2.02.
[51] Gardiner (n 46) 231; Villiger (n 45) 111.
[52] Art 31(1) of the Vienna Convention; Gardiner (n 46) 219, 221.
[53] *Grein v Imperial Airways Ltd* [1937] 1 KB 50, 74-76; *Fothergill v Monarch Airlines* [1981] AC 251, 272, 281-282; *Morris v KLM Royal Dutch Airlines Ltd* [2002] 2 AC 628, 656; *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 AC 495, 513-514.
[54] *Effort Shipping Co v Linden Management SA (The Giannis NK)* [1998] AC 605, 625. In this case, Lord Steyn indicated the predominant effect of English law by saying "That remained the legal position in the United States until the conferences that led to the adoption of the Hague Rules. The United States was then already a great maritime power. Its shipping law was a matter of great importance. The British Empire was in decline but collectively the trading countries under its umbrella controlled a considerable proportion of ocean-going world trade. That means that at the time of the drafting of the Hague Rules the dominant theory in a very large part of the world was that shippers were under an absolute liability not to ship dangerous goods. This circumstance must have been known to those who drafted and approved the Hague Rules." Also see *Jindal Iron and Steel Co Ltd and others v Islamic Solidarity Shipping Company Jordan Inc (The Jordan II)* [2005] 1 All ER 175, 187; G Treitel, FMB Reynolds, *Carver on Bills of Lading* (Thomson Reuters 2011) para 9-097.

much broader international participation was achieved in the drafting process.[55] However, English lawyers did not show enough interest in the drafting of the Convention, thus it seems that the predominant influence of English law will vanish.[56] Therefore, the determination of the ordinary meaning of a term will possibly be based on the same principle as applied to non-maritime conventions, i.e. the international nature of the Convention will be taken into account.

- **Treaty's Context, Object and Purpose:** Article 31(1) requires the interpreter to determine the ordinary meaning of a term in the light of the context, object and purpose of the treaty.[57] The context of a treaty includes not only headings, punctuations, entire sentences and paragraphs of the articles in which the term is used, but also the remainder of the treaty, including its preamble, annexes and related articles on similar matters.[58] Possible inconsistencies between an individual term and the rest of the treaty will be avoided by interpreting a term in the light of the context of the treaty. The object and purpose of a treaty can be found in the preamble and general clauses of the treaty.[59] When interpreting a treaty on the basis of its object and purpose, the interpreter needs to avoid causing any revision by overriding the treaty's text.[60] The Rotterdam Rules do not contain a specific provision for its object and purpose, but the opening clauses indicates that the Rules desire to establish uniformity, meet the industry's commercial needs, and update and modernise the law governing international carriage of goods by sea.[61] The object and purpose indicated in the opening clauses seem very broad; therefore as Rainey pointed out, they will probably provide little help in interpreting the ordinary meaning of a term.[62]

❖ Article 32: Supplementary Means of Interpretation

Article 32 regulates sources used as supplementary means of interpretation and

[55] http://www.uncitral.org/uncitral/commission/working_groups/3Transport.html accessed 30.03.2015.
[56] Rainey (n 37) para 3.130; F Berlingieri, 'An Analysis of the Recent Commentaries of the Rotterdam Rules' (2012) 1 Il Diritto Marittimo 3, 73.
[57] Art 31(1) of the Vienna Convention.
[58] Gardiner (n 46) 234; Villiger (n 45) 110-111.
[59] Villiger (n 45) 111.
[60] Gardiner (n 46) 246.
[61] General Assembly 63/122 (11 Dec. 2008).
[62] Rainey (n 37) paras 3.76-3.77.

states that the interpreter may refer, *inter alia*, to preparatory works of the treaty and the circumstances of its conclusion to confirm the meaning of terms, due to application of Article 31, or to determine the meaning when application of Article 31 causes ambiguous, obscure, absurd or unreasonable meaning.[63] The provision makes it clear that supplementary means are applied for two reasons; to confirm or to determine the meaning of a treaty term. Contrary to the mandatory application of the general rules indicated in Article 31, from use of the word "may" it would seem that application of Article 32 is not mandatory. The list of supplementary means of interpretation indicated in Article 32 is not exhaustive and as Viliger expressed, "travaux préparatoires of an earlier version of the treaty; interpretative declarations made by treaty parties which do not qualify as reservations; rational techniques of interpretation (….); and, finally, any non-authentic translations of authenticated text" may be resorted to as supplementary means.[64]

The Vienna Convention does not provide any further information related to the concept of prep aratory work of the treaty and the circumstances of its conclusion. It is stated by some scholars that the notion of preparatory works embraces individual submissions and documents, drafts of treaty, memoranda, reports of Working Group and so forth.[65] The notion of circumstances of a treaty's conclusion directs to the circumstances under which a treaty is written out, and it may be linked within the object and purpose of the treaty. The Rotterdam Rules were drawn up under circumstances where the legal regime did not properly answer developments in containerisation, door-to-door transport and the usage of electronic transport document.[66] Accordingly, the object and purpose of the Rotterdam Rules and the circumstances of their conclusion are linked.

Article 32 does not provide any standard for supplementary means, thus it is not clear whether there is any requirement to be satisfied in order to apply supplementary means. English courts have applied standards set up in *Fothergill v*

[63] Art 32 of the Vienna Convention.
[64] Villiger (n 45) 113; L Sbolci, 'Supplementary Means of Interpretation' in E Cannizzaro, *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 152.
[65] Sbolci (n 64) 153; Gardiner (n 46) 95.
[66] General Assembly 63/122 (11 Dec. 2008).

Monarch Airlines[67] and this indicates that the preparatory works are applied "only where two conditions are fulfilled. First, that the material involved is public and accessible, and secondly, that the travaux préparatoires clearly and indisputably point to a definite legislative intention."[68] The second condition was formulated as the "bull's eye" approach, first mentioned in *The Giannis NK*[69], and is based on how clearly the draftsmen and delegates have a common view, and whether the preparatory works show a clear and common understanding, and definite legal intention.[70] The bull's eye approach is criticised on the grounds that although Article 32 of the Vienna Convention makes supplementary means applicable to confirm and determine the meaning, the bull's eye approach seems to only apply to the latter situation.[71] Regarding the Rotterdam Rules, it seems that the requirement of being publicly available in *The Giannis NK* will be easily met, since all preparatory works (individual submissions and documents, former drafts, reports of Working groups) are available on UNCITRAL's webpage in an easily accessible format.[72] However, because of the intensive debates and variety of suggestions proposed by the delegates, the preparatory works are rich in ambiguity, thereby it would be difficult to score a bull's eye to determine the meaning, but they could still apply for confirmation.

❖ Article 33: Interpretation of Treaties Authenticated in Two or More Languages

Article 33 expresses that in cases where a treaty has more than one authentic language, the text is equally authoritative in each language, unless a particular text is given priority by the treaty or the parties' agreement.[73] Under English law, it is accepted that identifying the correct authentic text is the starting point of treaty

[67] [1981] AC 251.
[68] Ibid 281. Also see *Morris v KLM Royal Dutch Airlines Ltd* [2002] 2 AC 628, 656; *The Jordan II* [2005] 1 All ER 175, 186; *The Rafaela S* [2005] 2 AC 423 (HL), 446; *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 AC 495, 513.
[69] [1998] AC 605, 623.
[70] Rainey (n 37) para 3.97; Gardiner (n 46) 36.
[71] Rainey (n 37) para 3.99; Gardiner (n 46) 35-36.
[72] http://www.uncitral.org/uncitral/commission/working_groups/3Transport.html accessed 30.03.2015.
[73] Art 33(1) of the Vienna Convention.

interpretation.[74] In the case of the Hague Rules, the French text is the only authentic language, whereas in the case of the Hague-Visby Rules the English and French texts are equally authentic; therefore to interpret these Conventions English courts have applied the French text when necessary.[75] In the case of the Rotterdam Rules, the working language was English, and the Rules were signed in six equally authentic texts: Arabic, Chinese, English, French, Russian and Spanish. Rainey asserts that where one authentic text is not clear, a wider comparison with other authentic texts will presumably be necessary.[76] However expecting English courts to rely upon an unfamiliar language, such as the Arabic or Russian text would not be conceivable, since the working language was English and the texts were translated to other texts from the English or French original. Therefore, as pointed out by Berlingieri, relying upon the text most familiar to an English court, such as the French text, would seem to be enough for interpretation.[77]

1.4- Structure and Methodology

In this thesis, English law is chosen to apply as the applicable national law, as the UK is one of the major maritime countries and English law has predominant influence on international maritime matters.[78] To present how the new definitions and rules related to identification of the parties in the Rotterdam Rules would be integrated into English law, if adopted, the thesis will benefit from English case law. Particularly, English cases directly relevant to provisions on the identification of the parties, such as *The Starsin,*[79] which addresses identification of the carrier, will be used. To demonstrate how the provisions on definitions of the carrier, maritime performing party, shipper/documentary shipper and consignee have changed, the definitions in previous carriage of goods by sea Conventions will be briefly mentioned. Furthermore, under the Rotterdam Rules, the provisions related to identification of the parties are

[74] *The Jordan II* [2005] 1 All ER 175, 184-185; *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 AC 495, 508; Rainey (n 37) para 3.23.
[75] See *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402, 421; *The Rosa S* [1989] QB 419, 423; *The Rafaela S* [2005] 2 AC 423, 457; *Carver* (n 54) paras 9-064, 9-066.
[76] Rainey (n 37) para 3.49.
[77] Berlingieri, 'An Analysis of the Recent Commentaries' (n 56) 74-75.
[78] TL MacDorman, 'The History of Shipping Law in Canada: The British Dominance' (1983) 7 Dalhousie L.J. 620.
[79] *Homburg Houtimport B.V. v Agrosin Private Ltd. and Others (The Starsin)* [2003] 1 Lloyd's Rep 571 (HL).

complex and vaguely drawn, and as the Convention has not entered into force yet and there is no case law on it, the preparatory works are intensively relied on in this thesis, in order to interpret the provisions.

The thesis consists of nine chapters including the introduction and conclusion;

- Chapter 2 presents the factors which make the issue of identification of the parties important.

- Chapter 3 analyses the concept of "transport document". The chapter firstly indicates the importance of the existence and types of transport documents on the issue of identification of the parties. The chapter then continues with an examination of provisions related to definition, issuance and types of the transport documents.

- Chapter 4 examines the concept of "contract particulars" and analyses the contract particulars related to identification of the parties. The parties can be identified through examination of the contract particulars indicated in a transport document, therefore the analyses made in Chapter 3 and Chapter 4 will provide guidance for the subsequent chapters on how the parties will be identified.

- Chapter 5 examines the issue of identification of the carrier. The chapter firstly analyses the definition of carrier and secondly, in order to show how the carrier would be identified under the Rotterdam Rules, the chapter analyses the new provision, Article 37, on the issue of identification of the carrier, in detail.

- Chapter 6 deals with the issue of identification of the maritime performing party. The chapter firstly examines the concept of "maritime performing party", and secondly presents how the maritime performing party would be identified under the Rotterdam Rules. Due to the absence of a specific

provision on the issue of identification of the maritime performing party in the Rotterdam Rules, the examination is made in light of English case law.

- Chapter 7 examines the issue of identification of the shipper and documentary shipper. The chapter firstly analyses the terms "shipper" and "documentary shipper", and secondly indicates how the shipper and documentary shipper would be identified under the Rotterdam Rules. As in the case of identification of the maritime performing party, due to the absence of a specific provision on the issue of identification of the shipper and documentary shipper in the Rotterdam Rules, the analysis is made in light of English case law.

- Chapter 8 analyses the issue of identification of the consignee. The chapter first examines the definition of the term "consignee", and secondly presents how the consignee would be identified under the Rotterdam Rules. In this chapter, due to the close link between the identification of the consignee and the provisions on delivery of the goods, right of control and transfer of rights, the analysis will substantially make in accordance with these provisions.

- Chapter 9 presents the outcomes obtained as a result of this research. The outcomes related to each party are briefly as follows:

  — Article 37, which was introduced to resolve the problems related to identification of the carrier, will not properly shed light on the issue of identification of the carrier. With regard to English law, owing to the effect of *The Starsin*[80], the application of the rule indicated in Article 37(1) will not arise. Furthermore, subject to some limited situations, the application of Article 37(2) will not arise, and the carriers will be identified by interpreting the transport document as a whole, as in the current situation under English law.

  — The definition of maritime performing party contains intense ambiguity therefore it would be drastically difficult to determine whether a person

[80] [2003] 1 Lloyd's Rep 571 (HL).

falls within this definition or not. After presenting the problems related to the wording of definition, the thesis suggests that a correction procedure should be taken to clarify the definition.

— Identification of the shipper and documentary shipper will depend on how the national courts will interpret the definitions related to these parties and determine the contractual nexus with the carrier. With regard to English law, subject to the cases where the f.o.b. buyer concludes an initial contract of carriage with the carrier but the name of the f.o.b. seller is indicated as the shipper on the transport document, there will not be any alteration about identification of the shipper. Accordingly, the thesis concludes that the shipper and documentary shipper will be identified depending on the fact, types of the contracts of sale, the existence of an initial contract of carriage, information on the bill of lading and the intention of the parties.

— For the identification of the consignee, the provisions on delivery of the goods, right of control and transfer of rights might be useful. However, these provisions are comprehensive, complex and contain some inconsistencies thus to identify the consignee considering these provisions all together would be intensely difficult. The thesis presents that the inclusion of a provision specifically devoted to identification of the consignee would have better served.

CHAPTER 2: IMPORTANCE OF IDENTIFICATION OF THE PARTIES UNDER THE ROTTERDAM RULES

Identification of the parties will have crucial importance on a number of issues; thus before analysing how parties will be identified under the Rotterdam Rules, the importance of identification of the parties will be presented here. The chapter is divided into four parts, each dealing with the importance of identification of the carrier, maritime performing party, shipper/documentary shipper and consignee respectively, under separate sub-headings, in relation to certain issues.

The first part deals with the issue of bringing an action, the second part on applying as a defence, in the third part, performance of certain obligations will be analysed, whereas in the final part, the issue of determination of the place of jurisdiction and arbitration will be examined. Identification of the parties is only important if the place of jurisdiction or arbitration is in the defendant's domicile, therefore this part focuses on the notion of domicile only.

2.1- Bringing an Action

2.1.1- Identification of the Carrier

Under the Rotterdam Rules, the carrier who is the counterpart of the shipper under a contract of carriage has some obligations towards the shipper imposed on him, and if it breaches any of its obligations it would be held liable.[81] For instance, as stated in Article 13(1), the carrier must "properly and carefully receive, load, handle, stow, keep, care for, unload and deliver the goods" and in case of breach of any of those obligations, the carrier would be held liable against the shipper. Some of the obligations of the carrier, such as issuing and giving a transport document to the

[81] Arts 1(5), 11-16, 35 of the Rotterdam Rules; Chapter 5.1. For further details on the obligations of the carrier see Sturley and others (n 26) para 5.008 *et seq*.; M Tsimplis, 'Obligations of the Carrier' in Y Baatz and others, *The Rotterdam Rules: A Practical Annotation* (Informa 2009) para 11-01 *et seq*.; A Nicholas, 'The Duties of the Carrier under the Conventions: Care and Seaworthiness' in R Thomas (ed), *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa 2010) para 6.1 *et seq*.; MF Ulgener, 'Obligations and Liabilities of the Carrier, in MD Güner-Özbek (ed), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the Rotterdam Rules* (Springer 2011) 139 *et seq*.; A Diamond, 'The Rotterdam Rules' (2009) LMCLQ 445, 464 *et seq*.; F Berlingieri, 'Revisiting the Rotterdam Rules' (2010) LMCLQ 583, 593

shipper as regulated in Article 35,[82] arise only against the shipper who is the carrier's counterpart under the contract of carriage or documentary shipper if the shipper consents, but some of its obligations arise not only towards the shipper but also to another person, such as the holder of the negotiable transport document or the consignee.[83] For example pursuant to Article 11, the carrier is obliged to deliver the goods to the consignee, who can be the shipper but is not necessarily so, and if it fails to deliver the goods to the consignee it would be held liable against the consignee under the Convention.[84] If the carrier breaches any of its obligations under the Convention, in order to be sued, the cargo interests -who can be the shipper, holder or consignee- firstly need to identify who the carrier is.

Furthermore, pursuant to Article 62(1), a judicial or arbitral proceeding for claims or disputes arising from breach of an obligation under the Convention must be instituted within the 2-year time bar.[85] Accordingly, cargo interests wanting to sue the carrier must identify him and bring the action before the expiration of the 2-year time bar. Article 62(1) expressly indicates that the 2-year time bar applies to both the court and arbitration proceedings.[86] Although the provision requires the cargo interests to sue the carrier within the 2-year time bar, the parties can agree to a longer time limit in their contract or the person against whom the action is brought may extend the time period with a declaration at any time before the time for suit expires.[87] On the other hand, the parties cannot arrange for a shorter time limit; this is because Article 79 allows for agreements which increase the obligations and liabilities of the carrier but does not allow for agreements which exclude or limit the obligations and liabilities of

[82] Art 35 of the Rotterdam Rules; Chapter 3.3.
[83] Below parts 2.3.3-2.3.4.
[84] Art 11 of the Rotterdam Rules.
[85] Art 62(1) of the Rotterdam Rules. In the *travaux préparatoires*, there was support for the 1-year time limit however this period was found too short thereby the 2-year time limit was accepted. See UN Doc., A/CN.9/616 para 126. For further about time for suit see Y Baatz, 'Time for Suit' in Y Baatz and others, *The Rotterdam Rules: A Practical Annotation* (Informa 2009) para 62-01 *et seq*.; Sturley and others (n 26) para 11-001 *et seq*.; H Kim, 'Time for Suit' in A Von Ziegler, J Schelin, S Zunarelli, *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Wolters Kluwer 2010) 273 *et seq*. It should be added that under the Hague and Hague-Visby Rules (Art III(6)) the time bar is 1-year whereas under the Hamburg Rules (Art 20) the time bar is 2-year.
[86] Art 62(1) of the Rotterdam Rules; Baatz (n 85) para 62-03.
[87] Art 63 of the Rotterdam Rules; Kim (n 85) 279; Sturley and others (n 26) paras 11.014-11.016. The authors pointed out that although Article 63 states that the extension is made by the declaration of the person against whom a claim is made nothing in the Convention prevents the parties to agree on an extended time bar in their contract.

the carrier.[88] It must be pointed out that the time bar applies only for claims arising from breach of an obligation under the Convention; i.e. if the claim is not based on an obligation under the Convention, e.g. arises from the contract of carriage itself such as claims for unpaid freight, the 2-year time bar will not apply.[89]

Article 62(2) shows that the 2-year time bar starts "on the day on which the carrier has delivered the goods or, in cases in which no goods have been delivered or only part of the goods have been delivered, on the last day on which the goods should have been delivered."[90] The commencement of the time period is important in calculating when the time to file suit will end, as well as how much time there is for the carrier to be identified. In the *travaux préparatoires,* it is stated that to provide certainty and predictability, the date of delivery of the goods should be taken into account as the commencement of the time bar, since in most cases it is easy to ascertain.[91] Accordingly, if the goods are actually delivered the time bar starts running on that date; however if the goods are not delivered or are partly delivered, then the time period begins on the last day on which the goods should have been delivered. In the latter cases, if the parties have not agreed about the date of delivery in their contract, the court will decide on the date when the goods should have been delivered.[92] Consequently, identification of the carrier is the first essential step in bringing an action against it under the Rotterdam Rules, and subject to Article 63, in order not to lose their claims against the carrier, cargo interests must identify and sue the carrier within the 2-year time bar.

2.1.2- Identification of the Maritime Performing Party

The Rotterdam Rules introduce the concepts of "performing party"[93] and "maritime performing party"[94] but impose obligations and liabilities as owed by the carrier under

[88] Art 79 of the Rotterdam Rules; Baatz 'Time for Suit' (n 85) para 62-02; F Lorenzon, 'Validity of Contractual Terms' in Y Baatz and others, *The Rotterdam Rules: A Practical Annotation* (Informa 2009) para 79-03; Sturley and others (n 26) para 13-015 *et seq*.
[89] Baatz, 'Time for Suit' (n 85) para 62-04; Sturley and others (n 26) para 11.004; Kim (n 85) 276.
[90] Art 62(2) of the Rotterdam Rules.
[91] UN Doc., A/CN.9/616 paras 142-143.
[92] Sturley and others (n 26) para 11-008; Kim (n 85) 277. The word "delivery" is not defined under the Rotterdam Rules, the meaning and extent of it are left to the applicable national law. For further details on the notion of delivery see Chapter 8.1.
[93] Art 1(6) of the Rotterdam Rules; Chapter 6.1.1.

the Convention, only on maritime performing parties, such as the obligations stated in Article 13(1).[95] Correspondingly, the Rotterdam Rules also confer the defences and limits of liability given to the carrier under the Convention, such the 2-year time bar, only on maritime performing parties.[96] Thus while maritime performing parties can be sued under the Rotterdam Rules and can apply the defences and limits of liability available to the carrier under the Convention, performing parties cannot be sued and cannot apply such defences and limits of liability, although they can be sued in tort or bailment under the applicable law.[97] For instance, assuming the goods are damaged while the inland carrier performs its services within the port area. The cargo claimant can sue the inland carrier under the Convention only if the inland carrier falls within the notion of maritime performing party as regulated in Article 1(7), otherwise the action must be brought in tort or bailment under the applicable national law. Therefore, before bringing an action against the inland carrier under the Rotterdam Rules, the cargo interest needs to be certain whether the inland carrier is a performing party or a maritime performing party.

Although, there is no contractual relationship between the maritime performing party and the cargo interest, the Rotterdam Rules create a statutory relationship, thus the maritime performing part can directly be sued by the cargo interests under the

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[94] Art 1(7) of the Rotterdam Rules; Chapter 6.1.

[95] Arts 13(1), 19(1) of the Rotterdam Rules; R Thomas, 'An Analysis of the Liability Regime of Carriers and Maritime Performing Parties' in R Thomas (ed), *A New Convention for the Carriage of Goods by Sea- The Rotterdam Rules* (Lawtext 2009) 60-61; A Von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' in A Von Ziegler, J Schelin, S Zunarelli, *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Wolters Kluwer 2010) 116-117; Smeele (n 29) 14-15. It should be added that the maritime performing parties imposed the same obligations and liabilities as imposed to the carrier under the Convention thus Article 19(2) expressly states that if the carrier has agreed to assume obligations greater than those imposed under the Convention, the maritime performing party will not be bound by this agreement unless it expressly accept it. And, because of the effect of Article 79(1) any terms that exclude or limit the liability of the maritime performing party will be null and void.

[96] Arts 4, 19(1), 62(1) of the Rotterdam Rules; UN Doc., A/CN.9/544 para 23. Sturley describes this as "the bitter with the sweet". See MF Sturley, 'The Treatment of Performing Parties' in CMI Yearbook 2003, 230, 235. Due to the effect of automatic Himalaya protection in Article 4 and Article 19(1), the maritime performing parties can rely on the defences and limits available to the carrier under the Convention notwithstanding that there is a Himalaya clause in the contract. For further see T Nikaki, 'Himalaya Clauses and the Rotterdam Rules' (2011) 17(1) JIML 20, 33 *et seq*.; J Chuah, 'Impact of the Rotterdam Rules on the Himalaya Clause: The Port Terminal Operators' Case' in R Thomas (ed) *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa 2010) 300 *et seq*.; Smeele (n 29) 7-11; Sturley and others (n 26) para 5.186 *et seq*.

[97] Diamond (n 81) 489-490; Nikaki, 'Himalaya Clauses and the Rotterdam Rules' (n 96) 20-21.

Convention.[98] The Rotterdam Rules provide that the liability of the carrier and one or more maritime performing parties for loss, damage or delay in delivery is joint and several.[99] It must be noted that under the Convention, a maritime performing party can only be held liable in cases where: (a) its performance has a sufficient connection to a contracting state; (b) the loss, damage or delay in delivery caused by either its fault or acts or omissions of any person to whom it delegates its responsibilities, occurs within its period of responsibility; (c) and the cargo interest proves that the occurrence happened within the period of responsibility of the maritime performing party by localising it.[100] When all requirements for bringing an action against the maritime performing party are satisfied, the cargo claimant can claim full and complete compensation, up to the limits provided in the Convention, from one or some of the joint debtors or all of them, as liability is joint and several.

For instance, assuming that the goods are damaged due to fault of the carrier and maritime performing party, and the cargo interest sustains £20,000 in damages, within the limits of liability provided in the Convention. In such a scenario, the cargo interest can claim £20,000 from either the carrier or maritime performing party or both of them. And, if the cargo interest receives any compensation from any of the debtors, this will reduce the total that can be claimed against the other. Significantly, in cases where the carrier is bankrupt or there is risk of insolvency, the identification of the maritime performing party will have crucial importance, as the cargo claimant would only have the maritime performing party to claim for compensation in accordance with the rules under the Rotterdam Rules.[101]

The cargo claimant also needs to identify the maritime performing party as soon as possible. The time for suit regulated under Article 62(1) embraces actions brought

[98] Art 19 of the Rotterdam Rules; Zunarelli, 'The Carrier and the Maritime Performing Party in the Rotterdam Rules' (n 26) 1021.
[99] Art 20(1) of the Rotterdam Rules. For further see R Thomas, 'An Analysis of the Liability Regime of Carriers and Maritime Performing Parties' (n 95) 67; Von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' (n 95) 120-212.
[100] Arts 19(1)(a)-(b), 19(3) of the Rotterdam Rules; MF Sturley, 'Amending the Rotterdam Rules: Technical Corrections to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea' (2012) 18(6) JIML 423, 426 *et seq*.; Sturley and others (n 26) paras 5.167-5.168, 5.178; Von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' (n 95) 117-118; Atamer (n 29) 479 *et seq*.; M Tsimplis, 'Liability of the Carrier for Loss, Damage or Delay' in Y Baatz and others, *The Rotterdam Rules: A Practical Annotation* (Informa 2009) paras 19.03-19.04; Smeele (n 29) 18, 20-21.
[101] Von Ziegler, 'Liability of the Carrier for Loss, Damage or Delay' (n 95) 120; Smeele (n 29) 19.

against the maritime performing parties for claims or disputes arising from a breach of an obligation under the Convention.[102] Although the 2-year time bar cannot be suspended or interrupted, the maritime performing party against whom a claim is made can extend the limit before expiration of the 2-year time bar by a declaration to the claimant.[103] It should be noted that according to Article 79(1), only terms that exclude or limit the obligations and liabilities of the maritime performing parties are void thus a declaration which extends the time for suit will be valid under the Convention.[104] Consequently, identification of the maritime performing party is the first essential step to be taken by the cargo claimant in order to bring action against him, within the time bar.

2.1.3- Identification of the Shipper and Documentary Shipper

Under the Rotterdam Rules, the shipper has some obligations imposed on him towards the carrier and if it fails to perform any of its obligations it will be held liable against the carrier.[105] For instance, pursuant to Article 32, the shipper must inform the carrier about the dangerous nature or character of the goods in a timely manner before delivering them to the carrier, and if he fails to inform the carrier and the carrier sustains loss or damage, then the carrier can bring an action against the shipper.[106]

Moreover, the Convention introduces the concept of "documentary shipper", and apart from the shipper, the documentary shipper has some obligations and liabilities towards the carrier.[107] Article 33(1) expressly states that the documentary shipper has the same obligations and liabilities as imposed upon the shipper in Chapter 7 and Article 55, therefore it can be submitted that in respect of any other obligations and liabilities of the shipper not listed in Chapter 7 and Article 55, the documentary shipper cannot be held liable *vis-à-vis* the carrier under the Convention.[108] For instance, the payment of freight is not listed as an obligation in Chapter 7 and Article

[102] Art 62(1) of the Rotterdam Rules; Above part 2.1.1.
[103] Art 63(1) of the Rotterdam Rules; n 87.
[104] Art 79(1) of the Rotterdam Rules; Lorenzon, 'Validity of Contractual Terms' (n 88) para 79-03.
[105] Arts 1(8), 27-34, 55 of the Rotterdam Rules; Chapter 7.1.1. For further details on obligations and liabilities of the shipper see sources in n 32.
[106] Arts 30, 32 of the Rotterdam Rules.
[107] Arts 1(9), 33(1) of the Rotterdam Rules; Chapter 7.1.2.
[108] Art 33(1) of the Rotterdam Rules; Sturley and others (n 26) para 6.066; *Carver* (n 54) para 1-006; Lorenzon, 'Obligations of the Shipper to the Carrier' (n 32) para 33-02.

55, therefore the carrier cannot sue the documentary shipper for unpaid freight under the Convention. As explained below,[109] pursuant to the Rotterdam Rules, the obligations and liabilities of the shipper and documentary shipper arise only against the carrier, therefore in respect of bringing an action under the Convention it can be submitted that the issue of identification of the shipper and documentary shipper is important only in respect of carriers when they sustain loss or damage due to the shipper/documentary shipper's breach.

It should be added that although the documentary shipper owes the same obligations as the shipper in Chapter 7 and Article 55, the Convention does not include a specific provision to show the link between the liability of the shipper and the documentary shipper. However, Article 33(2) expressly states that imposing obligations and liabilities upon the documentary shipper does not relieve the contractual shipper from its obligations and liabilities.[110] In the *travaux préparatoires*, it was questioned whether the contractual shipper's liability passes to the documentary shipper; whether the liability of the documentary shipper is additional i.e. alternative; or whether the contractual shipper and documentary shipper are jointly and severally liable.[111] It was made clear that the draftsmen did not aim to create joint and several liability between the shipper and documentary shipper, and that the provision intends to impose obligations and liabilities upon the documentary shipper in addition to the contractual shipper; thereby, the documentary shipper can be held liable in addition to the contractual shipper under the Convention.[112] It must be noted that under the Convention the liabilities of the shipper and documentary shipper are based on fault; thus they will be liable against the carrier in the ratio of their faults.[113] However, for the obligations indicated in Article 31(2) and Article 32, the shipper and documentary shipper are strictly liable, hence the carrier can either sue the shipper, documentary shipper or both of them for the whole amount of its damages.[114]

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[109] Below part 2.2.1.
[110] Art 33 (2) of the Rotterdam Rules.
[111] UN Doc., A/CN.9/552 para 156; UN Doc. A/CN.9/591 para 174; UN Doc., A/CN.9/WG.III/WP.55 para 38. Some delegates suggested adding an express provision to make the shipper and documentary shipper jointly liable whereas one delegate suggested that the contractual shipper should be relieved its liability otherwise; the carrier would be in a better position in f.o.b. contracts than c.i.f. contracts. Also see S Zunarelli, 'The Liability of the Shipper' (2002) LMCLQ 350, 351.
[112] UN Doc., A/CN.9/552 para 156; UN Doc., A/63/17 para 106; Stevens (n 32) para 11.73.
[113] Art 30 of the Rotterdam Rules.
[114] Arts 30(2), 31(2) and 32 of the Rotterdam Rules; Sturley and others (n 26) para 6.067.

For example, pursuant to Article 27, the shipper must deliver the goods ready for carriage, and as a result of the effect of Article 33(1), the documentary shipper has the same obligation against the carrier. However, let us assume that the goods have not been delivered on time and consequently the carrier sustains £10,000 in damages.[115] In such a case, the shipper and documentary shipper would be held liable against the carrier and if, for instance, the shipper caused £2,000 worth of damages and the documentary shipper £8,000 worth of damages, the carrier can claim its damages from each of them in proportion to their faults. On the other hand, under Article 31(2) the shipper and, because of the effect of Article 33(1), the documentary shipper are imposed an obligation to guarantee the accuracy of information required for the compilation of the contract particulars and the issuance of transport document.[116] Assuming they provide inaccurate information and the carrier sustains £10,000 in damages, the liabilities of the shipper and documentary shipper will be based on strict liability, therefore they cannot escape liability by proving that they were not at fault. Accordingly, the carrier can claim £10,000 from the shipper, documentary shipper or both of them. But before bringing an action, the carrier firstly needs to identify who the shipper and documentary shipper are.

As with suing the carrier and maritime performing party, pursuant to Article 62(1), a judicial or arbitral proceeding against the shipper and documentary shipper for claims or disputes arising from a breach of the Convention must be instituted within the 2-year time bar.[117] Therefore the carrier needs to identify and sue those parties before the expiration of the 2-year time bar. Article 62 is widely worded and embraces not only actions brought against the carrier but also actions brought by the carrier.[118] Unlike suing the carrier and maritime performing party, the time bar cannot be extended in accordance with the rule in Article 63,[119] as Article 79(2) expressly states that any term directly or indirectly increasing the shipper or documentary shipper's

[115] Arts 27, 33(1) of the Rotterdam Rules.
[116] Arts 31(2), 33(1) of the Rotterdam Rules.
[117] Art 62(1) the Rotterdam Rules; Above parts 2.1.1-2.
[118] Baatz, 'Time for Suit' (n 85) para 62-04; Sturley and others (n 26) para 11.002. It should be added that under the Hague and Hague-Visby Rules (Art III(6)) the time bar only applies to the actions brought against the carrier and the ship whereas under the Hamburg Rules (Art 20) the time bar applies to both the actions brought against the carrier and the actions brought by the carrier.
[119] Art 63 of the Rotterdam Rules; Above parts 2.1.1-2.

obligations and liabilities will be void.[120] Consequently, when the shipper and documentary shipper breach any of their obligations regulated under the Convention and cause the carrier to sustain loss or damage in order to recover its damages under the Convention the carrier must bring the action within the 2-year time bar and to do that it firstly needs to identify the shipper and documentary shipper.

2.1.4- Identification of the Consignee

The Rotterdam Rules contain a provision for the definition of the consignee,[121] and introduce a specific provision about transfer of contractual liabilities from the shipper to a third party in cases where a negotiable transport document is issued.[122] According to Article 58, the holder of a negotiable transport document may assume liabilities and be held liable under the Convention when the following preconditions are satisfied; firstly, there must be a negotiable transport document or electronic transport record within the meaning of the Convention.[123] Secondly, the consignee and the shipper need to be different persons; otherwise, there is no need for the transfer of the obligations, since the shipper, as the original counterparty of the carrier, has obligations to the carrier under the contract of carriage.[124] Thirdly, in order to assume liabilities against the carrier, the consignee has to exercise one of its rights under the contract of carriage, such as exercising right of control or claiming delivery of the goods.[125] In other words, merely being the holder of a negotiable transport document

[120] Art 79(2) of the Rotterdam Rules; Lorenzon, 'Validity of Contractual Terms' (n 88) para 79-05; Sturley and others (n 26) para 13-026; Lamont-Black (n 34) 405.
[121] Art 1(11) of the Rotterdam Rules; Chapter 8. 1.
[122] Art 58 of the Rotterdam Rules. In the current position, the issue of whether the carrier has a right to sue the cargo interests other than the shipper depends on the applicable laws, since the Hague, Hague-Visby and Hamburg Rules do not provide any provisions related to liabilities of the third parties against the carrier.
[123] Arts 1(15), 1(19) of the Rotterdam Rules. For further details on negotiable transport documents, see Chapter 3.4.1-2.
[124] Sturley and others (n 26) para 10.023; R Thomas, 'A Comparative Analysis of the Transfer of Contractual Rights under the English Carriage of Goods by Sea Act 1992 and the Rotterdam Rules' (2011) 17(6) JIML 437, 448; Lamont-Black (n 34) 399.
[125] The provision aims to protect the intermediate holders, who do not involve into the contract of carriage. For instance, in practice, banks usually do not involve the contract of carriage but they hold the bill of lading only for security purposes. In such cases, as long as the banks do not exercise any contractual rights they will not be imposed any liabilities against the carrier. See Thomas, 'A Comparative Analysis of the Transfer of Contractual Rights' (n 124) 449; A von Ziegler, 'Transfer of Rights and Transport Documents' http://www.uncitral.org/pdf/english/congress/vonZiegler.pdf accessed 09.12.2013; Sturley and others (n 26) para 10.024 *et seq.*; C Debattista, 'Transfer of Rights' in Y Baatz and others, *The Rotterdam Rules: A Practical Annotation* (Informa 2009) para 58-05 *et seq.*; R Williams, 'Transport Documentation- the New Approach' in R Thomas (ed), *A New Convention for the*

is not enough to have contractual liabilities imposed. Even though such person becomes the holder of the negotiable transport document and is entitled to receive delivery of the goods, if he does not exercise any contractual rights he will not obtain liabilities against the carrier. Finally, the consignee will be liable only for obligations imposed on it by the carriage contract to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document.[126] Therefore, obligations imposed by oral agreements or separate written contracts, which are not incorporated in the transport documents, cannot be transferred to the consignee.[127] For example, assuming the transport document states that the consignee must return the containers to the carrier and all requirements listed in Article 58 are met, if the consignee fails to return the containers to the carrier and the carrier sustains loss or damage, the carrier can sue the consignee under the Convention. But to do that it firstly needs to identify who the consignee is.

The Rotterdam Rules regulate the transfer of liabilities only in cases where a negotiable transport document is issued; when there is a non-negotiable transport document or no transport document is issued at all, transfer of liabilities is left to the applicable national law.[128] It must be noted that when a person becomes the consignee, who is entitled to obtain delivery of the goods, because of such status some obligations under Chapter 9 of the Convention are imposed.[129] Without any need to be transferred, those obligations directly arise on the consignee i.e. by being the consignee the person directly becomes subject to obligations regulated in Chapter 9.

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[126] For instance, in practice, in order to impose liabilities upon the third parties, the bills of lading usually contain a merchant clause. Such as cl 1 of BIMCO Conlinebill 2000 states that the term merchant includes " the shipper, the receiver, the consignor, the consignee, the holder of the Bill of Lading, the owner of the cargo and any person entitled to possession of the cargo". Depending on the interpretation of national courts, the holders could be imposed liabilities through such clauses. See Lamont-Black (n 34) 400-402; Debattista, 'Delivery of the Goods' (n 34) para 58.09.

[127] Sturley and others (n 26) para 10.035; Williams (n 125) 222.

[128] In the *travaux préparatoires*, the issue of transfer of the liabilities when no negotiable transport document is issued was also discussed but eventually it was left to applicable national law. See UN Doc., A/CN.9/526 paras 143-146; UN Doc., A/CN.9/576 paras 212-213; UN Doc., A/CN.9/642 para 132. Under English law, in respect of liabilities of the third party, s. 3 of COGSA 1992 applies to bills of lading, sea waybills and ship's delivery orders. According to that section, the person becomes subject to the same liabilities under the contract as if he had been a party to that contract in cases where he "(a) takes or demands delivery from the carrier of any of the goods to which the document relates;(b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or (c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods".

[129] Sturley and others (n 26) paras 2.056-2.057.

For instance, pursuant to Article 43, if the consignee demands delivery of the goods it has to accept the delivery.[130] Under this provision, the obligation is imposed directly on the consignee irrespective of the types of transport document, and if it fails to perform its obligation under Article 43, the carrier can bring an action against him.[131] Assuming that there is a non-negotiable transport document stating the name of the consignee, however the unpaid shipper redirects the goods to another consignee without notifying the carrier, and although the named consignee is aware of the replacement it still demands delivery of the goods. But when the goods arrive the named consignee does not show up to take delivery, and the carrier has to store the goods and bears extra costs. In such a case, before bringing an action on the basis of breach of Article 43 against the person, who has demanded but does not accept delivery, the carrier needs to be sure whether it is the true consignee or not.

Lastly, a judicial or arbitral proceeding against the consignee for claims or disputes arising from a breach of an obligation under the Convention must be instituted within the 2-year time bar.[132] As with the shipper/documentary shipper, if the parties have agreed a longer time bar such agreement will be void, as Article 79(2) expressly states that any term directly or indirectly increases the consignee's obligations and liabilities will be void.[133] Consequently, to bring a claim under the Convention, the consignee must be identified and sued before the expiration of the 2-year time bar.

2.2- Appling as a Defence

2.2.1- Identification of the Carrier

The issue of identification of the carrier can be used as a defence for lack of title to sue in cases where the action has to be brought by the carrier itself or the carrier's successor, such as an insurance company, but instead, it is brought by someone else. Identification of the carrier for the purpose of making a defence might have vital importance for the following parties; the shipper, documentary shipper and consignee.

[130] Art 43 of the Rotterdam Rules; Diamond (n 81) 509; Debattista, 'Delivery of the Goods' (n 34) para 43-01 *et seq.*
[131] Debattista, 'Delivery of the Goods' (n 34) para 43-02.
[132] Art 62(1) the Rotterdam Rules. For further on Art 62(1) see above part 2.1.1.
[133] Art 79(2) of the Rotterdam Rules; Lorenzon, 'Validity of Contractual Terms' (n 88) para 79-05; Sturley and others (n 26) para 13-026; Lamont-Black (n 34) 405. Also see Above part 2.1.3.

The shipper is the counterparty of the carrier under a contract of carriage and in the *travaux préparatoires*, it was discussed that the shipper's liability should arise only in the context of the contractual relationship between him and the carrier, and the Convention should address the shipper's liability to other parties such as maritime performing parties.[134] The former draft articles regulated the shipper's liability not only to the carrier but also to a consignee, controlling party and maritime performing party; however it was concluded that the Convention should focus on the contractual relationship between the carrier and the shipper, thus the portion related to the shipper's liability against third parties was deleted from the final text of the Rotterdam Rules.[135]

Pursuant to the final version of the Convention, the chapeau of Chapter 7, which regulates the shipper's obligations and liabilities, explicitly shows that the shipper's obligations and liabilities arise only towards the carrier; therefore the shipper can only be sued by the carrier under the Rotterdam Rules.[136] Additionally, Article 55 regulates the obligation of the shipper on providing information, instructions and documents relating to the goods.[137] Under Article 55, the performing party can also request information, instructions and documents relating to the goods; however as the chapeau of the provision expressly shows, the duty is owed merely to the carrier. Although third parties cannot sue the shipper under the Rotterdam Rules, they can still apply general tort law or bailment under the applicable national law.[138]

Also, Article 33 expressly indicates that the documentary shipper is subject to the same obligations and liabilities as imposed on the contractual shipper in Chapter 7

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[134] Art 1(8) of the Rotterdam Rules; UN Doc., A/CN.9/552 para 144; UN Doc., A/CN.9/WG.III/WP.55 paras 25-27; UN Doc., A/CN.9/591 paras 116, 120,140,153,165-166; UN Doc., A/CN.9/WG.III/WP.67 para 2.

[135] Draft article 29 in UN Doc., A/CN.9/WG.III/WP.32; UN Doc., A/CN.9/552 para 144; A/CN.9/WG.III/WP.39 n 77; draft article 31 in UN Doc., A/CN.9/WG.III/WP.56; UN Doc., A/CN.9/591 paras 140, 165-166.

[136] The chapeau of Chapter 7; M Bridge (ed), *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2010) para 18-014; Lorenzon, 'Obligations of the Shipper to the Carrier' (n 32) para 30-02; Baughen, 'Obligations Owed by the Shipper to the Carrier' (n 32) 185; Fujita, 'Shipper's Obligations and Liabilities under the Rotterdam Rules' (n 32) 4; TJ Schoenbaum, 'An Evaluation of the Rotterdam Rules from the US' (2011) 17(4) JIML 274, 287. It must be added that pursuant to Article 34 the shipper is also liable against the carrier for the acts or omission of its employee, agent or independent contractor.

[137] Art 55 of the Rotterdam Rules.

[138] UN Doc., A/CN.9/WG.III/WP.67 para 2.

and Article 55.[139] As with the contractual shipper, under the Convention, the liability of the documentary shipper arises only against the carrier; therefore even if a person other than the carrier sustains loss or damage caused by the contractual shipper or documentary shipper's breach of obligations, that person cannot sue those parties under the Convention but can of course sue in tort or bailment under the applicable national law.[140]

For instance, assuming that dangerous goods are carried on a chartered ship, and the charterer is the contractual carrier, whereas the shipowner is the maritime performing party. Pursuant to Article 32, the shipper must inform the carrier about the dangerous nature and character of the goods in a timely manner before they are delivered to the carrier, and because of the effect of Article 33(1), the documentary shipper has the same obligation towards the carrier.[141] However, the shipper and documentary shipper do not inform the carrier about the dangerous nature of the goods, which explode during the journey. In a scenario like this, even if the ship and the goods are damaged because of dangerous cargo, only the carrier/charterer can sue the shipper/documentary shipper under the Rotterdam Rules. The shipowner or any person other than the carrier, such as the consignee, who sustains loss or damage caused by the shipper/documentary shipper's breach, cannot sue them under the Rotterdam Rules. In such a case, if the action is brought by a person other than the carrier, the shipper and documentary shipper can make a defence on the basis of lack of title to sue but to do that they might firstly need to identify who the carrier is.

Also, it must be added that the Convention addresses the legal position of the consignee under the contract of carriage, which is concluded between the carrier and the shipper, and as in the case of the shipper and documentary shipper, the consignee's liability will arise only against the carrier.[142] Therefore, if the consignee

[139] Arts 1(9), 33(1) of the Rotterdam Rules; Above part 2.1.3.
[140]Article 30 of the Rotterdam Rules states that the shipper is liable for "loss or damage sustained by the carrier" and Art 33 states that the documentary shipper is imposed the same obligations and liabilities as the shipper. See Baughen, 'Obligations Owed by the Shipper to the Carrier' (n 32) 185; Fujita, 'Shipper's Obligations and Liabilities under the Rotterdam Rules' (n 32) 4; Schoenbaum (n 136) 287.
[141] Arts 32-33(1) of the Rotterdam Rules.
[142]As Sturley pointed out, the Convention does not contain a general provision, on the basis of the consignee's liability against the carrier but depending on the interpretation of the national court Article

is sued by a person other than the carrier it can make a defence on the basis of lack of title to sue. For example, pursuant to Article 13(1), unloading the goods is one of the obligations of the carrier; however Article 13(2) expressly shows that if the shipper and the carrier have agreed so, the goods must be unloaded by the shipper, the documentary shipper or the consignee.[143] In such cases, for instance, if there is a negotiable transport document that satisfies the requirements indicated in Article 58(2), the consignee must unload the goods.[144] If the consignee fails to unload the goods, causing delay, and the carrier sustains extra costs, the consignee would be held liable against the carrier under the Convention. In such a case, the consignee must be sued by the carrier; however if the action is brought someone else, such as a maritime performing party who is not a party to the contract of carriage, then the consignee might make a defence on the basis of lack of title to sue, by identifying that the claimant is not the carrier.

2.2.2- Identification of the Maritime Performing Party

As explained above,[145] under the Rotterdam Rules, the cargo interests owe obligations only towards the carrier. And although Article 19(1) expressly indicates that maritime performing parties are subject to the same obligations and liabilities as imposed on the carrier, and they are given the defences and limits available to the carrier under the Rotterdam Rules, as Bridge pointed out, the Convention does not confer any right on maritime performing parties.[146] Therefore maritime performing parties cannot sue cargo interests under the Convention, but of course they can bring actions in tort or bailment under the applicable national law, if the necessary prerequisites are met. Under the Rotterdam Rules, cargo interests can only be sued by carriers; therefore the explanations made above regarding using the identification of the carrier as a defence can apply here too.[147] Accordingly, if the action is brought by the maritime performing party, cargo interests can raise a defence on the basis of lack of title to sue,

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30, which regulates the basis of liability of the shipper and documentary shipper, would also apply to determine the basis of liability of the consignee. See Sturley and others (n 26) para 8.019.

[143] Art 13 of the Rotterdam Rules.

[144] Art 58(2) of the Rotterdam Rules; Above part 2.1.4.

[145] Above part 2.2.1.

[146] Art 19(1) of the Rotterdam Rules; *Benjamin* (n 136) para 18-014. See also Above part 2.1.2.

[147] Above part 2.2.1.

by identifying that the claimant is the maritime performing party rather than the carrier.

2.2.3- Identification of the Shipper and Documentary Shipper

When an action is brought against the carrier, identification of the shipper and documentary shipper may become important for the carrier, in order to make a defence on the basis of lack of title to sue. As the carrier's counterparty under the contract of carriage, the shipper is conferred some rights and defences towards the carrier, and when the carrier breaches any of its obligations imposed on it by the Convention, the shipper can sue him.[148] Furthermore, Article 33(1) expressly states that the documentary shipper is conferred the same rights and defences given to the shipper in Chapter 7 and Chapter 13.[149] In respect of the obligations of the carrier, unlike the obligations of the shipper and documentary shipper, the Convention does not refer to any specific party against whom the carrier's obligations arise. However, from the wording of some provisions, it is submitted that some obligations of the carrier arise only against a specific person, such as the requirement that the carrier must give the transport document to the shipper, or the documentary shipper if the shipper consents (Article 35); or that the carrier must deliver the goods to the consignee (Article 11).[150] Therefore, for instance, regarding claims brought on the basis of the carrier's failure to perform its documentary obligation, the action must be brought by the shipper or documentary shipper, otherwise the carrier can successfully raise a defence on the basis of lack of title to sue, by demonstrating that the claimant is not the shipper or documentary shipper.

Also, the Rotterdam Rules introduce a specific provision related to transfer of the contractual rights in cases where negotiable transport documents are issued.[151]

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[148] For the rights and defences of the shipper, for instance, see Art 35, Chapters 7,13 of the Rotterdam Rules, and for the obligations and liabilities of the carrier, for instance, see Chapter 4 of the Rotterdam Rules.

[149] Art 33(1) of the Rotterdam Rules; Lorenzon, 'Obligations of the Shipper to the Carrier' (n 32) para 33.04.

[150] Arts 11, 35 of the Rotterdam Rules; Below parts 2.3.3-4.

[151] Art 57 of the Rotterdam Rules. For further see Thomas, 'A Comparative Analysis of the Transfer of Contractual Rights' (n 124) 446-448; Sturley and others (n 26) para 10.009 *et seq.*; Debattista, 'Transfer of Rights' (n 125) para 57-01 *et seq.*; Lamont-Black (n 34) 398-400; Williams (n 125) 216 *et seq.*

According to Article 57, the rights incorporated in the negotiable transport document can be transferred to third parties in the following ways: (i) duly or blank endorsement and transfer of the document if there is an order document; or (ii) transfer of the transport document only, without endorsement if there is a bearer, blank endorsed document or if the document is being transferred between the holder and the named person. When the negotiable transport document is transferred to a third party, as the holder[152] of the transport document, that person obtains the rights incorporated on the transport document and can sue the carrier if it breaches any of its obligations. Under the Convention, it is not clear whether the transferor's rights are extinguished or remain alive; the issue will depend on the applicable national law.[153] Under English law, where there is a bill of lading, section 2(5) of COGSA 1992 clearly states that the transferor's rights cease after the transfer of the document.[154] Therefore, when the shipper transfers the negotiable transport document to the transferee, it cannot sue the carrier anymore; but if it does, then the carrier can raise a defence on the basis of lack of title to sue by demonstrating that the claimant is the shipper rather than the consignee.

It should be noted that Article 57 only applies to the negotiable transport document; thus in cases of non-negotiable transport documents, the issue of transfer of rights will depend on the applicable national law.[155] In such cases, lack of title to sue on the basis of the identity of the shipper might not be a sufficient defence if the applicable national law is English law. Under English law, pursuant to section 2(1)(b) of COGSA 1992, the rights under a non-negotiable transport document are transferred to the named consignee as soon as the document is signed, but even though the rights are transferred to the named consignee, section 2(5) of COGSA 1992 states that the rights of the original shipper will not be extinguished.[156] Therefore, under English law, provided the document in question is a non-negotiable transport document, both the

[152] Art 1(10) of the Rotterdam Rules. For further details on holder, see Chapter 8.2.3.
[153] Thomas, 'A Comparative Analysis of the Transfer of Contractual Rights' (n 124) 447, 450.
[154] S. 2(5) of COGSA 1992; R Aikens and others, *Bills of Lading* (1st edn 2006) para 8.35; Thomas, 'A Comparative Analysis of the Transfer of Contractual Rights' (n 124) 442; *Scrutton* (n 24) para 2.013.
[155] UN Doc., A/CN.9/526 paras 143-146; UN Doc., A/CN.9/576 paras 212-213; UN Doc., A/CN.9/642 para 132.
[156] S. 2(1)(b), 2(5) of COGSA 1992; *AP Moller-Maersk A/S v Sonaec Villas Cen Sad Fadoul* [2010] EWHC 355 (Comm) para 37; Law Com. No. 196, Scot. Law Com. No.130 (1991) para 5.23. Also see *Carver* (n 54) paras 8-002, 8-013; Aikens and others (n 154) para 8.74 *et seq*.; Thomas, 'A Comparative Analysis of the Transfer of Contractual Rights' (n 124) 443; *Benjamin* (n 136) para 18-194 *et seq*.; *Scrutton* (n 24) paras 2.023-2.026.

shipper and the named consignee can have title to sue and identification of the shipper will not have any effect when the action is brought against the carrier.

Lastly, the issue of identification of the shipper and documentary shipper may have a vital role to play where the carrier builds its defence upon the evidentiary effect of contract particulars. The evidentiary effect of contract particulars varies depending on whether the transport document is in the hands of the shipper or a third party. Pursuant to Article 41, in the hands of the shipper the contract particulars are *prima facie* evidence, therefore this can be rebutted by the carrier, whereas in the hands of the third party, depending on the types of transport document, some or all of the contract particulars will be conclusive evidence and the carrier cannot prove the contrary.[157] For instance, assuming that the amount of the delivered cargo is different to the amount indicated on the transport document. In such a case, if the claimant is the shipper, the carrier can prove to the contrary of the term written in the transport document; however, if the claimant is a person other than the shipper, the carrier may not prove the contrary. Therefore depending on whether the claimant is the shipper or not, the carrier can or cannot rebut the terms stated on the transport document.

2.2.4- Identification of the Consignee

The Rotterdam Rules do not specify to whom the carrier's obligations arise. However as pointed out below, [158] some of the obligations of the carrier arise only in relation to a specified party. Among the carrier's obligations, the delivery of goods is specified as being directed to the consignee, who is defined as the person entitled to delivery of the goods.[159] Accordingly, if the carrier delivers the goods to someone other than the consignee, then the consignee can sue the carrier on the basis of misdelivery. In some

[157] Art 41 of the Rotterdam Rules. For further see Sturley and others (n 26) paras 7.079-7-96; F Lorenzon, 'Transport Documents and Electronic Transport Records' in Y Baatz and others, *The Rotterdam Rules: A Practical Annotation* (Informa 2009) para 41.01-41.05; *Carver* (n 54) 91 *et* seq.; B Bulut, 'The Evidentiary Effect of the Contract Particulars under the Rotterdam Rules' (2012) 5(1) A. Bar Rev. 25 *et seq.* Also, under English law, it has been accepted that in the hands of the shipper the bill of lading is mere receipt whereas in the hands of the third party it is a contract of carriage. See *Crooks v Allan* (1879) 5 QBD 38; *Leduc v Ward* (1880) 20 QBD 475; *Rodocanachi v Milburn* (1886) 18 QBD 67 (CA); *The Ardennes* [1951] 1 KB 55; *President of India v Metcalfe Shipping Co Ltd* [1969] 2 Lloyd's Rep 476; *George Kallis Manufactures Ltd. v Success Insurance Ltd* [1985] 2 Lloyd's Rep 8; *Cho Yang Shipping Co Ltd. v Coral (UK) Ltd* [1997] 2 Lloyd's Rep 641.
[158] Below parts 2.3.3-4.
[159] Arts 1(11), 11 and 13 of the Rotterdam Rules.

cases the consignee and the shipper can be the same person; however if they are not, the action for misdelivery must be brought by the consignee.[160] If the action is brought by the shipper instead of the consignee, the carrier can raise a defence on the basis of lack of title to sue.

Also, in cases where the contractual rights are transferred, identification of the consignee might also arise as a defence.[161] As in the case of raising identification of the shipper as a defence, due to the effect of Article 57, which regulates the transfer of the contractual rights when a negotiable transport document is issued, the carrier can raise a defence on the ground of lack of title to sue, on the basis of the identify of the consignee.[162] As stated above,[163] the Rotterdam Rules leave the destiny of the transferor's rights after transfer of the negotiable transport document to the applicable national law, and pursuant to section 2(5) of COGSA 1992, where there is a bill of lading the transferor's rights cease, under English law.[164] Accordingly, if the applicable national law is English law, after transfer of the negotiable transport document in accordance with the rules in Article 57, the transferor's rights cease; therefore instead of the consignee, if an action is brought by the transferor against the carrier, the carrier can raise a defence on the basis of lack of title to sue by identifying that the claimant is not the consignee.

2.3- Performance of Some Obligations

2.3.1- Identification of the Carrier

Identification of the carrier may have a role to play on the issue of performance of the cargo interests' obligations. As stated above,[165] under the Rotterdam Rules the shipper, documentary shipper and consignee owe obligations only towards the carrier;

[160] Arts 1(8), 1(11) of the Rotterdam Rules. For identification of the shipper and consignee see Chapters 7 and 8 respectively.
[161] As arisen in *Standard Chartered Bank v Dorchester LNG Ltd (The Erin Schulte)* [2013] EWHC 808 (Comm). For details about this case see Chapter 8.2.3.
[162] Art 57 of the Rotterdam Rules; Above part 2.2.3.
[163] Above part 2.2.3.
[164] S. 2(5) of COGSA 1992. In respect of non-negotiable transport document the rights of the original shipper will not be extinguished thus identification of the consignee does not seem to have any role to make a defence on the basis of lack of title to sue. See Above part 2.2.3.
[165] Above part 2.2.1.

therefore in order to properly perform some of their obligations, those parties need to know who the carrier is. For instance, pursuant to Article 32(a), the shipper shall inform the carrier about the dangerous nature and character of the goods.[166] Accordingly, if the shipper informs someone else (e.g. a performing party) rather than the carrier, such performanc may not be deemed as proper performance, and the shipper's liability would arise against the carrier if the carrier sustains loss or damage as stated in Article 30.[167] Particularly in door-to-door carriage, the goods are usually received by a performing party and if the shipper/documentary shipper does not know who the carrier is, they might not properly perform their obligations against the carrier. Likewise in practice, some bills of lading require consignees to return containers to carriers and to properly perform their obligation under the transport documents, consignees need to be sure about the identity of the carrier.[168] Consequently, in order not to be held liable against the carrier on the basis of failure to perform their obligations, the shipper, documentary shipper and consignee need to know who the carrier is before performing their obligations.

2.3.2- Identification of the Maritime Performing Party

As indicated above,[169] because the shipper, documentary shipper and consignee have obligations only against the carrier under the Rotterdam Rules, it can be submitted that in respect of performance of obligations, identification of the maritime performing party does not seem to have vital importance. However, identification of the maritime performing party may have an ancillary effect with regard to performance of the cargo interest's obligations towards the carrier. For instance, under Article 31(1), the shipper is obliged to provide some information to the carrier for compilation of contract particulars and the issuance of the transport document.[170] The shipper needs to be sure that the person to whom it provides the information is

[166] Art 32(a) of the Rotterdam Rules. It should be noted that although the provision states that the shipper must inform the carrier, the addressee may not need to be the carrier itself; informing a person who has acted as the carrier's agent would be deemed as informing the carrier. The Rotterdam Rules do not touch agency issues, therefore depending on the applicable law, the shipper may properly perform its obligation under Article 32(a) by informing the carrier's agent. However, to do that the shipper needs to know who the carrier is, and whether the person has acted as the carrier's agent.
[167] Art 30 of the Rotterdam Rules.
[168] For instance, see BIMCO Multidoc 95, cl 18; BIMCO Conlinebill 2000, cl 18.
[169] Above part 2.2.1.
[170] Art 31(1) of the Rotterdam Rules.

the carrier, and identifying the person, whether the carrier or a maritime performing party, would help the shipper to properly perform its obligation against the carrier.

2.3.3- Identification of the Shipper and Documentary Shipper

In order to adequately perform some of its obligations, the carrier may need to know who the shipper and the documentary shipper are. For instance, pursuant to Article 35, the carrier is under an obligation to issue a transport document, unless the carrier and the shipper have agreed or there is custom, usage or practice of the trade not to use a transport document.[171] The provision explicitly states that only the shipper, or if the shipper consents, the documentary shipper, is entitled to obtain the transport document from the carrier.[172] In practice, both the shipper and documentary shipper may have a legitimate interest to obtain the transport document, and when the carrier's obligation to issue a transport document arises, it needs to figure out to whom it has to deliver the transport document to properly perform its documentary obligation.[173]

Furthermore, in order to properly handle and carry the goods, the carrier may need information and instructions, and pursuant to Article 28, the shipper and because of the effect of Article 33(1) the documentary shipper, are obliged to give information and instructions to the carrier.[174] Also, the Convention introduces the concepts of "controlling party" and "right of control", and under Article 50(1) the controlling party is given rights to give or modify instructions, obtain delivery of the goods, and replace the consignee.[175] The Convention indicates that in cases where there is a non-

[171] Art 35 of the Rotterdam Rules; Chapter 3.3.
[172] For detailed explanations see T Fujita, 'Transport Documents and Electronic Transport Records' in A Von Ziegler, J Schelin, S Zunarelli, *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Wolters Kluwer 2010) 165; B Bulut, 'Being An FOB Seller under the Rotterdam Rules: Better or Worse?' (2014) 49(3) ETLJ 291, 297-298.
[173] The documentary shipper might want to obtain the transport document to guarantee the payment whereas the shipper might want the document to control the goods. See UN Doc., A/CN.9/WG.III/WP.62 paras 5, 9; UN Doc., A/CN.9/594 paras 219-220.
[174] Arts 28, 33(1) of the Rotterdam Rules.
[175] Arts 1(12), 1(13), and 50(1) of the Rotterdam Rules. For explanations on the definition of controlling party see Chapter 8.2.1. For further details on the right of control see C Debattista, 'Rights of the Controlling Party' in Y Baatz and others, *The Rotterdam Rules: A Practical Annotation* (Informa 2009) para 50-01 *et seq.*; Diamond (n 81) 523; Sturley and others (n 26) para 9.001 *et seq.*; G van der Ziel, 'Delivery of the Goods, Rights of the Controlling Party and Transfer of Rights' (2008) 14(6) JIML 597, 601; S Zunarelli, C Alvisi, 'Rights of the Controlling Party' in A Von Ziegler, J Schelin, S

negotiable transport document or there is no transport document at all, the shipper is qualified as the controlling party; therefore the carrier must be instructed by the shipper, not by someone else. However, if the shipper designates, the documentary shipper can be qualified as the controlling party.[176] On the other hand, where there is a negotiable transport document, the holder of the transport document is the controlling party, and because of the effect of Article 35, which states that the shipper is entitled to obtain the transport document, the shipper becomes the holder and the controlling party- at least until the transfer of the negotiable transport document.[177] Furthermore, pursuant to Article 55, the shipper or documentary shipper is obliged to provide information, instructions or documents relating to the goods to the carrier on the request of the carrier or a performing party when the controlling party cannot be determined.[178] Accordingly, the carrier and performing party may need to identify the shipper or documentary shipper to request necessary information, instructions and documents.

More importantly, under the Rotterdam Rules, one of the duties of the carrier is to deliver the goods to the consignee, and identification of the shipper and documentary shipper may have crucial importance over the issue of identification of the consignee and the performance of the carrier's delivery obligation. [179] Since, pursuant to Articles 45-47, where the carrier struggles to identify the consignee, it may request instructions from the shipper or documentary shipper.[180] Consequently, it can be stated that performance of some of the carrier's obligations are directly related to the identification of the shipper and documentary shipper, therefore the carrier needs to know who the shipper and documentary shipper are before performing its obligations.

2.3.4- Identification of the Consignee

Zunarelli, *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Wolters Kluwer 2010) 220-223.

[176] Art 51(1)-(2) of the Rotterdam Rules. For further see Debattista, 'Rights of the Controlling Party' (n 175) para 51-01 *et seq*.; Sturley and others (n 26) para 9.018 *et seq*.; Diamond (n 81) 524; van der Ziel (n 175) 602; Zunarelli and Alvisi (n 175) 223 *et seq*.

[177] Arts 35, 51(3) of the Rotterdam Rules.

[178] Art 55 of the Rotterdam Rules.

[179] Below part 2.3.4; Chapter 8.2.

[180] Arts 45-47 of the Rotterdam Rules.

The Rotterdam Rules contain specific provisions related to the carrier's delivery obligation; pursuant to Article 11, the carrier is obliged to "carry the goods to the place of destination and deliver them to the consignee", and furthermore, under Article 13, delivery of the goods is listed as one of the special obligations of the carrier.[181] As Article 11 expressly states, the carrier must deliver the goods to the consignee, who is defined as "a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record", in accordance with the rules regulated in Articles 45-47 on delivery of the goods.[182] Moreover, according to Article 26, the carrier would be held liable against the cargo interests only if the breach occurs within its period of responsibility, and Article 12 indicates that the carrier's period of responsibility begins when the goods are received for the carriage and ends when the goods are delivered.[183] Therefore, if the goods are damaged or lost after they have been delivered to the consignee, the carrier will not be held liable by the cargo interests. Except for the cases listed in Article 12(2)(b)[184] and Article 48,[185] in order to properly perform his delivery obligation and end his period of responsibility, the carrier must deliver the goods to the right person, i.e. the consignee, its authorised agent or representative. But to do so the carrier firstly needs to identify who the consignee is.

It should be added that in current practice, even though seldom, in order to escape liability for misdelivery, carriers may add some exception or limitation clauses to the carriage contracts. Under English law, such clauses are considered effective; however, if they are widely worded, the language is not clear and misdelivery is not expressly

[181] Arts 11, 13 of the Rotterdam Rules; Sturley and others (n 26) paras 5.008 *et seq*., 8.002; Tsimplis, 'Obligations of the Carrier' (n 81) paras 11.05-11-08, 13.01-13-05; Diamond (n 81) 468 *et seq*. For further details on the notion of delivery, see Chapter 8.1.
[182] Arts 1(11), 45-47 of the Rotterdam Rules; Chapter 8.2.
[183] Arts 12, 26 of the Rotterdam Rules.
[184] Art 12(2)(b) of the Rotterdam Rules. According to this provision, the carrier's period of responsibility ends when he hands over the goods to an authority or a third party as required by the law or regulation of the place of destination. For further about the period of responsibility, see Tsimplis, 'Obligations of the Carrier' (n 81) para 12-01 *et seq*.; A von Ziegler, 'The Liability of the Contracting Carrier' (2008-2009) 44 Tex. Int'l L. J 329, 334; Diamond (n 81) 465; Berlingieri, 'Revisiting the Rotterdam Rules' (n 81) 593.
[185] Article 48 of the Rotterdam Rules regulates the cases, where the goods are deemed to remain undelivered. In such cases, even the goods are not delivered to the consignee the carrier's period of responsibility ends when he acts in accordance with the rules regulated in Article 48. For further details on undelivered goods, see Sturley and others (n 26) para 8.054 *et seq*.; Diamond (n 81) 521; Berlingieri, 'Revisiting the Rotterdam Rules' (n 81) 634; Debattista, 'Delivery of the Goods' (n 34) para 48-01 *et seq*.

referred to, then the clauses are not given any effect.[186] It seems that under the Rotterdam Rules, carriers would not escape liability for misdelivery through such clauses, since pursuant to Article 79, any term directly or indirectly excluding or limiting the carrier's obligations and liabilities will be null and void.[187] Because of the effect of Article 79, carriers cannot rely on exception and limitation clauses if the Convention applies; therefore, in order not to face a claim on the basis of misdelivery under the Convention, the carrier has to carefully identify the consignee before delivering the goods.

Lastly, pursuant to Article 51, the consignee can be the controlling party by transfer of the transport document or by designation of the shipper.[188] As with the shipper and documentary shipper,[189] identification of the consignee might be important in order to request information, instructions and documents relating to the goods from the consignee, where it is the controlling party.

2.4- Determination of the Place of Jurisdiction and Arbitration

When a dispute arises out of an international carriage of goods by sea transaction, the claimant, who wants to recover its damages by bringing an action, will want to sue the defendant in the most advantageous place, in respect of applicable national and international law, limitation of liability, procedural rules, legal costs, speed of proceeding and so forth.[190] Depending on the identity of the defendant, the place of jurisdiction and arbitration may vary; therefore in order to determine the rightful and most advantageous place for jurisdiction or arbitration, the claimant needs to identify whom to sue first.

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[186] *Chartered Bank of India, Australia and China v British India Steam Navigation Co. Ltd* [1909] AC 369; *Sze Hai Tong Bank v Rambler Cycle Co Ltd* [1959] AC 576, 586; *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556; *The Antwerpen* [1994] 1 Lloyd's Rep 213; *The Sormovskiy 3068* [1994] 2 Lloyd's Rep 266; *M.B. Pyramid Sound N.V. v Briese Schiffahrts G.M.B.H. and Co. K.G. M.S. "SINA" and Latvian Shipping Association Ltd. (The Ines)* [1995] 2 Lloyd's Rep 144; *Motis Exports Ltd v Dampskibsselskabet AF 1912 A/S* [1999] 1 Lloyd's Rep 837 (QBD). See also Chapter 8.2.

[187] Art 79 of the Rotterdam Rules; Baughen, 'Misdelivery Claims' (n 34) para 9.70; Lorenzon, 'Validity of Contractual Terms' (n 88) para 79-01 *et seq*.; Sturley and others (n 26) para 13-015 *et seq*.

[188] Arts 1(13), 51 of the Rotterdam Rule; Chapter 8.2.1.

[189] Above part 2.3.3.

[190] Y Baatz, 'The Conflict of Laws' in Y Baatz (ed), *Maritime Law* (Informa 2014) 2; MF Sturley, 'Jurisdiction and Arbitration under the Rotterdam Rules' (2009) 14 Unif. L. Rev. 945, 946.

2.4.1- Identification of the Carrier and Maritime Performing Party

The Rotterdam Rules contain special provisions in Chapter 14 and Chapter 15 dealing with the place of jurisdiction and place of arbitration, respectively.[191] However, under the Convention, the application of the provisions in Chapters 14-15 depends on whether a Contracting State declares to be bound with those provisions.[192] Subject to cases where there is a choice of court agreement, which is binding on both parties as regulated in Article 67,[193] the provisions related to place of jurisdiction only apply when an action is brought against the carrier or/and maritime performing party. Therefore the provisions do not apply to actions brought against cargo interests.[194] Similarly, subject to cases where there is an arbitration agreement, which is binding on both parties as regulated in Article 75(3),[195] the provisions related to place of arbitration only apply to arbitration proceedings brought against the carrier, relating to matters dealt with under the Convention.[196]

With regard to actions against the carrier, pursuant to Article 66, where the contract of carriage does not contain an exclusive choice of court agreement[197] or there is no agreement for jurisdiction after the dispute has arisen,[198] the carrier can be sued in a

[191] Chapters 14 -15 of the Rotterdam Rules. For the Working Group discussion on Chapters 14-15 see UN Doc., A/CN.9/510 para 61; UN Doc., A/CN.9/572 paras 110-150; UN Doc., A/CN.9/576 paras 110-175; UN Doc., A/CN.9/591 paras 9-84, 95-103; UN Doc., A/CN.9/616 paras 245-270, 273-275; UN Doc., A/CN.9/642 paras 180- 201, 207-211; UN Doc., A/63/17 paras 212-225, 227-228. The Hague and Hague-Visby Rules do not contain provisions on place of jurisdiction and arbitration but the Hamburg Rules regulate the issue of place of jurisdiction and arbitration in Articles 21-22.

[192] Arts 74, 78 and 91 of the Rotterdam Rules. For EU Member States, the European Commission has the sole authority to make decisions for its Member States on the jurisdiction chapter. See Y Baatz, 'Jurisdiction and Arbitration' in R Thomas (ed), *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa 2010) para 16-11; Sturley and others (n 26) para 12-021; Sturley, 'Jurisdiction and Arbitration under the Rotterdam Rules' (n 190) 949 *et seq*.

[193] Art 67 of the Rotterdam Rules. When the certain requirements indicated in this provision are met the carrier must sue the cargo interest in the place chosen by the parties.

[194] Chapter 14 of the Rotterdam Rules. See also UN Doc., A/CN.9/572 paras 116-119; UN Doc., A/CN.9/576 paras 112-114; M Alba-Fernandez, 'Jurisdiction' in A Von Ziegler, J Schelin, S Zunarelli, *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Wolters Kluwer 2010) 287.

[195] Art 75(3) of the Rotterdam Rules. When the requirements indicated in Article 75(3) of the Rotterdam Rules are met the carrier must sue the cargo interest in the place chosen by the arbitration agrement.

[196] Chapter 15 of the Rotterdam Rules. Maritime performing parties do not have any contractual relationship with the cargo interests therefore Chapter 15 only addresses to the carriers. See Sturley and others (n 26) para 12.071 *et seq*.; Y Baatz, 'Jurisdiction' in Y Baatz and others, *The Rotterdam Rules: A Practical Annotation* (Informa 2009) para 75-01 *et seq*.; Baatz, 'Jurisdiction and Arbitration' (n 192) para 16-53 *et seq*.

[197] Art 67 of the Rotterdam Rules.

[198] Art 72 of the Rotterdam Rules.

competent court,[199] which is situated in one of the following places: the carrier's domicile; the place of receipt/delivery of the goods agreed in the contract of carriage; the port of initial loading/final unloading; or the court(s) designated by an agreement between the shipper and the carrier.[200] As seen, the Rotterdam Rules allow the shipper and the carrier to designate a competent court by agreement, and provided the choice of court agreement satisfies the requirements listed in Article 67(1), the agreement will be exclusive, otherwise the choice of court agreement will only be one of the options listed in Article 66.[201] In practice, choice of court agreements usually select the court(s) located in the carrier's domicile or principal place of business, or the places traditionally suitable for dispute resolution.[202] The reason for stating the carrier's domicile or principal place of business as the place of jurisdiction in the choice of court agreement is because choice of court agreements are usually written on transport documents, which are drafted by carriers on standard forms, therefore carriers usually have the upper hand in choosing the most convenient place for themselves.[203]

In respect of actions brought against the maritime performing party, unless there is agreement after the dispute has arisen as regulated in Article 72, the action must be

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[199] Pursuant to Article 1(30) of the Rotterdam Rules, in order to be qualified as a competent court, the court must be within a Contracting State. Accordingly, if the domicile of the defendant is not in a Contracting State then it will not be qualified as a competent court and the claimant cannot bring the action in the defendant's domicile. Like Article 66, Article 68 also requires the action to be brought in a competent court. However, Article 75(2) does not require the place of arbitration to be in a Contracting State thereby the arbitration proceeding can be commenced in a Non-contracting State. See Sturley and others (n 26) paras 12.023-12.024, 12.065, 12.078; Sturley, 'Jurisdiction and Arbitration under the Rotterdam Rules' (n 190) 954-955, 971, 975; Chuah, 'Impact of the Rotterdam Rules on the Himalaya Clause' (n 96) 310.

[200] Art 66 of the Rotterdam Rules. For further see Alba-Fernandez (n 194) 286 *et seq*.; Sturley and others (n 26) para 12.025 *et seq*. Although Article 66 does not expressly indicates arbitration as an exception when there is an arbitration agreement instead of the provisions related to the place of jurisdiction the provision related to the place of arbitration will apply. See Baatz, 'Jurisdiction' (n 196) para 66-02.

[201] Arts 66, 67 of the Rotterdam Rules; Baatz, 'Jurisdiction' (n 196) para 66-02; Baatz, 'Jurisdiction and Arbitration' (n 192) para 16-30; Alba-Fernandez (n 194) 289, 292.

[202] For instance, BIMCO Conlinebill 2000, cl 4; BIMCO Multidoc 95, cl 5.

[203] Sturley and others (n 26) para 12.041; Baatz, 'Jurisdiction and Arbitration' (n 192) para 16-02; Rolf Herber, 'Jurisdiction and Arbitration – Should the New Convention Contain Rules on these Subjects?' [2002] LMCLQ 405, 406; A von Ziegler, 'Jurisdiction and Forum Selection Clauses and Freedom of Contract in a Modern Law on Carriage of Goods by Sea' http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.swlegal.ch%2FCMSPages%2FGetFile.aspx%3Fdisposition%3Dattachment%26guid%3Df4618dfb-ebd5-4062-af21-8e085b6d0dbe&ei=58HtVL_pNoTWarqjgYAO&usg=AFQjCNHbt6mCAE1WjYvIHZbpKyE-NcGDzA&bvm=bv.86956481,d.d2s, 11, 35 accessed 25.02.2015.

brought in a competent court situated in the maritime performing party's domicile, or the port where the goods are received or delivered by the maritime performing party, or where the maritime performing party performs its activities related to the goods.[204] Article 68 does not list the designated court as one of the options, as maritime performing parties merely have a relationship with the carrier; they do not have any contractual relationship with cargo interests, hence there is no opportunity to make a choice of court agreement.[205] Accordingly, under the Rotterdam Rules, the claimant is given optional places to sue the carrier and the maritime performing party. All those places have connecting factors either with the transaction itself or the carrier and maritime performing party. However, among the places listed in Article 66(a) and Article 68, only the domiciles of the carrier and maritime performing party are related to the identification issue, while the other places are directly linked to the transaction itself.

Likewise, with arbitration, the claimant can commence arbitration proceedings in the place designated for that purpose or one of the places listed in Article 75(2)(b), which are exactly the same places as listed in Article 66(a), unless an exception applies.[206] Again, amongst the places, only the domicile of the carrier and occasionally the place designated for arbitration- for example if the domicile of the carrier is chosen as the place of arbitration-are related to the issue of identification of the carrier. [207] Therefore, in this section of the thesis only, the domiciles of the carrier and the maritime performing party will be explained; other places listed for jurisdiction and arbitration are outside the scope of this work.

Under the Rotterdam Rules, for the legal persons the word "domicile" refers to the statutory seat or place of incorporation or central registered office whichever is applicable, central administration or principal place of business, and for the natural

[204] Art 68 of the Rotterdam Rules; Baatz, 'Jurisdiction' (n 196) para 68-01; Alba-Fernandez (n 194) 300-302; Sturley and others (n 26) paras 12.061-12.065; Zunarelli, 'The Carrier and The Maritime Performing Party in the Rotterdam Rules' (n 26) 1022; Smeele (n 29) 19.
[205] Sturley, 'Jurisdiction and Arbitration under the Rotterdam Rules' (n 190) 971; Sturley and others (n 26) para 12.064.
[206] Art 75(2) of the Rotterdam Rules. For the exception see Art 75(3)-(4) of the Rotterdam Rules.
[207] However, in practice, the place designed for arbitration is usually a neutral place. For instance, even if it does not have any connection factor with the transaction London is a popular place for arbitration in maritime contracts. See W Tetley, 'Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods By Sea' http://www.shippinglaw.ru/upload/iblock/89b/jurisdiction.pdf 38 accessed 30.05.2014.

persons it refers to the habitual residence irrespective of their nationality.[208] According to this definition, more than one place might be qualified as the domicile under the Convention, and the cargo claimant would have a right to bring the action in the most advantageous competent court.[209] For instance, assuming the Rotterdam Rules enter into force and both state A and state B ratify the Convention, with a declaration that Chapter 14 is binding, and the claimant wants to sue the carrier, who has its place of incorporation in state A and principal place of business in state B, as commonly happens in practice. In such a case, the carrier would have more than one domicile, therefore the claimant can sue the carrier in the most advantageous jurisdiction in any of those states where the carrier has its domicile.

Although, the domicile may not have any connection with the transaction, suing the carrier and the maritime performing party in their respective domicile might be beneficial for both claimants and defendants. For the claimant, suing the defendant in its domicile would make enforcement of the decision easier, as the defendant most likely has its assets in its domicile, whereas for the defendant, the domicile would provide a predictable place to defend a suit in its home base, notwithstanding that the transaction has no connection with the domicile.[210] It must be pointed out that although the domicile provides a predictable place for the defendant carrier and maritime performing party, it might not be foreseeable for claimant cargo interests. This is because the location of the domicile varies depending on the identification of the carrier and the maritime performing party, therefore to determine the domicile, the claimant first needs to identify the rightful defendant. For example, assuming that a freight forwarder who has its domicile in state A, and a shipowner who has its domicile in state B, enter into a carriage transaction, and in order to recover its damages, the claimant wants to sue the carrier in its domicile to make the enforcement process easier. In such a situation, the claimant cannot determine the domicile and thus the place of jurisdiction, until it identifies who the carrier is. Depending on whether the freight forwarder or the shipowner is the carrier, either state A or B would be qualified as the place of jurisdiction. Accordingly, it can be submitted that

[208] Art 1(29) of the Rotterdam Rules; UN Doc. A/CN.9/576 para 115.
[209] Alba-Fernandez (n 194) 290; Sturley and others (n 26) para 12.027.
[210] Sturley and others (n 26) paras 12.028, 12.063; Von Ziegler, 'Jurisdiction and Forum Selection Clauses' (n 203) 28.

identification of the carrier and maritime performing party will have a crucial role to play in determining the domicile and the most advantageous place for jurisdiction.

Additionally, pursuant to Article 71(1) of the Rotterdam Rules, if the dispute arises out of a single occurrence, the claimant is allowed to bring a single action against the carrier and the maritime performing party in a competent court listed in both Article 66 and Article 68.[211] Allowing such single actions may give an opportunity to the claimant to sue both the carrier and maritime performing party in its own jurisdiction, which would be less expensive than foreign litigation. In order to determine the place of jurisdiction in accordance with Article 71(1), the claimant firstly needs to know whether only the carrier has performed the carriage, or whether a maritime performing party who has caused loss, damage or delay, has been involved in the carriage process. For instance, assuming the goods are damaged while they are carried on a chartered ship and the cargo interest wants to bring an action to recover its damages. To determine whether the claimant can bring a single action, firstly it must identify the carrier and maritime performing party, if there is any. If, for example, the charterer is the carrier as defined in Article 1(5)[212] and the shipowner is the maritime performing party as defined in Art 1(7),[213] and the dispute arises out of a single occurrence, then the place of jurisdiction might be determined in accordance with Article 71(1). However, without knowing the involvement and identification of the maritime performing party, the place of jurisdiction cannot be determined under Article 71(1), therefore the claimant firstly needs to identify such parties.

2.4.2- Identification of the Shipper/Documentary Shipper and Consignee

As stated above,[214] Chapter 14 merely applies if the Contracting State declares to be bound by it. Even though under the Rotterdam Rules, the shipper, documentary shipper and the consignee can also be sued in addition to the carrier and maritime performing parties, other than in Article 67, the Convention does not say anything relating to the place of jurisdiction, where the action is brought against those parties

[211] Art 71(1) of the Rotterdam Rules; Baatz, 'Jurisdiction' (n 196) para 71-01 *et seq*.; Baatz, 'Jurisdiction and Arbitration' (n 192) para 16-35 *et seq*.; Alba-Fernandez (n 194) 307 *et seq*.
[212] Art 1(5) of the Rotterdam Rules; Chapter 5.1.
[213] Art 1(7) of the Rotterdam Rules; Chapter 6.1.
[214] Above part 2.4.1.

by the carrier.[215] Therefore, if a State does not declare to be bound by Chapter 14 or even if a declaration is made, if the action is brought against the cargo interest and there is no exclusive jurisdiction agreement, the place of jurisdiction will be determined in accordance with the applicable national law. Under English law, as the UK is an EU Member State, jurisdiction is determined in accordance with the Recast Regulation,[216] the revised Lugano Convention[217] or English common law rules, whichever is applicable.[218]

The Recast Regulation aims to provide uniform rules to ensure speed, certainty and predictability for jurisdiction in civil and commercial matters among EU Member States.[219] Under the Recast Regulation, subject to alternative grounds for jurisdiction, such as place of performance of the obligation, and exceptions indicated in the Regulation,[220] jurisdiction is generally based on the defendant's domicile; namely the person domiciled in an EU Member State must be sued in that State, notwithstanding its or the claimant's nationality, or the claimant's domicile.[221] As in the Rotterdam Rules, the word "domicile" is defined as the place where a company or other legal person, or association of natural or legal persons, has its statutory seat, central administration or principal place of business.[222] Depending on the identity of the defendant, the determination of the place of jurisdiction, thereby the application of the Recast Regulation will vary. For instance, if the shipper has its domicile in Germany,

[215] Art 67 of the Rotterdam Rules; n 194.
[216] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Recast Regulation). The Recast Regulation is the updated version of Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the EC Jurisdiction Regulation), and it has repealed the EC Jurisdiction Regulation and applied from 10 January 2015. However, Council Regulation (EC) No 44/2001 still applies to proceedings commenced before 10 January 2015.
[217] The EFTA Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 2007 (the revised Lugano Convention). The revised Lugano Convention entered into force in 01.01.2010.
[218] Pursuant to Article 6 of the Recast Regulation, if the defendant is not domiciled in an EU Member State and Articles 24-25 do not apply (i.e. there is not any exclusive jurisdiction or jurisdiction agreement for the courts of an EU Member State), the place of jurisdiction will be determined in accordance with the applicable national law. According to English law, to bring an action against a foreign defendant, the claimant must obtain permission from the court to serve English court proceedings. See Civil Procedure Rules, Part 6, r. 6.36; Civil Procedure Rules, Practice Direction Part 6B. See also Baatz, 'The Conflict of Laws' (n 190) 34 *et seq*.
[219] The Recast Regulation paras 4, 10, 15; A Mandaraka-Sheppard, *Modern Maritime Law Volume 1: Jurisdiction and Risk* (Informa 2013) paras 2.2-2.3; Baatz, 'The Conflict of Laws' (n 190) 11.
[220] Sections 2-7 of Chapter II of the Recast Regulation.
[221] Para 15 at 3 and Art 4 of the Recast Regulation; Mandaraka-Sheppard, *Vol 1* (n 219) para 3.2; Baatz, 'The Conflict of Laws' (n 190) 12.
[222] Art 63 of the Recast Regulation; Art 1(29) of the Rotterdam Rules.

an EU Member State, the place of jurisdiction will be determined in accordance with the Recast Regulation. Unless an exception applies, the general rule will apply and the carrier must sue the shipper in its domicile, Germany, irrespective of whether the carrier has its domicile in another EU Member State or in a non-EU Member State. However, if the defendant shipper is not domiciled in an EU Member State and there is no jurisdiction clause as regulated in Article 25(1) of the Recast Regulation, then the Recast Regulation will not apply therefore the place of jurisdiction will be determined in accordance with national law. Additionally, the Recast Regulation provides that in certain circumstances, where there is more than one defendant, the claimant can sue all defendants in the domicile of one of them; therefore, in such situations identification of the parties might be important to determine the most favourable domicile to bring the action.[223]

The Recast Regulation allows the parties to choose a court of a Member State, and regardless of the parties' domicile, the court chosen by the agreement shall have jurisdiction, unless the agreement is null and void under the national law of that Member State.[224] Under English law, jurisdiction clauses are given effect unless there is a good reason not to.[225] It must be pointed out that as in the Rotterdam Rules, identification of the parties will be important only if the choice of court agreement indicates the domicile as the place of jurisdiction. Depending on the identification of the defendant, the domicile, thus the place of jurisdiction, will differ. However, if the choice of court agreement indicates a neutral Member State as the place of jurisdiction, then the issue of identification would not have any effect on the place of jurisdiction.

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[223] Art 8(1) of the Recast Regulation.

[224] Art 25(1) of the Recast Regulation. The choice of court agreement must be concluded in accordance with the rules listed in Article 25(1) otherwise it will not be valid. See Baatz, 'The Conflict of Laws' (n 190) 13 *et seq*.

[225] For instance, in *The Morviken* [1983] 1 AC 565, an Amsterdam court jurisdiction clause was held null and void on the grounds that the clause would lessen the carrier's liability, and because of the effect of Art III(8) of the Hague-Visby Rules, which applied mandatorily, the clause was accepted as null and void. Also see *The Eleftheria* [1969] 1 Lloyd's Rep 237, 245; *The El Amria* [1981] 2 Lloyd's Rep 119, 123; *The Angelic Grace* [1995] 1 Lloyd's Rep 87, 97; *Donohue v Armco Inc and Others* [2002] 1 Lloyd's 425 (HL), 440; Baatz, 'The Conflict of Laws' (n 190) 37 *et seq*; Y Baatz, 'Enforcing English Jurisdiction Clauses in Bills of Lading' (2006) 18 SAcLJ 727, 755 *et seq*.; Baatz, 'Jurisdiction' (n 196) para 66-05; J Cooke and others, *Voyage Charters* (3rd edn 2007) para 85.25 *et seq*.; Tetley, 'Jurisdiction Clauses' (n 207) 44.

Lastly, it should be added that as with Chapter 14, Chapter 15 only applies if the Contracting State declares to be bound by it. And, subject to cases where the place of arbitration is designated by an agreement, which is binding on both parties as regulated in Article 75(3)-(4), if the action is brought by the carrier against the cargo interest, then determination of the place of arbitration will depend on the applicable national law. The Recast Regulation does not apply to arbitration, therefore under English law, the place of arbitration is determined in accordance with the Arbitration Act 1996.[226] If the defendant's domicile is nominated as the place of arbitration, then identification of the defendant will have vital importance.

[226] The Recast Regulation para 12 at 2; s. 3 of the Arbitration Act 1996.

CHAPTER 3: TRANSPORT DOCUMENTS UNDER THE ROTTERDAM RULES

The Rotterdam Rules do not follow traditional terminology, and instead of using the term "bill of lading" as the previous Conventions do, they introduce the generic term "transport document".[227] By introducing this generic term, it was aimed to provide a common label, resolve the terminology differences among jurisdictions, and embrace all types of documents currently used in practice and may be used in the future, provided they satisfy the requirements indicated in Article 1(14).[228]

The Rotterdam Rules apply to the contract of carriage; i.e. notwithstanding the existence and/or type of shipping document issued, the existence of a contract of carriage as defined in Article 1(1), is enough to trigger the application of the Convention.[229] However, although transport documents are not important to determine the scope of application of the Convention, they still have crucial importance on a number of matters such as the receipt of the goods, evidencing or containing the terms of the contract of carriage and more importantly for the purpose of this research, the issue of the identification of the parties.[230]

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[227] Art I(b) of the Hague and Hague-Visby Rules; Art 1(7) of the Hamburg Rules; Art 1(14) of the Rotterdam Rules; Below part 3.2.

[228] Art 1(14) of the Rotterdam Rules; Below part 3.2. See also UN Doc., A/CN.9/WG.III/WP.21 para 6; UN Doc., A/CN.9/526 para 25; Diamond (n 81) 496; Berlingieri, 'Revisiting the Rotterdam Rules'(n 81) 619; Debattista, 'General Provisions' (n 50) paras 1-03,1-15; Sturley and others (n 26) para 7.005; Williams (n 125) 193. The author states that the traditional common law categorisation does not apply in all countries therefore for instance while a document is qualified as sea waybill in one country it may be qualified as bill of lading in another country. As examples to different categorisations see Below part 3.4.

[229] Arts 1(1), 5 of the Rotterdam Rules; Below part 3.2.1. See also, Berlingieri, 'Revisiting the Rotterdam Rules' (n 81) 591; Sturley and others (n 26) para 2.023 *et seq.*; KS Goddard, 'The Application of the Rotterdam Rules' (2010) 16(3) JIML 210, 215; A Mollmann, 'From Bills of Lading to Transport Documents-The Role of Transport Documents under the Rotterdam Rules' (2011) 17(1) JIML 50, 53; R Thomas, 'The Emergence and Application of the Rotterdam Rules' in R Thomas (ed), *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa 2010) para 1.17; MF Sturley, 'Scope of Application' in A Von Ziegler, J Schelin, S Zunarelli, *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Wolters Kluwer 2010) para 2.2.2.

[230] G van der Ziel, 'The Issue of Transport Documents and the Documentary Shipper under the Rotterdam Rules' http://webcache.googleusercontent.com/search?q=cache:8ulaxL5N4CUJ:shhsfy.gov.cn/hsinfoplat/platformData/infoplat/pub/hsfyenglish_42/docs/200911/19.doc+&cd=1&hl=en&ct=clnk&gl=uk part 1, accessed 30.03.2013; Williams (n 125) 191; Mollmann (n 229) 55 *et seq*; W Tetley, 'Some General Criticisms of The Rotterdam Rules' (2008) 14(6) JIML 625, 626.

As examined in the next chapter,[231] transport documents contain some information related to identification of the parties; therefore the existence and type of transport document is at the core of the identification issue. In this chapter, to show the link between the existence/type of transport document and identification of the parties, the importance of transport documents in relation to identification will be briefly mentioned in the first part. In the second part of the chapter, the concept of "transport document" will be examined in detail; and in the third and fourth parts, issuance of the transport document and types of transport documents will be analysed respectively.

3.1- Importance of the Existence and Type of Transport Document on Identification of the Parties

When a transport document is issued in accordance with the rules in Article 35,[232] the information on it, as well as the type of transport document, would be helpful in identifying the parties. In the following section, the importance of the existence and type of transport document on identification of the parties will be briefly examined for each party under different sub-headings.

a) Identification of the Carrier[233]: According to Article 36(2)(b), the name and address of the carrier must be indicated on the transport document and further, Article 36(3)(b) requires the transport document to indicate the name of the ship if it is specified in the contract of carriage.[234] The Convention also includes a specific provision, Article 37, for the identification of the carrier. An indication of the carrier's name on the transport document is one of the requirements for the application of Article 37(1), whereas indicating the name of the ship on the transport document is one of the requirements for the application of Article 37(2).[235] Therefore, in order to identify the carrier in accordance with Article 37(1)-(2), existence of a transport document, which shows the name of the carrier or the name of the ship, is necessary.

[231] Chapter 4.
[232] Art 35 of the Rotterdam Rules; Below part 3.3.
[233] Art 1(5) of the Rotterdam Rules; Chapter 5.
[234] Arts 36(2)(b), 36(3)(b) of the Rotterdam Rules; Chapter 4.2.1.1-2.
[235] Art 37(1)-(2) of the Rotterdam Rules; Chapter 5.2.1.3-5.2.2.

Furthermore, the type of transport document also plays a crucial role in the identification of the carrier. The evidentiary effect of the contract particulars will change depending on the type of the transport document and such change might affect the application of Article 37(1)-(2).[236] Article 41(b) regulates the evidentiary effect of contract particulars when there is a negotiable transport document (Article 1(15)), a negotiable electronic transport record (Article 1(19)) or a non-negotiable transport document that requires surrender (Article 46).[237] This provision indicates that in these types of transport documents; if the transport document is in the hands of the third party or the consignee acting in good faith, all of the contract particulars are conclusive evidence, i.e. the carrier is not allowed to prove the contrary.[238] Article 41(b) does not specifically refer to any specific contract particulars; it embraces all particulars indicated on the transport document. Therefore, contract particulars such as the name and address of the carrier and the name of the ship will be considered as conclusive evidence, and the carrier cannot prove the contrary against a third party or consignee. It seems that when a transport document is in the hands of the third party, the type of transport document does not have any effect on the application of Article 37(1). Since, the evidentiary effect of the particulars related to the name and address of the carrier will be the same, i.e. conclusive evidence, for the relevant transport documents.

On the other hand, pursuant to Article 41(c), in respect of the non-negotiable transport document that does not require surrender (Article 1(16)) and the non-negotiable electronic transport record (Article 1(20)), if the document is in the hands of the consignee who has acted in good faith and in reliance on the contract particulars, some particulars are treated as conclusive evidence and cannot be rebutted, whereas other particulars can be rebuttable by the carrier.[239] Article 41(c)(iii) refers to the

[236] Art 41(a)-(c) of the Rotterdam Rules. For detailed sources on evidentiary effect of contract particulars see sources in n 157.
[237] Arts 1(15), 1(19), 41(b)(i)-(ii), and 46 of the Rotterdam Rules. For the types of the transport documents, see Below part 3.4.
[238] The term "good faith" is not defined under the Convention. Under English law, COGSA 1992 does not define it but s. 61(3) Sale of Goods Act 1979 defines it as "honest conduct". For more details see Chapter 8.2.3.
[239] Such as contract particulars related to description, leading marks or quantity of the goods-when they are furnished by the carrier- cannot be rebutted whereas contract particulars related to the name of the port of loading/discharge can be rebutted. See Arts 1(16), 1(20), and 41(c) of the Rotterdam Rules. For sources on the evidentiary effect of the contract particulars, see n 157; and more details on the type of transport document, see Below part 3.4.

particulars listed in Article 36(2), which include particulars related to the name and address of the carrier.[240] Accordingly, as with the negotiable transport document and non-negotiable transport document that requires surrender, in cases where a non-negotiable transport document that does not require surrender is issued, the particulars about the name and address of the carrier will be non-rebuttable. However, Article 41(c) does not refer to Article 36(3)(b), which requires the indication of the name of the ship on the transport document if it is specified in the contract of carriage. Depending on the type of transport document, the particulars related to the name of the ship can be rebutted by the carrier, thus identification of the carrier on the basis of Article 37(2) might be prevented. Therefore it is submitted that the type of transport document in this instance would have vital importance on the application of Article 37(2).

It should be added that the type of transport document may not have any effect on the identification of the carrier when the transport document is in the hands of the shipper. According to Article 41(a), the transport document "is *prima facie* evidence of the carrier's receipt of the goods as stated in the contract particulars" when it is in the hands of the shipper.[241] Therefore when the shipper holds the transport document, all contract particulars, including the names of the carrier and the ship, can be rebutted irrespective of the type of transport document.

b) Identification of the Maritime Performing Party[242]: Subject to certain cases,[243] the existence and type of transport document has no effect on the identification of maritime performing parties. This is because maritime performing parties are involved in the carriage process by the carrier and have a direct contractual relationship with the carrier only; they are neither a party to the contract of carriage and the document issued under it, nor have contractual relationship with the cargo interests.

[240] Art 41(c)(iii) of the Rotterdam Rules.
[241] Art 41(a) of the Rotterdam Rules; Williams (n 125) 211; Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 184; n 157.
[242] Art 1(7) of the Rotterdam Rules; Chapter 6.
[243] In cases, for instance, where the shipowner is the maritime performing party, the contract particulars related to the name of the ship on the transport document would be helpful to trace and thus identify the maritime performing party. See Chapter 4.2.2.

c) Identification of the Shipper and Documentary Shipper[244]: According to Article 31(1), for the compilation of contract particulars and the issuance of the transport document, the shipper is required to provide information about the name of the party to be identified as the shipper- which can be the contractual shipper or documentary shipper- on the transport document.[245] Also, with regard to the documentary shipper, pursuant to Article 1(9), being the documentary shipper depends on the non-contractual person's acceptance to be named as the shipper on the transport document.[246] Therefore, for the inclusion of the information related to the shipper and the existence of a documentary shipper, there must first be a transport document within the meaning of the Convention.

It should be noted that regarding the shipper and documentary shipper, the Convention does not address any specific type of transport document; therefore the type of transport document does not seem to have any effect on the identification of these parties. Besides, the Convention does not mention anything about the evidentiary effect of the contract particulars related to the names of the shipper and documentary shipper. Article 41 merely regulates the evidentiary effect of the contract particulars against the carrier; it does not apply to the evidentiary effect of the contract particulars against the shipper and documentary shipper.[247]

d) Identification of the Consignee[248]: According to Article 36(3)(a), the name of the consignee must be indicated on the transport document if it is provided by the shipper, and also, Article 31(1) states that for the compilation of the contract particulars and the issuance of the transport document, the shipper must provide information about the name of the consignee, if there is any.[249] Therefore, provided there is a transport document within the meaning of the Convention, some information related to identification of the consignee may be stated on it. Moreover, under the Convention, identification of the consignee is linked to the provisions on delivery of goods (Articles 45-47), right of control (Articles 50-51), and transfer of contractual rights

[244] Arts 1(8), 1(9) of the Rotterdam Rules; Chapter 7.
[245] 31(1) of the Rotterdam Rules; Chapter 4.2.3.
[246] Art 1(9) of the Rotterdam Rules; Chapter 7.1.2.
[247] Art 41 of the Rotterdam Rules; n 157. See also Above part 3.1.a.
[248] Art 1(11) of the Rotterdam Rules; Chapter 8.
[249] Arts 31(1), 36(3)(a) of the Rotterdam Rules; Chapter 4.2.4.

(Article 57).[250] The rules in those Articles are regulated on the basis of the existence and types of transport documents and thus, because of their effect on the delivery of goods, right of control and transfer of contractual rights, the rules related to identification of the consignee can vary.

3.2- The Notion of "Transport Document"

Considering the abovementioned importance of the existence of the transport document on identification of the parties, the most important question at this stage is: what does the term "transport document" mean? The Convention provides an answer to this question in Article 1(14), which defines "transport document" as follows:

> ".... a document issued under a contract of carriage by the carrier that:
> (a) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and
> (b) Evidences or contains a contract of carriage."[251]

Pursuant to the definition, in order to qualify as a transport document, such document needs to satisfy the requirements explained in detail below.

3.2.1- The Document Must Be Issued Under A Contract of Carriage

According to Article 1(14), a transport document must be a document issued under a contract of carriage. That means that for the existence of a transport document, the existence of a contract of carriage is necessary. The Convention defines the term "contract of carriage" as "a contract in which a carrier, against the payment of freight, undertakes to carry the goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage."[252] The definition addresses three preconditions: (a) undertaking to carry goods from one place to another; (b) payment of freight; and (c) the existence of a sea leg.

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[250] Arts 45-47, 50-51, and 57 of the Rotterdam Rules; Chapter 8.2.
[251] Art 1(14) of the Rotterdam Rules.
[252] Art 1(1) of the Rotterdam Rules.

(a) Undertaking to Carry the Goods from One Place to Another: It seems that the word "undertake" refers to the carrier's promise; namely there is no need for actual performance by the carrier, and a promise to carry the goods from one place to another is sufficient.[253] In the *travaux préparatoires,* the use of the word "undertake" was questioned on the grounds that it would be in contradiction with the period of responsibility of the carrier, in cases where the carrier sub-contracts.[254] It was concluded that the word "undertake" could not cause any contradiction, as carriers can undertake to carry the goods and can conclude sub-contracts for the actual performance of the obligation.[255] Also, using the word "undertake" complies with the definitions of the carrier and the shipper; according to those definitions, to qualify as carrier and shipper, entering into a contract of carriage is sufficient, i.e. there is no need for actual performance.[256] Additionally, Article 1(24) defines the goods as "the wares, merchandise, and the articles of every kind whatsoever that a carrier *undertakes to carry under a contract of carriage*..."[257] (emphasis added). Accordingly, the definition refers to the notion of contract of carriage, and states that the goods are undertaken to carry by a carrier under a contract of carriage.

From the wording of the definition of contract of carriage, it is submitted that depending on the carriers' wishes, they can either perform the carriage themselves or undertake to carry the goods and conclude sub-contracts for the actual performance. For example, assuming that the shipper concludes a contract with a non-vessel operating common carrier (hereinafter the NVOCC)[258] for door-to-door carriage. In respect of ocean carriage, the NVOCC needs to conclude a sub-contract with an ocean carrier, since it cannot physically perform the carriage itself.[259] When the NVOCC concludes a sub-contract with an ocean carrier, there will be two independent

[253] Sturley and others (n 26) para 2.025.
[254] UN Doc., A/CN.9/510 para 84.
[255] Ibid.
[256] Article 1(5) of the Rotterdam Rules defines the carrier as "a person that enters into a contract of carriage with a shipper." Article 1(8) of the Rotterdam Rules defines the shipper as "a person that enters into a contract of carriage with a carrier." See Sturley and others (n 26) para 2.025; Debattista, 'General Provisions' (n 50) para 1-07. For further details on the terms "carrier" and "shipper, see Chapter 5.1 and Chapter 7.1.1.
[257] Art 1(24) of the Rotterdam Rules; Chapter 4.1.
[258] The NVOCC does not own any vessel and it does not have any power upon the control of the carrying vessel. See N Passas, K Jones, 'The Regulation of Non-vessel-operating Common Carriers (NVOCC) and Customs Brokers: Loopholes Big Enough to Fit Container Ships' (2007) 14(1) JFC 84, 85.
[259] Sturley and others (n 26) para 7.006 n 21.

contracts of carriage if the other preconditions in Article 1(1) are met: (i) a head contract of carriage concluded between the shipper and the NVOCC, who is the contracting carrier; and (ii) a sub-contract of carriage concluded between the NVOCC, who is the shipper, and the ocean (actual) carrier.[260] For the sea leg, the NVOCC only undertakes that the goods will be carried, while the sub-carrier actually carries them. Therefore the documents issued by the NVOCC under the head contract of carriage and by the sub-carrier under the sub-contract of carriage will be treated as transport documents under each contract when the other preconditions of being a transport document are also met.

Furthermore, with door-to-door contracts for multimodal carriage for instance, the NVOCC might prefer to perform one part of the voyage as an actual carrier, and it might conclude a sub-contract of carriage as an agent of the shipper for the ocean leg.[261] In such cases, there will again be two contracts of carriage if the other preconditions are also met, but this time one contract is between the shipper and the NVOCC, who performs the one leg of the journey; the other between the shipper and the ocean carrier, who performs or undertakes to perform the ocean leg. The NVOCC and the ocean carrier would be the counterparts of the shipper under different contracts of carriage for the performance or undertaking of the different legs of the carriage. Therefore, they would be able to issue transport documents under those contracts of carriage. It must be pointed out that in some cases, the NVOCC might act merely as an agent of the carrier and conclude a contract of carriage on its behalf.[262] In such cases, since the NVOCC acts merely as an agent and does not undertake to carry the goods, there will not be any contract of carriage between the NVOCC and the shipper. Thus, a document issued by the NVOCC on its own name will not be considered as a transport document within the meaning of the Convention.

Lastly, precondition (a) of the definition of contract of carriage requires the carrier to carry the goods from one place to another. Instead of the phrase "from one port to another", the Rotterdam Rules use the phrase "from one place to another". This is

[260] As happened in *Center Optical (Hong Kong) Ltd. v Jardine Transport Services (China) Ltd and Pronto Cargo Corporation (Third Party)* [2001] 2 Lloyd's Rep 678, 680.
[261] Aikens and others (n 154) paras 11.09-11.10; JF Wilson, *Carriage of Goods by Sea* (7th edn, Pearson 2010) 253.
[262] Aikens and others (n 154) para 11.28.

because the nature of the Convention is maritime plus; i.e. it applies not only to the sea carriage but also to other modes of transport, which involve a sea leg.[263] Therefore, depending on the agreement between the parties, the carrier may undertake to carry the goods from one place to another, from one port to another, or from tackle-to-tackle.[264]

(b) Payment of Freight: The carrier must be owed freight against the carriage of the goods. The word "freight" is defined as "the remuneration payable to the carrier for the carriage of goods under a contract of carriage".[265] If the carrier does not undertake to carry the goods against payment of freight, for instance, if he undertakes to carry the goods for free, then there will be no contract of carriage within the meaning of the Convention, therefore the Convention will not apply.[266] In such cases, as the Convention does not apply, it is superfluous to evaluate whether the document satisfies the requirements indicated in Article 1(14).

(c) Existence of a Sea Leg: The contract must provide at least one sea leg and may include other modes of transport in conjunction with the sea leg.[267] If the contract does not include a sea leg, it will not be classified as a contract of carriage within the meaning of the Convention. More importantly, the requirement for a sea leg is a precondition for the application of the Convention, therefore if the contract does not involve a sea leg the Convention will not apply, and the issue of whether the

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[263] Arts 1(1), 5(1) of the Rotterdam Rules; Sturley and others (n 26) para 2.027; S Girvin, *Carriage of Goods by Sea* (2nd edn, Oxford 2011) para 20.03; Diamond (n 81) 451; H Stanilan, 'Scope of Application' in Y Baatz and others, *The Rotterdam Rules: A Practical Annotation* (Informa 2009) para 5-03; T Nikaki, 'The UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]: Multimodal at Last or Still All at Sea?' (2005) JBL 647, 651.

[264] Article 12(3) prohibits the contract of carriage concluded shorter than tackle-to-tackle period. See Art 12(3) of the Rotterdam Rules; Fujita, 'The Comprehensive Coverage of the New Convention' (n 29) 354; Chuah, 'Impact of the Rotterdam Rules on the Himalaya Clause' (n 96) 308; the CMI's Questions and Answers on the Rotterdam Rules (10 October 2012), 6 http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/RotterdamRules_QA_10102012.pdf accessed 21.09.2014.

[265] Art 1(28) of the Rotterdam Rules. It should be added that if the transport document is issued under a time charter party, the goods are carried not against freight but against a payment of hire, which involves the price for the usage of the ship for a specific time period. For further, see Wilson (n 261) 86.

[266] Sturley and others (n 26) para 2.026; Sturley, 'Scope of Application' (n 229) 42; S Unan, 'The Scope of Application of the Rotterdam Rules and Freedom of Contract' in MD Güner-Özbek (ed), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the Rotterdam Rules* (Springer 2011) 90.

[267] Art 1(1) of the Rotterdam Rules. For further details, see Sturley and others (n 26) para 2.027 *et seq*.; Stanilan (n 263) para 5-01 *et seq*.; Unan (n 266) 89 *et seq*.; Thomas, 'The Emergence and Application of the Rotterdam Rules' (n 229) para 1.25 *et seq*.; Diamond (n 81) 450 *et seq*.

document is a transport document or not will not be determined in accordance with the provisions in the Rotterdam Rules. In the preparatory works, it was stated that the key element for determination of the scope of application of the Convention is to the contract of carriage itself, not the actual carriage.[268] Namely, to determine the existence of a sea leg, the Convention considers the contractual terms rather than the actual mode of the carriage. In cases where the contract requires the goods to be carried by sea but in fact the goods are carried by some other mode, the requirement for the existence of a sea leg would be satisfied, but in the reverse situation, it would not.[269] As Diamond rightfully criticises, the situation is quite puzzling in cases where the contract of carriage provides for different modes of carriage including a sea leg, but the goods are not actually carried by sea.[270] In this author's opinion (not without some hesitation), in such cases, a plausible conclusion would be reached by construing the contractual terms together with the actual carriage, and as Berlingieri suggests, depending on the choice of the carrier, if the goods are in fact carried by sea, the requirement for carriage by sea will be satisfied otherwise it will not.[271]

3.2.2- The Document Must Be Issued by The Carrier

The word "carrier" is defined as "a person that enters into contract of carriage with a shipper".[272] The definition does not refer to actual performance, therefore the carrier does not need to perform the contract of carriage through its own means; simply entering into a contract of carriage with a shipper is sufficient to qualify as a contractual carrier.[273] The carriers may issue transport documents themselves or transport documents may be issued on behalf of carriers by their agents, the charterers or agents of the charterers.

It should be noted that in practice, particularly in cases where there is door-to-door carriage, the goods are usually received by the performing party against a document. The question may arise whether a document issued by the performing party qualifies

[268] UN Doc., A/63/17 para 24.
[269] Stanilan (n 263) para 5.02; Diamond (n 81) 452; Berlingieri, 'Revisiting the Rotterdam Rules' (n 81) 585.
[270] Diamond (n 81) 452.
[271] Berlingieri, 'Revisiting the Rotterdam Rules' (n 81) 585.
[272] Art 1(5) of the Rotterdam Rules; Chapter 5.1.
[273] Above part 3.2.1.a.

as a transport document within the meaning of the Convention. The Convention defines "performing party" as "a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, keeping, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control."[274] According to the definition, the performing party is a not a carrier, who is the contractual counterparty of the shipper, therefore the performing party does not have any contractual relationship with the shipper, who is the carrier's counterparty under the contract of carriage; however it is involved in the carriage process by virtue of its relationship with the carrier. The obligations listed in the definition are the carrier's core obligations, as indicated in Article 13(1).[275] All these obligations are related to the goods and carriage, however, in addition to these obligations, the carrier, according to circumstances,[276] is also under a duty to issue a transport document. Article 1(6)(a) does not refer to the performance of the carrier's documentary obligation; besides, Article 1(14) does not mention the performing party.[277] Article 1(14) expressly requires that the issuer of a transport document must be the carrier; namely, to qualify as a transport document under this provision, the document must be issued either by the carrier itself or a person acting on its behalf. By interpreting Article 1(14) and Article 1(6)(a) together, it is submitted that a document issued by the performing party as a principal cannot qualify as a transport document; however if the performing party acts as an agent of the carrier and issues the document on its behalf, then the document would be a transport document under the Convention.[278]

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[274] Art 1(6)(a) of the Rotterdam Rules; Chapter 6.1.1.
[275] Art 13(1) of the Rotterdam Rules.
[276] Art 35 of the Rotterdam Rules; Below part 3.3.
[277] In the previous drafts of Article 1(14), the words "or performing party" were also included in the definition, therefore transport documents could be issued not only by the carrier but also by the performing party. However, in the 41st session, it was pointed out that "...while there was perceived to be a need to reference acting on behalf of the carrier with respect to signature, it was thought that inserting the phrase in the definition of 'transport document' would raise questions regarding its absence elsewhere in the draft Convention". Eventually, the draftsmen decided to delete the words "or performing party" from the definition of the transport document on the ground of the general rule, which leaves the agency issues to the applicable national law. See Draft Art 1.20, UN Doc., A/CN.9/510; Draft Art 1(14), UN Doc., A/CN.9/645; UN Doc., A/63/17 para 133-134; Sturley, 'Transport Law for the Twenty-First Century' (n 7) 476.
[278] Sturley and others (n 26) para 7.006; Zunarelli, 'The Carrier and the Maritime Performing Party in the Rotterdam Rules' (n 26) 1019. The author highlighted that Article 1(6)(a) is not wide enough to embrace the activity of issuing of the transport document; the transport document is issued either by the carrier or its representative.

Although the document issued by the performing party as a principal at the time when the goods are received does not qualify as a transport document within the meaning of the Convention, it may qualify as a receipt, which shows the performing party's receipt of the goods. As such, the document would only have a receipt function; it would not create any contractual relationship between the performing party and the shipper, nor satisfy the requirements of being a transport document in Article 1(14). However, such a document would be useful to ascertain the period of responsibility of the carrier, as under Article 12(1), the carrier's period of responsibility begins when the carrier or a performing party receives the goods.

The determination of whether or not the document is a transport document might be more complex in multimodal transports. To provide better understanding, the situation will be explained with an illustration. Assuming that the shipper concludes a multimodal contract of carriage with a multimodal transport operator (hereinafter the MTO). If the MTO actually performs all legs of the voyage, it will be the contractual carrier, as he is the counterpart of the shipper under the contract of carriage, as well as the performing carrier, since he actually carries the goods.[279] In such cases, if the MTO issues a document upon delivery of the goods, the document will meet the precondition of being issued by the carrier. However in practice, MTOs usually conclude sub-contracts to perform one or all legs of the journey. Therefore, for instance, if the MTO does not perform any part of the voyage personally and concludes sub-contracts of carriage, there will be a head contract of carriage between the MTO (as carrier) and the shipper, and sub-contract(s) of carriage between the MTO (as shipper) and the sub-contractor(s) who actually performs the carriage, and will qualify as the performing party under the Convention.

In such cases, if the sub-carrier/performing party issues a document at the time when the goods are taken over from the shipper, the determination of whether the document is a transport document under the Rotterdam Rules will depend on whose behalf the sub-carrier has acted. If the sub-carrier acts as an agent of the MTO and issues the document on behalf of the MTO, the requirement of being issued by the carrier would be satisfied. However, if the sub-carrier acts on its own behalf, the document issued

[279] Aikens and others (n 154) paras 11.9-11.10.

by him as principal will not be considered as a transport document for the purpose of the Convention.[280] This is because the sub-carrier/performing party is not a party to the head contract of carriage between the MTO (as the carrier) and the shipper and he cannot qualify as the carrier; therefore the document issued by him cannot be deemed a transport document. On the other hand, in respect of the sub-contract of carriage, the sub-carrier would be the carrier whereas the MTO would be the shipper, therefore a document issued by the sub-carrier as principal under the sub-contract of carriage would meet the precondition of being issued by the carrier and will qualify as a transport document for the purpose of the Convention.[281]

In conclusion, it can be said that if the goods are received from the shipper either by the carrier personally or on behalf of the carrier by its agent, and a document is issued by the carrier itself or by someone else on its behalf, the document will meet the precondition of being issued by the carrier. However, if the agent acts as principal and issues the document on its own behalf, the document will not meet the precondition and will not be a transport document within the meaning of the Convention.[282]

3.2.3- The Document Must Evidence the Carrier's or the Performing Party's Receipt of the Goods

In current practice, some documents are issued before the goods are loaded on board a vessel, whereas some are issued after the goods have been loaded on board of a specific vessel. In the former situation, the transport document is labelled as a "received for shipment" transport document, while in the latter, the document is labelled as a "shipped on board" transport document.[283] Because of extended scope of application of the Convention,[284] in respect of meeting the receipt function, the Rotterdam Rules do not make any express distinction between the received for shipment and shipped on board transport document. Therefore, under the Convention, as long as the document evidences the carrier or performing party's receipt of the

[280] Sturley and others (n 26) para 7.006 n 21.
[281] Ibid.
[282] Ibid para 7.006.
[283] *The Berkshire* [1974] 1 Lloyd's Rep 185, 188; *Carver* (n 54) para 1-019; Aikens and others (n 154) para 2.50; N Gaskell and others, *Bills of Lading: Law and Contracts* (LLP 2000) 14; *Scrutton* (n 24) para 1-002.
[284] Arts 1(1), 5 of the Rotterdam Rules.

goods, the precondition of being evidence of the receipt of the goods will be met, irrespective of whether the document is a received for shipment or shipped on board transport document.

It should be pointed out that in respect of being a receipt for the goods, the requirement in the Rotterdam Rules is very similar to the present situation under English law. Under English law, bills of lading are originally used as a receipt for the goods, and it is accepted that as a receipt, the bill of lading indicates that the goods are received or shipped by the carrier at the stated weight, condition and so forth on the document.[285] Contrary to the Rotterdam Rules, under English law, a clear distinction is made between received for shipment and shipped on board bills of lading. Where a received for shipment bill of lading is issued, the document will only evidence that the goods are received by the carrier and therefore the document will not be evidence of whether the goods have been shipped on board a specific vessel or on what date the shipment has occurred.[286] On the other hand, where there is a shipped on board bill of lading, it is accepted that the document evidences not only the carrier's receipt of the goods, but also the fact that the goods have been shipped on board a specific vessel on a specific date.[287]

Although the phrase "performing party" was removed from the first part of the definition of transport document, it still appears in this part of the definition. Sturley states that the term "performing party" is included in this part of the definition, as UNCITRAL recognises the possibility that the performing party's receipt of the goods might not be assumed as the carrier's receipt in all jurisdictions.[288] However, in this author's opinion, this justification would not be persuasive, as under the Convention

[285] S. 4(a) of COGSA 1992; *Smith & Co v Bedouin Steam Navigation Co* [1896] AC 70; *North Shipping Co Ltd v Joseph Rank Ltd*. (1926) 26 L1 L Rep 123. See also *Benjamin* (n 136) para 18-047; Girvin*, Carriage of Goods by Sea* (n 263) para 6.01; Aikens and others (n 154) para 1.7; *Carver* (n 54) 39-55.
[286] *The Marlborough Hill v Cowan & Sons* [1921] 1 AC 444, 450*; Diamond Alkali Export Corporation v Fl. Bourgeois* [1921] 3 KB 443, 449*; Westpac Banking Corpn v South Carolina National Bank* [1986] 1 Lloyd's Rep 31. See also *Benjamin* (n 136) para 18-057; *Carver* (n 54) para 2-025; JS Mo, 'Forwarder's Bill and Bill of Lading' (1996-1997) 5(2) Asia Pac. L Rev 96, 99.
[287] The word "shipped" *prima facie* means that the goods are placed on board of the ship. See *Smith & Co v Bedouin Steam Navigation Co* [1896] AC 70; *Mowbray Robinson & Co v Rosser* (1922) 91 LJKB 524. See also *Carver* (n 54) para 2-001.
[288] Sturley and others (n 26) para 7.006.

in various Articles,[289] it is expressly stated that the goods can be received or shipped either by the carrier itself or on behalf of the carrier by a performing party. Therefore, if Article 1(14)(a) is interpreted with those relevant Articles, it can be submitted that the inclusion of the phrase "performing party" in this provision is superfluous. Pursuant to Article 1(6)(a), the performing party performs or undertakes to perform the carrier's core obligations, and receiving the goods is one of the core obligations of the carrier, as indicated in Article 13(1).[290] In practice, particularly in multimodal transport, the goods are commonly received by the performing party from the shipper at the shipper's place against a received for shipment transport document, and by receiving the goods, the performing party performs the carrier's core obligation to receive the goods under the contract of carriage. Also, pursuant to Article 12(1), the performing party's receipt of the goods leads to the commencement of the carrier's period of responsibility. Moreover, Article 41(a), which regulates the evidentiary effects of the contract particulars, states that a transport document is *prima facie* evidence of the carrier's receipt of the goods.[291] This provision merely refers to the carrier; it does not mention the performing party. Considering all these Articles together, it can be submitted that the performing party's receipt of the goods already counts as receipt of the goods by the carrier, therefore there was no need to add the phrase "performing party's receipt" within the definition of transport document. It should be added that although the inclusion of this phrase in Article 1(14)(a) is superfluous, it does not seem to cause any harm.

Furthermore, in order to satisfy the requirement of being a receipt for the goods, the transport document must indicate that the goods are received into the care of the carrier. For example a booking note, which is used for the purpose of booking space on the vessel, is not a transport document, as it does not evidence the carrier or the performing party's receipt of the goods.[292] As a receipt, the transport document must include some statements related to the leading marks, description, quantity, weight,

[289] Arts 1(6), 12(1), 13, 19, and 35 of the Rotterdam Rules.
[290] Arts 1(6)(a), 13(1) of the Rotterdam Rules; Chapter 6.1.1.
[291] Art 41(a) of the Rotterdam Rules; n 157. See also above 3.1.a.
[292] As an ordinary document, a booking note includes some information related to the shipper, carrier, vessel, port of loading and discharge, place and date of shipment, but it does not include any information on the carrier's or the performing party's receipt of the goods. For further, see Girvin, *Carriage of Goods by Sea* (n 263) paras 2.02-2.19; Sturley and others (n 26) para 7.006.

apparent order and condition of the goods.[293] However, although a document does not indicate such contract particulars, if it evidences that they are received or shipped by the carrier or the performing party, then the document would have satisfied the requirement in Article 1(14)(a).[294] For instance, if the document states that the goods are received or shipped by the carrier but it does not say anything about the quantity or weight of the goods, the omission of such particulars does not affect the fulfilment of the requirement of being a receipt. Accordingly, to satisfy the requirement of being a receipt for the goods, simply evidencing that the carrier or the performing party has taken delivery of the goods is sufficient; there is no need to include all contract particulars on the document.

3.2.4- The Document Must Evidence or Contain A Contract of Carriage

For the satisfaction of this requirement, there must first be a contract of carriage as defined in Article 1(1).[295] Even if there is a contract of carriage, if the document does not evidence or contain the contract of carriage, it cannot be a transport document under the Convention. For instance, if a dock receipt or a mate's receipt, which functions as a receipt, is issued under a contract of carriage, none of them meet the requirement of evidencing or containing a contract of carriage, therefore they are not transport documents for the purpose of the Convention. The contract of carriage might be entirely contained in the transport document or might be only evidenced in the document. The Convention intentionally uses the word "or" between the words "evidence" and "contain"; as by using this alternative requirement, the aim was to accommodate different approaches in various jurisdictions.[296]

Finally, it should be added that in the previous drafts, instead of the word "and", the word "or" was used between paragraphs (a) and (b) of Article 1(14); namely, the

[293] Arts 36(1)(a)-(d), 36(2)(a) of the Rotterdam Rules.
[294] Article 39(1) of the Rotterdam Rules states that although the transport document must contain the contract particulars listed in Articles 36(1)-(2) and 36(3) (if it is possible under the circumstances), the absence or inaccuracy of the particulars does not affect the validity of the transport document. See Chapter 4.3.
[295] Art 1(1) of the Rotterdam Rules; Above part 3.2.1. In practice, the contracts of carriage are typically concluded before or at the same time of the issuance of the transport document. See *Hansson v Hamel & Horley Ltd.* [1922] 2 AC 36, 47; *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 Q.B 402, 414.
[296] UN Doc., A/CN.9/510 para 110. Like the Rotterdam Rules, s. 5(1) of COGSA 1992 indicates that a bill of lading can either contain a contract of carriage or being evidence of it.

requirement of being evidence of the carrier's receipt did not need to be satisfied in conjunction with the requirement of containing or evidencing a contract of carriage.[297] Some delegates pointed out that the use of the word "or" between paragraphs (a) and (b) of Article 1(14) makes the definition of transport document tangled.[298] For instance, a dock receipt, which evidences apparent order and condition of the goods, would have been treated as a transport document under the Convention and would have given its holder a right to sue the carrier in certain circumstances. To prevent such difficulties, the word "or" was deleted, and pursuant to final version of the provision, to qualify as a transport document, the document must have both the function of being a receipt *and* the function of evidencing or containing the contract of carriage.[299] Consequently, when a document has met all of the foregoing four preconditions, it will qualify as a transport document within the meaning of the Convention, irrespective of whether it has been marked as a transport document or not,[300] and -for the purposes of this work- all the parties may be identified from data contained within the four corners of the transport document.

3.3- Issuance of Transport Document

The circumstances in which a transport document is issued are regulated under Article 35 as follows:

> *"Unless the shipper and the carrier have agreed* not to use a transport document or an electronic transport record, o*r it is the custom, usage or practice of the trade not to use one,* upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, *is entitled to obtain* from the

[297] UN Doc., A/CN.9/WG.III/WP.101, Draft Art 1(15). The reason is that, in the former drafts, the Convention also included the term "consignor", which was defined as "a person that delivers the goods to the carrier or to the performing party for carriage". In the twenty-first session, the delegations of Italy, the Republic of Korea and the Netherlands proposed to delete the definition of consignor in the draft Convention, since it was emphasised that when the consignor delivers the goods to carrier he would be entitled to obtain a receipt, and that was the only reason for containing a definition in the draft convention. Furthermore, it was said that the shipper and documentary shipper already had the right to obtain a transport document, which included also the receipt function; therefore there was no need for the definition of consignor and eventually the term "consignor" was deleted from the Convention. See UN Doc., A/CN.9/WG.III/WP.101, Draft Art 1(10); UN Doc., A/CN.9/WG.III/WP.103 para 4; UN Doc., A/CN.9/645 paras 21-24, 113-114.
[298] UN Doc., A/CN.9/WG.III/WP.103 para 6.
[299] Art 1(14) of the Rotterdam Rules; UN Doc., A/CN.9/645 paras113-114.
[300] *Carver* (n 54) 3; Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 162.

carrier..."[301](emphasis added)

Pursuant to the Article, the carrier is obliged to issue a transport document; however where one of the exceptions in the Article applies, the carrier's documentary obligations will not arise, and even if the shipper demands a transport document the carrier could refuse.[302] The fist exception is that if the shipper and the carrier have agreed not to use a transport document or an electronic transport record, then the carrier's documentary obligation will not arise. By providing such an exception, the Convention gives priority to the intention of the parties. As the original parties to the contract of carriage, if the shipper and the carrier have agreed not to issue a transport document, there would be no logical reason to oblige the carrier to issue a transport document.

The second exception is that if there is any custom, usage or practice of the trade regarding not issuing a transport document, the carrier's duty to issue a transport document will not arise. This part of the provision might cause problems, as the words "custom", "usage" and "practice of the trade" are not defined under the Convention, and the issue of whether there is a custom, usage or practice of the trade will depend on the applicable national law. Under English law, a distinction is drawn between the three, and when certain conditions (such as being universal, not being contrary to law, and having been followed continuously) are satisfied, then custom/usage will bind the parties, irrespective of their knowledge about its existence.[303] Lorenzon asserts that "in case of a conflict between a custom of the trade and the agreement between the relevant parties, it would seem that the former should prevail, as title to the document is expressly made subject to contrary custom, usage or practice"[304]. Against this argument Berlingieri states that custom, usage or practice of the trade, by their nature,

[301] Art 35 of the Rotterdam Rules.
[302] Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 163.
[303] A distinction between usage and practice of trade is expressly stated in *Cunliffe-Owen v Teather & Greenwood* [1967] 1 W.L.R. 1421, 1438-1439. The court pointed out "…clearly not necessary that a practice should be challenged and enforced before it can become a usage, as, otherwise, a practice so obviously universally accepted and acted upon as not to be challenged could never be a usage. However, enforcement would be valuable and might be conclusive in establishing usage. What is necessary is that for a practice to be a recognised usage it should be established as a practice having binding effect." See also *Royal Exchange Shipping Co v Dixon* (1886) 12 App Cas. 11; *Ropner v Stoate Hosegood & Co* (1905) 10 Com.Cas. 73; *Hogarth v Leith Seed Co.* (1909) S.C. 955; *Glasgow Navigation Co v Howard* (1910) 15 Com. Cas. 88; *Scrutton* (n 24) 1-074; A Rose, *On Law and Justice* (Lawbook Exchange Ltd. 2004) 96-97.
[304] Lorenzon, 'Transport Documents and Electronic Transport Records' (n 157) para 35.02.

cannot be mandatory and in cases where the agreement of the parties and custom, usage or practice of trade are in conflict, the agreement of the parties will prevail.[305] As indicated above, [306] contrary to Berlingieri's statement, under English law, depending on the circumstance, custom and usage have abinding nature. However, where the parties have expressly agreed to the contrary, that agreement prevails over custom and usage.[307] For instance, if the custom says not to issue a transport document but the agreement of the parties expressly requires the carrier to issue a transport document, the agreement prevails and the carrier's documentary obligation arises.

It should be noted that the existence of exception(s) is important to determine whether or not the carrier's documentary obligation emerges. For instance, if any of the exceptions has arisen but the shipper still requests a transport document, the carrier may refuse the shipper's request and justify its refusal on the ground that its documentary obligation does not arise due to the presence of an exception. However, even if any of the exceptions apply, if the carrier wishes, he can still issue a transport document. But in such cases, the issuance of a transport document occurs not because the carrier has an obligation to issue a transport document, but because the carrier's chooses to.

Additionally, in the parties' agreement section of Article 35, the phrase "not to use a transport document" is used, whereas in the custom, usage or practice of the trade section, the phrase "not to use one" is used. The use of the words "not to use one" has been criticised on the grounds that it is not clear whether the term "not to use one" refers to any document, or merely to the transport document within the meaning of the Convention.[308] This author does not agree with this criticism, as the heading of the provision expressly refers to the issuance of a transport document and electronic transport record; i.e. the provision makes adjustment for the transport document, not any other document. Besides not using the same phrase twice in the same sentence, it can be even said that wordiness is prevented.

[305] F Berlingieri, 'A Review of Some Recent Analyses of the Rotterdam Rules' (2009) 111(4) Il Diritto Marittimo 955, 1008-1009.
[306] n 303.
[307] *Royal Exchange Shipping Co v Dixon* (1886) 12 App Cas. 11; *Brenda Steamship Co v Green* [1900] 1 QB 518.
[308] *Carver* (n 54) para 6-079.

As a third exception, Treitel states that if the shipper does not ask for a transport document, the carrier is not required to issue a transport document.[309] Unlike the previous Conventions, the Rotterdam Rules use the phrase "is entitled to obtain" rather than the phrase "on demand of the shipper".[310] The preparatory works do not shed light on the intention of the draftsmen, and because of the ambiguous wording of the provision, it is not clear whether it was aimed at creating an automatic obligation or whether the issuance of the transport document is still tied to the shipper's demand.[311] In its literal interpretation, the phrase "is entitled to obtain" seems to infer that there is no need for a formal demand from the shipper; the carrier's obligation to issue a transport document automatically arises, in the absence of any of the exceptions indicated in the first part of Article 35.[312]

However, Süzel argues that if the shipper or documentary shipper does not demand the issuance of a transport document, this would create an implied contract not to issue a transport document.[313] The last part of Article 35, which states that the type of transport document is to be determined in accordance with the shipper's choice, would apply legitimacy to this argument. The absence of the shipper's choice relating to the type of transport document would be interpreted as an implied contract not to issue a transport document, and if the carrier proves the existence of an implied contract, it can justify that its documentary obligations has not materialised.[314] Namely, the absence of the shipper's demand would prevent the emergence of the

[309] Ibid.
[310] Art III(3) of the Hague-Visby Rules; Art 14(1) of the Hamburg Rules. See also F Reynolds, 'Transport Document under the International Conventions' in R Thomas (ed), *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa 2010) 273-274.
[311] In the 17th Session, the rules related to issuance of the transport document in the previous Conventions was mentioned and it was stated that the principal innovation is to the recognition of the "consignor". However, the terminology differences among the Conventions were not touched. With regard to deletion of the term "consignor", see n 297.
[312] Lorenzon, 'Transport Documents and Electronic Transport Records' (n 157) para 35-02; C Süzel, *Deniz Ticareti Hukukunda Taşıtan ve Yükleten* (12 Levha 2014) 194.
[313] Süzel (n 312) 195. This approach would be followed by English courts on the grounds that waiver of the right. This is because if the shipper does not demand a transport document, it would be deemed that the shipper has impliedly waived its right to obtain a transport document, and thus the carrier's obligation to issue a document does not arise. However, if the phrase "is entitled to obtain" in Article 35 is interpreted literally and it is accepted that the provision imposes an automatic obligation on the carrier, notwithstanding the shipper's demand, then the argument on the existence of an implied contract (or waiver of the right) not to issue a transport document would not be justifiable. As due to the effect of Article 79(1), it would be argued that the obligation of the carrier to issue a transport document could not be excluded by direct or indirect action of the shipper.
[314] The burden of proof is on the carrier. Lorenzon, 'Transport Documents and Electronic Transport Records' (n 157) para 35-04; Süzel (n 312) 195.

carrier's documentary obligation, only if there is an implied contract that can be proved by the carrier. However, even with such an interpretation, unlike Treitel's argument, the absence of the shipper's demand would not be treated as a third exception for not issuing a transport document, as it triggers the emergence of the first exception. Therefore, it is submitted that unless the carrier and the shipper have agreed, either expressly or impliedly, or if there is custom, usage or practice of trade not to use a transport document, then the carrier's obligation to issue a transport document will arise.

If none of the exceptions stated in Article 35 materialise, the carrier must issue a transport document upon delivery of the goods. Lorenzon argues that the phrase "upon the delivery of the goods" allows the issuance of received for shipment transport documents, however "the absence of a provision corresponding to Article III rule 7 of the Hague-Visby Rules makes it impossible for the shipper to request an 'on board' notation on the bill…"[315]. This author disagrees with this argument. It is true that the Rotterdam Rules do not contain an express provision like Article III(7) of the Hague-Visby Rules. However, this does not mean that the Rotterdam Rules exclude shipped on board transport documents from its scope nor the shipper's entitlement to request the carrier to issue such type of transport documents. As explained above,[316] because of its extended scope of application, the Rotterdam Rules do not draw any express distinction between received for shipment and shipped on board transport documents. In the *travaux préparatoires*, it was highlighted that the Convention does not aim to exclude any type of document currently in use or that will be used in future.[317]

Although Article 35 does not expressly mention shipped on board transport documents, Article 36(2)(c), which states that the transport document must contain "the date on which the carrier or a performing party *received the goods*, *or on which the goods were loaded on board the ship...*" (emphasis added), and Article 39(2), which indicates that depending on the circumstances, the date on a transport document might be treated as the date of loading or the date of receiving, explicitly

[315] Lorenzon, 'Transport Documents and Electronic Transport Records' (n 157) para 35-05.
[316] Above part 3.2.3.
[317] UN Doc., A/CN.9/526, 13; Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 164; Berlingieri, 'An Analysis of the Recent Commentaries (n 56) 32.

refer to both the received for shipment and shipped on board transport documents.[318] Accordingly, if the intention of the draftsmen and the wording of Articles 36(2)(c)-39(2) are considered together with Article 35, it is submitted that the Convention embraces both received for shipment and shipped on board transport documents.[319] Furthermore, as explained in detail in the following section, under Article 35, as the shipper is given power to choose the type of transport document, according to the circumstances, it can request the carrier to issue a shipped on board transport document. Consequently, despite the absence of a provision in the Rotterdam Rules similar to Article III(7) of the Hague-Visby Rules, because of the effect of Article 35(b), which obliges the carrier to issue an appropriate negotiable transport document, it can be submitted that where the goods are loaded on board the ship the shipper is entitled to request a shipped on board transport document from the carrier, as in the case of the Hague-Visby Rules.

3.4- Type of Transport Document

In practice, there are different types of transport documents used, and in order to determine the reasons for demanding a specific type, UNCTAD created a questionnaire which was circulated in the industry.[320] According to the results of the questionnaire, the reasons for demanding negotiable transport documents are; (i) banking and finance requirements; (ii) the application of mandatory transport legislation; and (iii) the document of title function of negotiable transport documents.[321]

As to (i), in some cases banks might enter into international transactions through letters of credit, and where they do so, they might prefer to obtain negotiable bills of lading, since as a result of their document of title function, such bills provide security for the banks.[322] As to (ii), the application of the Hague-Visby Rules, for example,

[318] Arts 36(2)(c), 39(2) of the Rotterdam Rules. Article 39(2) states that where a transport document indicates a date but does not specify it the date will be treated as the date of loading, if the transport document shows that the goods have been loaded. However, if the transport document does not show that the goods have been loaded, then the date will be deemed as the date on which the goods are received by the carrier or performing party.
[319] For the same opinion see *Carver* (n 54) para 1.021; Sturley and others (n 26) para 7.019.
[320] Report of UNCTAD Secretariat, UNCTAD/SDTE/TLB/2003/3, The Use of Transport Documents in International Trade.
[321] Ibid paras 93-94. See also P Todd, *Bills of Lading and Bankers Documentary Credits* (4th edn, Informa 2007) para 3.3 *et seq*.
[322] Report (n 320) para 12; Todd, *Bills of Lading* (n 321) para 3.7; van der Ziel, 'Delivery of the Goods, Rights of the Controlling Party' (n 175) 605.

depends on the existence of a bill of lading or similar document of title, and this affects the shipper's choice of the type of transport document.[323] However, in respect of the Rotterdam Rules, this factor will not have any effect on the shipper's choice relating to the type of transport document, as the Convention applies to the contract of carriage irrespective of the existence and type of transport document.[324] Therefore, carriers cannot prevent the application of the Rotterdam Rules by forcing shippers to demand a specific form of document. With regard to (iii), under English law, for instance, it has been accepted that bills of lading are documents of title, therefore, if the buyer wants to sell the goods while they are in transit, it can do so by transferring the bills of lading, thus the transferee obtains constructive possession of the goods.[325] In the questionnaire mentioned above,[326] it was pointed out that if there is no intention to sub-sell, the voyage is short, or there is no need for a letter of credit, shippers generally demand non-negotiable transport documents.[327]

It should be added that shippers have tended more to demand non-negotiable transport documents rather than negotiable transport documents in recent years.[328] The reasons being that firstly, negotiable transport documents have to be surrendered to obtain delivery of the goods whereas non-negotiable transport documents generally do not. Accordingly, negotiable transport documents might cause problems; for example, with documentary credits, if a negotiable transport document is produced to the buyer's bank, the bank will pay the price of the goods to the seller, but will hold the document until it is reimbursed by the applicant.[329] If the cargo arrives at its destination while the negotiable transport document is in the hands of the bank, the buyer cannot obtain delivery without surrendering the negotiable document duly endorsed to it. The second reason is that banks have changed their attitudes towards non-negotiable transport documents, and under the UCP 500 and the UCP 600,

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[323] Art I(b) of the Hague Visby Rules. Under English law, in recent cases, it has been accepted that in respect of the application of Article I(b) of the Hague-Visby Rules, straight bills of lading are deemed as a similar document of title. See *The Happy Ranger* [2002] 2 Lloyd's Rep 357; *The Rafaela S* [2005] 1 Lloyd's Rep 347 (HL).

[324] Arts 1(1), 5(1) of the Rotterdam Rules.

[325] Under English law, according to the case law, "document of title" means that having the possession of the bill of lading is equivalent to having the possession of the goods themselves, and where the bill of lading is transferred, the constructive possession of the goods is also transferred from transferor to the transferee. See Chapter 8.2.3.

[326] Report (n 320).

[327] Ibid paras 96-97.See also Gaskell and others (n 283) 14; *Scrutton* (n 24) 20; Todd, *Bills of Lading* (n 321) paras 1.112-1.113; 3.4, 3.11; 3.51-3.55.

[328] CMI Yearbook 2003, 250, 254; ICC, *Documentary Credits: UCP 500 and 400 Compared* (ICC Publication No. 511-1993) 72; Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 164; Todd, *Bills of Lading* (n 321) paras 1.109-1.110.

[329] CMI Yearbook 2000, 229; Todd, *Bills of Lading* (n 321) para 3.9; L Li, 'The Legal Status of Intermediate Holders of Bills of Lading under Contracts of Carriage by Sea-A Comparative Study of US and English Law' (2011) 17(2) JIML106.

documentary credits can be obtained in relation to non-negotiable transport documents as well as negotiable transport documents.[330]

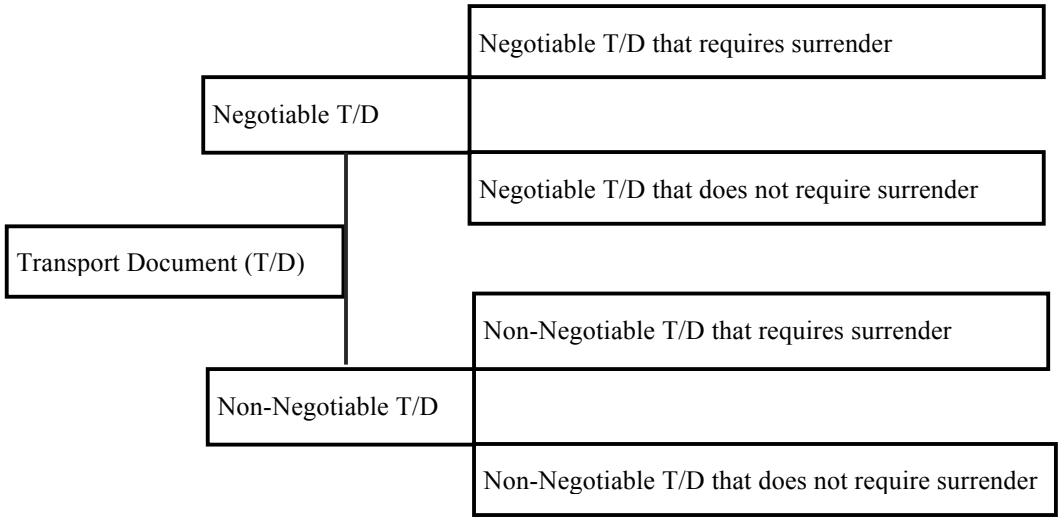
Returning to the Rotterdam Rules, where the carrier's obligation to issue a transport document arises, the following questions may arise: which type of transport document will be issued, and more importantly, who has the right to determine the type of transport document issued? The answers to these questions are found in Article 35, which is worded as follows:

> "... at the shipper's option:
> (a) A non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record; or
> (b) An appropriate negotiable transport document or, subject to article 8, subparagraph (a), a negotiable electronic transport record, unless the shipper and the carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage or practice of the trade not to use one."

The Article expressly shows that the shipper has the power to choose the type of transport document. However, although the shipper can choose either a negotiable or non-negotiable transport document or their electronic equivalent, such power is limited on the following grounds: firstly, if the shipper and the carrier have agreed not to use a negotiable transport document; and secondly, if there is custom, usage or practice of the trade not to use a negotiable transport document. As pointed out in the preparatory works and as understood from the wording of the provision, the restriction is only in relation to the negotiable transport document; namely, where one of the restrictions indicated in the Article applies, the shipper can only demand a non-negotiable transport document where the carrier's obligation to issue a transport document arises.[331] Therefore, subject to a restriction of the shipper's right to choose a negotiable transport document, the carrier is obliged to issue a transport document as in the type demanded by the shipper.

[330] For the first time, non-negotiable transport documents were expressly included in ICC Uniform Customs and Practice for Documentary Credits, 1993 (the UCP 500), and then ICC Uniform Customs and Practice for Documentary Credits, 2007 (the UCP 600) contained provisions on such type of documents. See Art 24 of the UCP 500; Art 21 of the UCP 600. See also Todd, *Bills of Lading* (n 321) paras 1.110; 8.21-8.22.
[331] UN Doc., A/CN.9/621 para 267; Above part 3.3.

Under the Convention, transport documents are classified into two main categories (Article 1(15)-(16)),[332] and those main categories are divided to two sub-categories (Articles 46-47(2)),[333] as indicated in the schema below:



Article 35 merely states the main categories and gives the shipper the choice to demand any of those types of transport documents. Therefore, it is not clear whether Article 35 gives the shipper an option to choose the sub-categories. If the shipper does not have the option to choose the sub-type of transport document, which sub-type of document will be issued, and who has the power to determine the sub-type? In respect of negotiable transport documents, the answer could be found in Article 35(b), which states that the carrier must issue "an appropriate negotiable transport document". Because of the use of the word "appropriate", it could be argued that the carrier must issue a negotiable transport document which satisfies the shipper's needs, otherwise the carrier has not properly fulfilled its documentary obligation.[334] For instance, if the shipper demands a negotiable transport document that requires surrender, but the carrier issues a negotiable transport document that does not require surrender, this

[332] Art 1(15)-(16) of the Rotterdam Rules; Below parts 3.4.1-3.4.3.
[333] Arts 46, 47(2) of the Rotterdam Rules; Below parts 3.4.2-3.4.4. Although there are specific provisions for the definitions of negotiable and non-negotiable transport documents, the sub-categories are not defined by express provisions, but they are mentioned in the part of the Convention on delivery of the goods in Chapter 9. Also, it should be noted that electronic transport records are also divided into the same sub-categories, but the non-negotiable electronic transport record that requires surrender is not mentioned because such electronic transport records do not exist. See Arts 1(19)-(20), 47(2) of the Rotterdam Rules; UN Doc., A/CN.9/645 para 157.
[334] Mollmann (n 229) 55.

document might not constitute an appropriate negotiable document that satisfies the shipper's needs. Likewise, if for instance the goods are loaded on board the ship and the shipper requests a shipped on board negotiable transport document, but the carrier does not label the document as shipped on board, such a document would not be deemed as an appropriate negotiable document under Article 35(b).

On the other hand, with regard to non-negotiable transport documents, Article 35(a) does not use the word "appropriate", thus it is not clear whether the carrier or the shipper will determine the sub-type of the non-negotiable transport document. For instance, where the shipper asks the carrier to issue a non-negotiable transport document in a specific sub-type (e.g. in the form of a non-negotiable transport document that requires surrender) and with a specific notation, such as a shipped on board label, it is not clear whether the carrier can decline the shipper's demand or whether it is obliged to issue the transport document as per the shipper's wish.[335] As Mollmann states, in practice it would be unlikely to imagine that the carrier would not respond to its customer's express wish.[336] However if the shipper does not express any preference, it is argued that as the issuer of the document, the carrier, should seek clarification from the shipper, otherwise it would have to determine the sub-type of the non-negotiable transport document.

3.4.1- Negotiable Transport Document That Requires Surrender

Article 1(15) defines a negotiable transport document[337] as follows:

> "...a transport document that indicates, by wording such as 'to order' or 'negotiable' or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being 'non-negotiable' or 'not negotiable'.[338]

[335] Ibid.
[336] Ibid.
[337] UN Doc., A/CN.9/WG.III/WP.21 para 13. Instead of the word "transferable", the word "negotiable" was preferred, since it was pointed out that the word "negotiable" is well understood internationally, even if it is inaccurate in some legal systems.
[338] Art 1(15) of the Rotterdam Rules.

Pursuant to the definition, in order to qualify as a negotiable transport document within the meaning of the Convention, there firstly must be a transport document as defined in Article 1(14); namely, there must be a document, issued by the carrier under a contract of carriage, which evidences the carrier or performing party's receipt of the goods, and evidences or contains a contract of carriage.[339] Secondly, the transport document must contain the word(s) "to order" or "negotiable", or any other appropriate word with the same effect under the applicable law-as explained below-, and it must be issued either to the order of the shipper,[340] consignee[341] or to bearer.[342]For instance, if a transport document states that it is issued "to order of X" or without stating a name, if it contains the words "to order" or merely says "negotiable", the second precondition will be satisfied. Where a transport document is issued "to order" without indicating to whose order it has been issued, it would be ambiguous whether the document is issued to order of the shipper or to order of the consignee. Article 1(15) does not regulate such situations; therefore it seems that the issue will depend on the applicable national law. Under English law, if the document is issued "to order" without stating a name, it is accepted that the document is issued to the order of the shipper.[343]

It should be added that allowing the use of any other appropriate words under the applicable law might mean the same document is classified differently under different jurisdictions, thus it might be difficult for parties to properly evaluate the type of transport document.[344] For example, under English law, when a document is issued to bearer or "to order" or "to order or assigns", with or without naming a person to whom the goods are to be delivered, or contains similar words of transferability, the document will qualify as an order or bearer bill of lading, i.e. a negotiable transport document.[345] And, if the document is made out to a named person rather than to the

[339] Art 1(14) of the Rotterdam Rules; Above part 3.2.
[340] Art 1(8) of the Rotterdam Rules; Chapter 7.1.1.
[341] Art 1(11) of the Rotterdam Rules; Chapter 8.1.
[342] Under English law, a bearer bill of lading refers to the bill that does not name the person to whom the goods will be delivered but makes the goods deliverable to the bearer, who has the possession of the bill. See s. 1(2)(a), 5(2)(b) of COGSA 1992; *Benjamin* (n 136) para18-020; *Carver* (n 54) para 1-010; Aikens and others (n 154) para 2.41.
[343] *Laemthong International Lines Co Ltd v Artis and others* [2005] 2 All ER (Comm) 167, 169; *Carver* (n 54) 10, 397.
[344] Mollmann (n 229) 52, 57.
[345] *CP Henderson & Co v The Comptoir D'Escompte de Paris* (1873) LR 5 PC 253, 260. The court highlighted that to be qualified as a negotiable transport document some such words "to order or

order of the named person, the document will either be a straight bill of lading or a sea waybill; i.e. a non-negotiable transport document.[346] However under Norwegian law, a bill of lading may be issued to a named person or order, or to bearer; and furthermore Norwegian Maritime Code states that a bill of lading issued to "a named person is regarded as an order bill of lading unless it contains a reservation in such terms as 'not to order' or similar".[347] If the Rotterdam Rules apply to English and Norwegian law, and if we assume that there is a transport document that does not contain the words "to order" or "negotiable" but is issued to a named person, then this document would be classified as a non-negotiable transport document under English law, whereas it would be classified as a negotiable transport document under Norwegian law.[348] Therefore, as pointed out by Diamond, under the Rotterdam Rules, depending on the interpretation of the court in question, a bill of lading might be classified as a negotiable transport document, non-negotiable transport document or non-negotiable transport document that requires surrender.[349] And, as explained above,[350] this variation in the type of transport document would effect the identification of the parties.

The third and final precondition is that the transport document does not expressly states that it is "non-negotiable" or "not negotiable". The word "and" is used between the second and third requirements, therefore even if a transport document includes the word(s) "to order" or "negotiable" or any other appropriate word under national law it will not be classified as a negotiable transport document if it also includes the words "non-negotiable" or "not negotiable". It should be pointed out that in cases where the

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assigns" ought to be involved in the document. See also *The Chitral* [2000] 1 Lloyd's Rep 529; *The Happy Ranger* [2002] 2 Lloyd's Rep 357 para 29; Aikens and others (n 154) paras 2.38, 2.42; *Carver* (n 54) paras 1-011, 1-017; *Benjamin* (n 136) paras 18-020, 18-021.

[346] *The Mobil Courage* [1987] 2 Lloyd's Rep 655; *The Happy Ranger* [2002] 2 Lloyd's Rep 357; *The Rafaela S* [2005] 1 Lloyd's Rep 347 (HL). See also *Carver* (n 54) paras 1-014, 1-018; *Benjamin* (n 136) para 18-024 *et seq*.; S Girvin, 'Bills of Lading and Straight Bills of Lading: Principals and Practice' (2006) JBL 86, 98; Aikens and others (n 154) para 2.45. The authors emphasize that straight bills of lading are not negotiable in the normal sense; they are merely transferred from the shipper to the named person.

[347] S. 292 of Norwegian Maritime Code. English version of the Act can be accessed in http://folk.uio.no/erikro/WWW/NMC.pdf accessed 11.07.2015.

[348] Mollmann (n 229) 52.

[349] Diamond (n 81) 498. For further about different categorisation among the jurisdiction see CMI Yearbook 2001, 400; H Tiberg, 'Legal Qualities of Transport Documents' (1998-1999) 23(1) Tul. Mar. L.J.1, 13; T Schmitz, 'The Bill of Lading as a Document of Title' (2011) 10(3) J Int Trade Law & Policy 255, 264.

[350] Above part 3.1.

document contains both the words "to order" or "negotiable", and "non-negotiable", the inclusion of these terms on the transport document at the same time could be treated as an inconsistency, therefore the validity of such particulars and the determination of the type of transport document will depend on the applicable national law and the interpretation of the national courts.[351] For instance, under English law, where there is inconsistency, the bill of lading is interpreted as a whole and the intention of the parties is taken into account and furthermore, if one of the terms is typed while the other is pre-printed, the typed term is given priority over the pre-printed term, as they reflect the parties' intention.[352]Depending on the court's interpretation, if the term "not negotiable" or "non-negotiable" is considered inconsistent with the term "to order" or "negotiable" and is invalided, then the third precondition (i.e. the transport document does not expressly contain the words "non-negotiable" or "not negotiable") will be satisfied and the transport document will qualify as a negotiable transport document, if the other preconditions are also met. On the other hand, if the court interprets the words "not negotiable" or "non-negotiable" as valid, the third precondition will not be satisfied, therefore the transport document will not be a negotiable transport document.

The definition of negotiable transport document has been criticised on the grounds of its comprehensiveness, as well as elusiveness, and Diamond states that the inclusion of such a term might be accidently excluded by the average trader, thus, instead of issuing a negotiable transport document, a non-negotiable transport document might be mistakenly issued.[353] Moreover he suggests that instead of such a comprehensive definition, it would have been better if the Convention had provided a presumption classifying all documents as negotiable transport documents unless prominently

[351] Mollmann (n 229) 50; *Carver* (n 54) 397; Williams (n 125) 194.
[352] In *The Chitral* [2000] 1 Lloyd's Rep 529, the court was looking for whether there is an order or straight bill of lading. In the printed box of the bill of lading, a named person was indicated as the consignee but in a separate part of the printed form it was stated "unto the above-mentioned Consignee or to his or their assigns". The bill of lading was construed as a whole and the parties' intention was considered, and consequently, it was held that the bill is not negotiable. In, *The Starsin* [2003] 1 Lloyd's Rep 571 (HL), it was indicated that if there is an inconsistency between the typed terms and the pre-printed terms the typed terms are given priority over the pre-printed terms. See also *Carver* (n 54) paras 1-018; 6-080; *Benjamin* (n 136) para 18-021; Mollmann (n 229) 52; Williams (n 125) 194.
[353] Diamond (n 81) 497, 498; Williams (n 125) 194; Tetley, 'Some General Criticisms of The Rotterdam Rules' (n 230) 626. On the other hand, against such criticisms Berlingieri states that although it is true that the provisions related to transport documents are comprehensive they are not elusive, since the Convention has not introduced anything new. See Berlingieri, 'Revisiting the Rotterdam Rules' (n 81) 620.

labelled as non-negotiable.[354] It should be noted that even if the definition of negotiable transport document had been worded as suggested, there would still be problems; omitting the words "to order" is only one side of the coin. On the other side, there still might be traders, wanting to obtain a non-negotiable transport document, but the word "non-negotiable" has been accidentally omitted, or traders who want to obtain a negotiable transport document but the word "non-negotiable" has been mistakenly included.[355] Of course, such omissions might cause problems in practice, thus the trader ought to be cautious.[356]

3.4.2- Negotiable Transport Document That does not Require Surrender

The Convention introduces a negotiable transport document that does not require surrender as a new category. Although there is no specific provision for the definition of such type of transport documents in the definition chapter, in the delivery of the goods chapter, under Article 47(2), they are expressly mentioned.[357] As a negotiable transport document that does not require surrender is a sub-category of the negotiable transport document, in order to fall within this category, the transport document firstly needs to meet the requirements for qualifying as a negotiable transport document indicated in Article 1(15).[358] To recap, there must be a transport document, which indicates that the goods will be delivered to order of the shipper or the consignee or to bearer, by using the words "to order" or "negotiable" or any other appropriate word under the applicable law, and does not expressly contain the words "non-negotiable" or "not negotiable".

Pejović claims that the document referred to in Article 47(2) is not a negotiable transport document in the sense established by legal theory and practice.[359] In this author's opinion, Article 47(2) should be considered as within the meaning of the

[354] Diamond (n 81) 498. Also for the same suggestion see CMI Yearbook 2001, 284.
[355] Williams (n 125) 194; Mollmann (n 229) 52.
[356] *The Chitral* [2000] 1 Lloyd's Rep 529, 532; *The Rafaela S* [2005] 2 AC 423, 431, 434. In these cases, it was pointed out that if the shippers fail to include the word "to order" they will bear its consequences.
[357] Art 47(2) of the Rotterdam Rules; Chapter 8.2.4.
[358] Above part 3.4.1.
[359] The author states that delivering the goods against the surrender of the transport document is the essential feature of negotiable transport document therefore without this essential feature a document cannot be called as a negotiable document. See Ćaslav Pejović, 'Article 47(2) of the Rotterdam Rules: Solution of Old Problems or a New Confusion?' (2012) 18(5) JIML 348, 355.

Convention, not current legal theory or practice. The chapeau of Article 47(2) expressly states that the provision applies to the negotiable transport document, i.e. the transport document which satisfies the requirements indicated in Article 1(15), and in addition to those requirements, if the negotiable transport document expressly states that it does not need to be surrendered, it will fall within the Article 47(2) category.[360] The only difference between the negotiable transport document that requires surrender and the negotiable transport document that does not require surrender, is that the former needs to be surrendered, while the latter does not.

The second requirement is that the transport document must "expressly" state that there is no need to surrender the negotiable transport document to receive delivery of the goods. Diamond states that it is not clear whether such statement must be on the transport document itself, or whether a clause incorporating a charterparty would also satisfy the requirement.[361] In the preparatory works, it was discussed that the provision should contain the phrase "through incorporation by reference to the charterparty"; however there was not enough support for allowing delivery of goods without surrender of the transport document, through incorporation by reference to the charterparty only.[362] In order to protect the holder, instead of including the phrase "through incorporation by reference to the charterparty", the word "expressly" was added before the word "states".[363] The chapeau of Article 47(2) only refers to the transport document and electronic transport record, and via the express statement on a transport document, the transferee will be aware of the risk that the goods might be delivered to someone else without surrender of the transport document.[364] Therefore, to satisfy the requirement, an express statement must be indicated on the transport document, not in a charterparty or any other document. For instance, if the negotiable transport document does not say anything about delivery of the goods without surrender of the negotiable transport document, but refers to the terms and conditions of a charterparty which expressly states that the goods will be delivered without surrender of the negotiable transport document, the requirement of "expressly states"

[360] Arts 1(15), 47(2) of the Rotterdam Rules. For the same view see Sturley and others (n 26) para 8.046; Mollmann (n 229) 55.
[361] Diamond (n 81) 518.
[362] UN Doc., A/63/17 paras 160-161.
[363] Ibid paras 161, 165.
[364] Berlingieri, 'Revisiting the Rotterdam Rules' (n 81) 632; Diamond (n 81) 518; Sturley and others (n 26) paras 8.082-8.083; Mollmann (n 229) 53.

will not be met. In such a case, the express statement is indicated in the charterparty not in the negotiable transport document itself. Also, Reynolds notes that the problem might arise where there is an express but inconspicuous statement; therefore he suggests that a stronger wording should have been chosen.[365] However, this seems to be an interpretation issue, and depending on how the extent of the word "expressly" is determined by the national courts the inconspicuous statement could be deemed as either an express statement or not.[366]

3.4.3- Non-negotiable Transport Document That Does Not Require Surrender

Article 1(16) defines non-negotiable transport document as follows:

> "… a transport document that is not a negotiable transport document."[367]

The provision defines the non-negotiable transport document by addressing the negotiable transport document. In order to be classified as a non-negotiable transport document, firstly there must be a transport document as defined in Article 1(14),[368] and secondly this transport document must not meet the requirements of a negotiable transport document as defined in Article 1(15).[369] As a document not classified as a negotiable transport document will be a non-negotiable transport document, the explanations above[370] for determining whether a transport document is a negotiable transport document can also be applied here.

3.4.4- Non-negotiable Transport Document That Requires Surrender

Non-negotiable transport documents are not normally surrendered in order to take delivery of the goods; however, if the non-negotiable transport document itself indicates that it must be surrendered to take delivery, the consignee has to surrender the document to the carrier.[371] Although Article 1(16) defines a non-negotiable transport document, there is no definition of a non-negotiable transport document that

[365] Reynolds (n 310) 277.
[366] For the position under English law, see Chapter 8.2.4.
[367] Art 1(16) of the Rotterdam Rules.
[368] Art 1(14) of the Rotterdam Rules; Above part 3.2.
[369] Art 1(15) of the Rotterdam Rules; Above part 3.4.1. See also Williams (n 125) 194; Diamond (n 81) 497; CMI Yearbook 2000, 265.
[370] Above part 3.4.1.
[371] Art 46 of the Rotterdam Rules; Todd, *Bills of Lading* (n 321) para 3.51; Debattista, 'Delivery of the Goods' (n 34) para 46-01 *et seq*.

requires surrender in the definition chapter. However, in the delivery of the goods portion of the Convention, pursuant to Article 46, if a non-negotiable transport document "indicates that it shall be surrendered", then the transport document must be surrendered in order to receive delivery of the goods.[372] The non-negotiable transport document that requires surrender has the same features as the non-negotiable transport document that does not require surrender, the only difference being that while the former has to be surrendered to the carrier to obtain delivery of the goods, the latter does not have to.[373] Namely, to qualify as a transport document under Article 46, firstly there must be a transport document as defined in Article 1(14); secondly the transport document must be classified as a non-negotiable transport document by not meeting the preconditions for qualifying as a negotiable transport document under Article 1(15); and thirdly, the non-negotiable transport document must indicate that the transport document must be surrendered to receive delivery of the goods. Although, the use of the word "indicates" is criticised by Reynolds on the ground that it is not strong enough, as Berlingieri points out, the word "indicates" should be taken into account with the rest of the sentence, and because of the additional use of the word "shall", "indicates" would be strong enough.[374] Also, as stated in the *travaux préparatoires,* the word "indicates" is intentionally chosen; as such types of transport documents are currently used in some jurisdictions and the word "indicates" is the only acceptable term to preserve the existing law.[375]

Lastly, it should be added that the Convention does not contain any specific provision related to multimodal transport documents, and Tetley suggests that instead of the comprehensive regulation of the transport document, it would have been more logical for the Convention to introduce negotiable and non-negotiable multimodal transport documents.[376] In this author's view, the categorisation of the types of transport documents is appropriate for the scope of application of the Convention, as the

[372] Art 46 of the Rotterdam Rules; Chapter 8.2.2.
[373] Art 1(16) of the Rotterdam Rules; Above part 3.4.3. See also Debattista, 'Delivery of the Goods' (n 34) para 46-02; Todd, *Bills of Lading* (n 321) para 3.53; Diamond (n 81) 513.
[374] Reynolds (n 310) 276; Berlingieri, 'An Analysis of the Recent Commentaries' (n 56) 108.
[375] It was said that the words "indicate" is too flexible and broad therefore the words "provides" or "specifies" were considered instead of the word "indicates" but finally in order to preserve the existing law the word "indicates" was chosen. See UN Doc., A/CN.9/594 paras 213, 215; UN Doc., A/CN.9/WG.III/WP.81, draft Art 47; UN Doc., A/CN.9/642 paras 31-35; UN Doc., A/CN.9/645 paras 154-156. For the determination of the extent of the word "indicates" under English law, see Chapter 8.2.2.
[376] Tetley, 'Some General Criticisms of The Rotterdam Rules' (n 230) 626.

Convention is not purely a multimodal Convention, and there might be cases where only sea carriage is involved.[377] Furthermore, for multimodal transport, the issuance of a multimodal transport document is not essential; namely, in some multimodal transports, instead of multimodal transport documents, separate transport documents might be issued for every leg.

[377] Arts 1(1), 5 of the Rotterdam Rules.

CHAPTER 4: THE CONTRACT PARTICULARS RELATED TO IDENTIFICATION OF THE PARTIES UNDER THE ROTTERDAM RULES

Where the carrier's obligation to issue a transport document under Article 35 arises, the Rotterdam Rules require the inclusion of some information on the transport document.[378] To address the information indicated in the transport document, the Convention introduces the term "contract particulars" and furthermore provides a provision, Article 36, listing the contract particulars that need to be indicated on the transport document.[379] Apart from the contract particulars indicated in Article 36, there are other contract particulars addressed in other articles such as Article 1(23), Article 31(1) and Article 38(1).[380] Some of those contract particulars have vital importance on the issue of identification of the parties, therefore this Chapter is devoted to the examination of contract particulars related to identification of the parties.

The Chapter is structured as follows: in the first section, the concept of "contract particulars" will be examined; in the second section, contract particulars related to the identification of the carrier, maritime performing party, shipper/documentary shipper and consignee will be respectively analysed; and in the third section, the consequences of the deficiencies in the contract particulars will be analysed. It must be added that during the preparatory works, regarding the information that needs to be indicated on the transport document, the aim was to ensure consistency with the UCP 600.[381] Therefore, in some parts of this Chapter, the UCP 600 will be mentioned briefly.

4.1- The Notion of "Contract Particulars" under the Rotterdam Rules

Article 1(23) defines "contract particulars" as follows:

> "… any information relating to the contract of carriage or to the goods (including terms,

[378] Art 35 of the Rotterdam Rules; Chapter 3.3.
[379] Arts 1(23), 36 of the Rotterdam Rules; Below part 4.2.
[380] Arts 1(23), 31(1), 36, and 38(1) of the Rotterdam Rules; Below parts 4.1-2.
[381] UN Doc., A/CN.9/WG.III/WP.79 para 3 n 2; UN Doc., A/CN.9/616 para 18; UN Doc., A/CN.9/621 para 277.

notations, signatures and endorsements) that is in a transport document or an electronic transport record."

According to this definition, there are three kinds of information that qualify, as contract particulars under the Convention. Firstly, a transport document may contain information related to the contract of carriage. To include such information on the transport document, there has to be a contract of carriage that meets the requirements of Article 1(1).[382] In practice, bills of lading issued in paper form generally have two sides,[383] and information related to the contract of carriage is usually placed on the back, i.e. the contractual side of the transport document as with pre-printed forms.[384] For instance, information on the definition of the parties, e.g. definition of merchant and carrier, information about the applicable law and jurisdiction, falls within this category and are usually located on the back of paper bills of lading as pre-printed forms.[385]

Secondly, a transport document may contain information related to the goods. The word "goods" is defined as "the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier."[386] Because of the use of the phrase "undertakes to carry", it is understood that the goods do not have to be received or actually carried by the carrier; undertaken to be carried by the carrier would be enough to be qualified as goods under the Convention.[387]

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[382] Art 1(1) of the Rotterdam Rules; Chapter 3.2.1.
[383] However, in cases of short form bill of lading, the back of the bill is blank i.e. there are no pre-printed terms on the back of the bill (e.g. BIMCO Blank Back Bill).
[384] In ICC Position Paper No.4, 1994 it is pointed out that the phrase 'the back of the document' addresses the side, which includes details about the contract of carriage. See also *The Starsin* [2003] 1 Lloyd's Rep 571 (HL) 573.
[385] As examples of contract particulars related to the contract of carriage, see clauses on the contractual sides of BIMCO Multidoc 95 and BIMCO Conlinebill 2000. However, in some bills of lading, the contractual side might be replaced by the commercial side; i.e. face of the bill might contain information about the contract of carriage and the reverse of the bill might deal with the commercial issues (e.g. BIMCO Conlinebill 1978).
[386] Art 1(24) of the Rotterdam Rules.
[387] In the former version of Article 1(24), the word "goods" only referred to the goods, which have been received for carriage however it was pointed out that the scope of the term "received for carriage" is narrow and it might fail to "cover cases where there was a failure by the carrier to receive the goods or to load the goods on board a vessel" therefore, this term was replaced by the phrase "undertakes to carry". UN Doc., A/CN.9/510 para 90, UN Doc., A/CN.9/WG.III/WP.32 n 15.

In practice, information related to the goods is generally located on the face, i.e. commercial side, of paper bills of lading.[388] For instance, information on the description of the goods (Art 36(1)(a)), leading marks (Art 36(1)(b)), quantity (Art 36(1)(c)), weight (Art 36(1)(d)), and apparent order and condition of the goods (Art 36(2)(a)) falls within this category and is generally located on the face of paper bills of lading as typed or written forms.[389]

Thirdly, a transport document may include information which does not fall in either category, such as signature. Within a bracket, Article 1(23) expressly shows that the terms, notations, signatures, and endorsements on a transport document also qualify as contract particulars under the Convention. In the *travaux préparatoires*, it was stated that "contract particulars" is wide enough to embrace any other information on the transport document, therefore contract particulars in the third category are not limited to the particulars indicated in the bracket.[390] For instance, the transport document may contain a logo, which usually comprises of a designed figure along with the abbreviated name of the company, as contained in the transport documents of Maersk Line. Even if logos do not usually state the actual trade names of the companies, they may indicate some information relating to the owners of the forms by stating, for instance, "Maersk Line" or "CP Ships". A logo is neither related to the contract of carriage nor to the goods and further, it is not indicated in the bracket in Article 1(23). However, if the transport document contains a logo, it will be a contract particular, as the definition embraces all information. In practice, the location of contract particulars in the third category varies; some, e.g. signature, are located on the face whilst others, e.g. endorsement, are located on the back of paper bills of lading.[391]

Last but not least, under the Convention, inclusion of some contract particulars in the first and second category is mandatory. With regard to the first category, pursuant to Article 36, transport documents must mandatorily contain contract particulars relating

[388] In ICC Position Paper No.4, 1994 it is pointed out that the phrase 'the front of the document' addresses the side, which indicates the details about the goods, vessel and voyage. See also *The Starsin* [2003] 1 Lloyd's Rep 571 (HL) 573.
[389] Arts 36(1)(a)-(d), 36(2)(a) of the Rotterdam Rules. As examples see the face, i.e. the commercial side of BIMCO Multidoc 95 and BIMCO Conlinebill 2000.
[390] UN Doc., A/CN.9/510 para 153; Sturley and others (n 26) para 7.024; Atamer, Süzel (n 26) 169.
[391] For instance, see BIMCO Conlinebill 2000; BIMCO Congenbill 2007. See also *Scrutton* (n 24) para 10-001.

to the contract of carriage, such as the name of the carrier.[392] Furthermore, according to the definition of a transport document, to qualify as a transport document, the document must contain or evidence a contract of carriage.[393] Namely, the inclusion of such information in the transport document is one of the prerequisites for qualifying as a transport document. Moreover, in respect of information related to the goods, Article 36 lists some information as mandatory contract particulars; therefore the transport document must include such information.[394] It should be added that the information about the goods listed in Article 36 is not exhaustive; if the parties wish, they can add more information, but of course the inclusion of such information will not be mandatory; it will depend on the parties' wishes.[395]

On the other hand, the inclusion of the information in the third category might be mandatory or non-mandatory, varying with every case. For example, if a person holds a negotiable transport document issued to its order and wants to transfer the document to a third party, it must endorse and transfer the document to the transferee, and when the transport document is endorsed, the endorsement will be a contract particular within the meaning of Article 1(23).[396] However, as a result of the requirement in Article 38(1), a transport document, regardless of its type, must include a signature.[397] As it is seen, while endorsement is not mandatory and varies depending on the fact and type of transport document, the inclusion of signature is mandatory in all cases. It must be noted that the location of the information has no effect on it qualifying as a contract particular; any information either on the face or reverse of the transport document will be as a contract particular within the meaning of Article 1(23). Consequently, the definition "contract particulars" has a broad meaning and literally covers all information indicated on a transport document.

4.2- The Contract Particulars Related to Identification of the Parties

[392] Art 36 of the Rotterdam Rules; Below part 4.2.
[393] Art 1(14) of the Rotterdam Rules; Chapter 3.2.4.
[394] For example, information about the quantity (Art 36(1)(c)) and weight of the goods (Art 36(1)(d)).
[395] Sturley and others (n 26) para 7.025; Lorenzon, 'Transport Documents and Electronic Transport Records' (n 157) para 36-14; Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 167.
[396] Arts 1(15), 57(1) of the Rotterdam Rules; Below part 4.2.4; Chapter 3.4.1-2.
[397] Art 38(1) of the Rotterdam Rules; Below parts 4.2.1.3, 4.3.

In Article 36, the Rotterdam Rules provide a long list of contract particulars; however among those contract particulars, only the name and address of the carrier (Article 36(2)(b)), the name and address of the consignee (Article 36(3)(a)), the name of the ship (Article 36(3)(b)), and the port of loading/discharge (Article 36(3)(d)) are related to identification.[398] Apart from the contract particulars listed in Article 36, endorsement, which is stated as a contract particular in Article 1(23),[399] as well as the contract particulars indicated in Article 31(1),[400] are related to identification of cargo interests. Additionally signature, which is mentioned as a contract particular in Articles 1(23) and 38, is related to identification of the carrier.[401] In the following section, all these contract particulars related to identification of the parties will be examined in detail.

4.2.1- The Contract Particulars Related to Identification of the Carrier

4.2.1.1- The Name and Address of the Carrier

The existence of the carrier's name on the transport document is necessary for the application of Article 37(1).[402] The Article regulates identification of the carrier, where a person is identified by name as the carrier, but the transport document includes other information inconsistent with that identification. On the other hand, the absence of the carrier's name is necessary for application of Article 37(2), which introduces a rebuttable presumption on the shipowner, when the carrier is not identified by name.[403] As seen above, the regulations for identification of the carrier in Articles 37(1) and 37(2) are based on whether the transport document includes the name of the carrier or not. Under Article 36(2)(b), the inclusion of the name and address of the carrier is listed as one of the mandatory contract particulars of the transport document.[404] In the *travaux préparatoires*, the use of the word "name" is

[398] Art 36 of the Rotterdam Rules.
[399] Art 1(23) of the Rotterdam Rules.
[400] Which requires the shipper to provide information about the name of the party to be identified as the shipper and the name of the consignee, if any. See Art 31(1) of the Rotterdam Rules; Below part 4.2.3.
[401] Arts 1(23), 38 of the Rotterdam Rules; Below part 4.2.1.3.
[402] Art 37(1) of the Rotterdam Rules; Chapter 5.2.1.3.
[403] Art 37(2) of the Rotterdam Rules; Chapter 5.2.2.
[404] Art 36(2)(b) of the Rotterdam Rules. In the former drafts of Article 36(2)(b), it was stated that the transport document must show "the name and address of a person identified as the carrier"; however, it was said that the phrase "a person identified as the carrier" might be misinterpreted, and as a new

questioned on the grounds that it might cause confusion, but it was stated that "name" refers to the actual name of the carrier, not merely a vague trade name or logo.[405] Therefore, for instance, if the transport document indicates only a vague trade name or logo without showing the actual name of the carrier, such as A-Line, or if it is signed by an agent with the word "as agent", without indicating any legal or natural person's actual name, then the requirement under Article 36(2)(b) will not be met. In order to satisfy this requirement, Atamer states that if the carrier is a natural person, the transport document must contain the first and family name of the natural person as shown in the identification certificate; on the other hand, if the carrier is a legal person, the transport document must indicate the registered title of the legal person.[406]

It should be added that the UCP 600 also requires the inclusion of the name of the carrier on the transport document, and presenting a transport document that does not indicate the carrier's name will not be treated as good tender and banks will not pay against such a transport document.[407] Pursuant to the UCP 600, the name of the carrier must be indicated on the face of the paper bill of lading; since banks do not consider the contractual part of the bill of lading, they only focus on the face of the bill, i.e. the commercial part of the documents.[408] Therefore, even if the carrier's actual name is indicated on the back, i.e. the contractual side of the paper bill of lading, the requirement for the inclusion of the name of the carrier will not be satisfied under the UCP 600. However, unlike the UCP 600, under the Rotterdam Rules, neither Article 36(2)(b) nor Article 37 requires indication of the name of the carrier on the face of the transport document. Therefore, inclusion of the actual name of the carrier on the transport document is sufficient to meet the requirements in both Article

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notion "documentary carrier" might be created, thereby, the statement was changed as "the name and address of the carrier". See UN Doc., A/CN.9/WG.III/WP.70 para 3; UN Doc., A/CN.9/WG.III/WP.81, 30; UN Doc., A/CN.9/616 paras 18, 28; UN Doc., A/CN.9/621 para 276.

[405] UN Doc., A/CN.9/621 para 280.

[406] Atamer, Süzel (n 26) 166. The same explanation could apply about the name of the shipper/documentary shipper and the name of the consignee. Namely, if the shipper/documentary shipper and the consignee are the legal persons the word "name" refers to registered title however if they are natural persons the word "name" refers to the first and family name as shown in identification certificate.

[407] Arts 19(a)(i), 20(a)(i), and 21(a)(i) of the UCP 600; S Gee, 'Cargo Damage Claims-The Identification of the Contracting Carrier' in *Who is the Carrier in the Voyage to Troy? (The Hector and The Starsin),* The London Shipping Law Centre, Wednesday 26th February 2003, 17.

[408] Art 14(a) of the UCP 600; ICC Position Paper No.4, 1994; Gee, 'Cargo Damage Claims' (n 407) 17. See also *British Imex Industries Ltd. v Midland Bank Ltd*., [1958] 1 QB 542; *The Starsin* [2003] 1 Lloyd's Rep 571 (HL) 578, 584, 589, 615.

36(2)(b) and Article 37, irrespective of whether it is located on the face or back of the transport document.

Additionally, the UCP 600 does not require inclusion of the address of the carrier on the transport document; however Article 36(2)(b) of the Rotterdam Rules expressly requires it.[409] The word "address" is not defined, but Article 1(29) of the Convention defines "domicile", and according to this provision, in respect of legal persons, "domicile" refers to the statutory seat, place of incorporation, central registered office, central administration or principal place of business; and for natural persons it refers to their habitual residence.[410] It is not clear whether the word "address" refers to the word "domicile" or to any other location of the carrier. It should be pointed out that the address and domicile of the carrier might be the same, or could be different places, depending on each individual case. If they are different places that might cause problems, as cargo interests might not be able to contact the carrier using the address written on the transport document. When Article 36(2)(b) is considered together with Article 66(a)(i), which shows domicile as one of the places of jurisdiction, it could be said that the aims of requiring inclusion of the name and address of the carrier on the transport document are to provide convenience to cargo claimants in communicating with carriers, and to bring actions within the time bar.[411] Accordingly, it can be interpreted that the address indicated on the transport document must be the domicile of the carrier, which provides cargo interests with proper information to communicate with the carrier.[412]

4.2.1.2- The Name of the Ship

[409] Requiring the inclusion of the address of the carrier on the transport document is not consistent with the UCP 600. See Arts 19(a)(i), 20(a)(i), and 21(a)(i) of the UCP 600; Art 36(2)(b) of the Rotterdam Rules. See also Lorenzon, 'Transport Documents and Electronic Transport Records' (n 157) para 36-07; Atamer, Süzel (n 26) 166. For the effect of the inclusion and omission of the address of the carrier on the application of Articles 37(1)-(2), see Chapter 5.2.13, 5.2.2.
[410] Art 1(29) of the Rotterdam Rules.
[411] Arts 36(2)(b), 66(a)(i) of the Rotterdam Rules; CMI Yearbook 2001, 349, 570. It was pointed out that the transport document should identify the carrier and the cargo claimant should know the address of the carrier. See also Sturley and others (n 26) para 7.035, n 102. The authors point out that the cargo claimants need to know who the carrier is and where they can find it.
[412] Atamer, Süzel (n 26) 168.

The existence of the name of the ship on the transport document is one of the requirements for application of Article 37(2) and therefore it has vital importance.[413] However, where the name of the carrier is indicated on the transport document and Article 37(1) applies, or if the cargo interest wants to apply Article 37(3), the absence or existence of the name of the ship on the transport document will not have any effect on the identification of the carrier.[414] Pursuant to Article 36(3)(b), if the name of the ship is specified in the contract of carriage, it must be shown on the transport document too.[415] Unlike the inclusion of the name and address of the carrier, inclusion of the name of the ship as a mandatory contract particular is tied to its specification on the contract of carriage. Namely, the name of the ship does not have to be indicated on the transport document, unless it has been specified on the contract of carriage. A contract of carriage is usually concluded before, or at least at the same time as the issuance of the transport document; however the name of the ship may not be known when the contract is concluded, therefore it may not be indicated in the contract of carriage and the transport document.[416] The inclusion of the name of the ship is intentionally linked to the terms on the contract of carriage. This is because, as the draftsmen underlined, in international transactions shippers/sellers usually obtain payment for cargo when they present transport documents to the buyers or the buyers' bank, therefore they will want to acquire transport documents as soon as possible; however at the time when the transport document is issued, the name of the ship might not be known, thus in such cases, waiting for the specification of the name of the ship would cause unnecessary delays.[417] In the preparatory works, it was emphasised that in door-to-door carriage, indicating the name of the vessel is almost

[413] Art 37(2) of the Rotterdam Rules; Chapter 5.2.2.
[414] Arts 37(1), 37(3) of the Rotterdam Rules; Chapter 5.2.1, 5.2.3.
[415] Art 36(3)(b) of the Rotterdam Rules. For the definition of "contract of carriage" and "transport document", see Arts 1(1), 1(14) of the Rotterdam Rules repectively; Chapter 3.2.
[416] *Hansson v Hamel & Horley Ltd.* [1922] 2 AC 36, 47; *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402, 414; *The Starsin* [2003] 1 Lloyd's Rep 571 (HL) para 129. See also C Debattista, 'The Bill of Lading as the Contract of Carriage- A Reassessment of Leduc v Ward' (1982) 45 The Modern Law Review 652, 654; Lorenzon, 'Transport Documents and Electronic Transport Records' (n 157) para 36-11; Sturley and others (n 26) para 7.042.
[417] UN Doc., A/63/17 para 114; Berlingieri, 'A Review of Some Recent Analyses' (n 305) 1010. The author states "the reason why the name of the ship may not be specified in the contract of carriage is normally that may not be known yet on which ship the goods will be loaded, therefore, it is not an option in a true sense but a logical effect of the stipulation of a contract of carriage well in advance of the time of loading."

impossible, as in such carriages the NVOCC is often the carrier, and the name of the ship is not known when the goods are received.[418]

Inclusion of the name of the ship can vary, depending on whether there is a received for shipment or shipped on board transport document.[419] In cases of received for shipment transport document, at the time of the issuance of the transport document the name of the ship is generally not known and it might not be known until the goods are actually loaded, therefore such transport documents usually do not specify the name of the ship. On the other hand, if there is a shipped on board transport document, i.e. if the transport document is issued after the goods have already been loaded on board a ship, the name of the ship is known. However, even if the name of the ship is known at the time of the issuance of the transport document, it might not be indicated on the document. Because under the Convention, inclusion of the name of the ship on the transport document is linked with the content of the contract of carriage, if the name of the ship has not been indicated in the contract of carriage, it is not compulsory to state it on the transport document.

It should be added that like the Rotterdam Rules, the UCP 600 also has similar provisions about inclusion of the name of the ship on the transport document.[420] However, unlike the Rotterdam Rules, in case of port-to-port carriage, the UCP 600 requires issuance of shipped on board transport documents and the inclusion of the name of the ship on the transport document, irrespective of whether or not the name of the ship is indicated in the contract of carriage. In other words, there must be a shipped on board transport document which shows that the goods have been loaded on board of a named ship. Also, with multimodal transport documents, the UCP 600 requires the documents to show that "the goods have been dispatched, taken in charge or loaded on board"[421] there is no need for the issuance of a shipped on board transport document, and furthermore, the inclusion of the name of the ship is not

[418] UN Doc., A/CN.9/621 para 274. Also, in case of port-to-port carriage if the goods have not been shipped on board yet a received for shipment transport document is issued when the goods are received. See Gaskell and others (n 283) para 1.31; Lorenzon, 'Transport Documents and Electronic Transport Records' (n 157) para 36-11; Sturley and others (n 26) para 7.042.
[419] For further on the received for shipment and shipped on board transport document, see Chapter 3.2.3.
[420] For bills of lading see Art 20(a)(ii) of the UCP 600; for charter party bills of lading see Art 22(a)(ii) of the UCP 600; for non-negotiable see sea waybills Art 21(a)(ii) of the UCP 600.
[421] Art 19(a)(ii) of the UCP 600.

compulsory; only inclusion of the name of the intended vessel will be sufficient.[422] This is because in multimodal carriage, the performance of the sea leg may depend on the previous legs and the phrase "intended vessel" expresses that the named vessel is not guaranteed.[423] As seen above, contrary to the Rotterdam Rules, the UCP 600 makes a distinction between marine and multimodal transport documents, and the inclusion of the name of the ship depends on the form of the document rather than on the terms of the contract of carriage.

4.2.1.3- Signature

The list in Article 36 does not include signature as one of the contract particulars.[424] The preparatory works do not make it clear whether the draftsmen neglected to include signature or whether it was intentionally excluded. Although Article 36 does not mention signature, the definition of "contract particulars" expressly shows signature as a contract particular, and more importantly, Article 38(1) explicitly requires inclusion of a signature on the transport document.[425] From the combined effect of Article 1(23) and Article 38(1), it can be stated that signature is one of contract particulars under the Convention and must be indicated on the transport document. Under the Convention, "signature" is not defined, therefore its meaning can be questioned. During the *travaux préparatoires,* including a definition for "signature", as in Article 14(3) of the Hamburg Rules, was brought to agenda a few times.[426] However, it was stated that there is a broadly accepted meaning for the word in Conventions, international instruments and national laws, therefore it was said that including a definition in the Convention was not necessary.[427] Under English law, in

[422] Art 19(a)(iii)(b) of the UCP 600; C Debattista, 'The new UCP 600 - Changes to the Tender of the Seller's Shipping Documents under Letters of Credit' (2007) 4 JBL 329, 352; HY Low, 'UCP 600: The New Rules on Documentary Compliance, International Journal of Law and Management' (2010) 52(3) Int.J.L& Management 193, 203.
[423] Gaskell and others (n 283) 165.
[424] Art 36 of the Rotterdam Rules.
[425] Arts 1(23), 38(1) of the Rotterdam Rules.
[426] UN Doc., A/CN.9/WG.III/WP.32, 40 n 132; UN Doc., A/CN.9/WG.III/WP.56, 34, n 146. Pursuant to Article 14(3) of the Hamburg Rules "The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by an other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued".
[427] UN Doc., A/CN.9/WG.III/WP.62 paras 19-24; UN Doc., A/CN.9/616 para 11; UN Doc., A/63/17 para 124; Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 175. For instance, like Article 14(3) of the Hamburg Rules, Article 3 of the UCP 600 states "a document may be signed by handwriting, facsimile signature, perforated signature, stamp, symbol or any other mechanical or electronic method of authentication". See also Art 20(b) of the UCP 500 and in Article 5 (k) of the

Goodman v. J. Eban LD,[428] it was pointed out "the essential requirement of signing is the affixing in some way, whether by writing with a pen or pencil or by otherwise impressing upon the document, one's name or "signature" so as personally to authenticate the document."[429] Accordingly, a signature can be created by rubber stamping, marking, typewriting and so forth, with the aim of authenticating the document.

Article 38(1) explicitly states that the signatory of the document must either be the carrier or a person acting on its behalf. Therefore, even if an agent of the carrier signs a transport document without showing the name of the carrier, the requirement in Article 38(1) will be met but the requirement in Article 36(2)(b) will not.[430] It is emphasised that one of the functions of signature is to identify the issuer of the document, i.e. signature on the transport document is used as a tool for identifying the carrier.[431] However, under the Convention, with regard to identifying the carrier, signature is not given any special effect; it is only mentioned in Article 1(23) and Article 38 as a contract particular, but Article 37, which introduces rules for the identification of the carrier, does not mention it.[432] Even though the Convention does not give any special effect to signature to identify the carrier, if English law is the applicable national law, signature would be taken into account and may have determinative effect in identifying the carrier.[433]

United Nations Convention on International Bills of Exchange and International Promissory Notes. Likewise, in respect of electronic transport records, the Convention (Art 38(2)) requires electronic signature, which "shall identity the signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic record". But, again, the definition of electronic signature is left to the applicable national law.

[428] [1954] 1 QB 550

[429] Ibid 557. See also *Lucas v James* (1849) 7 Hare 410, 419; *Mcdonald v John Twiname Ltd* [1953] 2 QB 304.

[430] Arts 38(1), 36(2)(b) of the Rotterdam Rules; Above part 4.2.1.1. See also Lorenzon, 'Transport Documents and Electronic Transport Records' (n 157) para 38-02.

[431] P Jones, 'International Transport Conventions: Obstacles to the Use of EDI' (1994) 1 EDI L. Rev. 277, 280. The author pointed out "a signature on a document has three functions: identifying the issuer of a document, attesting to the accuracy of the contents, and where required by legislation imposing legal responsibility on the individual who signed it."

[432] Arts 1(23), 37, 38 of the Rotterdam Rules; Chapter 5.2.1.3.

[433] *The Starsin* [2003] 1 Lloyd's Rep 571 (HL); *Halsbury's Laws of England*, (5th edn, LexisNexis 2008) vol 7, para 354; T Coghlin and others, *Time Charters* (6th edn, Informa 2008) para 21.7; B Bulut, 'Identification of the Carrier in Cases of Inconsistencies: The Starsin and Article 37(1) of the Rotterdam Rules' (2014) 49(4) ETLJ 399; Chapter 5.2.1.1-2.

Lastly, in respect of the issues related to the authority of the signatory, the Convention does not say anything.[434] Although the former draft article required that the signatory must have authority to sign a transport document in the final article the issue was left to national law.[435] Under English law, with the exception of demise charterparties[436], it is accepted that the master has actual or apparent authority to sign a bill of lading on behalf of the shipowner, and further, that a bill of lading may be signed on behalf of the shipowner by a person other than the master; but in such a case the person signing the bill must have representative capacity which might derive from the charterparty or other contract.[437] According to circumstances, the master, agent of the charterer, or charterer itself, can sign the transport document on behalf of the charterer.[438] However, when the master or the agent exceeds its authority or the bill is signed without authorisation, the signatory may be held liable for breach of warranty of authority.[439]

4.2.2- The Contract Particulars Related to the Maritime Performing Party

With regard to maritime performing parties, as they are not parties to the contract of carriage, transport documents do not usually contain information related to them, and none of the contract particulars in the Convention are directly related to identifying maritime performing parties. However, in some cases, the contract particulars, which show the name of the ship and the port of loading/discharge, might be helpful in

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[434] Sturley and others (n 26) para 7.058; Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 175.

[435] In the former draft article it was required that "a transport document shall be signed by a carrier or a person *having authority* from the carrier" (emphasis added). However, in the 17th Session it was suggested that the word "authority" should be deleted and in the 18th Session the word was deleted, and the issue was left to the applicable national law. See UN Doc., A/CN.9/WG.III/WP.62 para 24; UN Doc., A/CN.9/616 para 12. However, in respect of the electronic transport record, it is required that there must be an electronic signature, which must identify the signatory and show the carrier's authorisation on the electronic transport record. See Art 38(2) of the Rotterdam Rules.

[436] In demise charterparties, whole possession and control of the ship is transferred to the charterer and the owner is not responsible for employing the crew and equipping the ship. For further details on demise charter, see Chapter 5.2.2.

[437] *Sandeman v Scurr* (1866) LR 2 QB 86; *Wehner v Dene Steamship Co.* [1905] 2 KB 92; *Tillmanns v SS Knutsford* [1908] 2 KB 385; *Wilston Steamship Co. v Andrew Weir & Co.* (1925) 22 LlL Rep 521; *The Berkshire* [1974] 1 Lloyd's Rep 185,188; *W. & R. Fletcher (New Zealand) Ltd and Others v Sigurd Haavik Aksjeselskap and Others (The Vikfrost)* [1980] 1 Lloyd's Rep 560 (CA), 562, 568; *Ngo Chewhong Edible Oil Pte Ltd. v Scindia Steam Navigation Co. Ltd. (The Jalamohan)* [1988] 1 Lloyd's Rep 443, 450; *The Rewia* [1991] 2 Lloyd's Rep 325; *Sunrise Maritime Inc v Uvisco Ltd (The Hector)* [1998] 2 Lloyd's Rep 287, 289-290. For further details see Chapter 5.2.1.2.

[438] *The Emilien Marie* [1874-80] All ER Rep Ext 2236, 2245; *Manchester Trust Ltd v Furness Withy & Co* [1895] 2 QB 539, 547; *The Rewia* [1991] 2 Lloyd's Rep 325 (CA), 336.

[439] *Halsbury's Laws of England* (5th edn, LexisNexis 2008) vol 1, para 160; Gee, 'Cargo Damage Claims' (n 407) 7.

tracing and thus identifying, maritime performing parties.[440] For instances assuming the ship is chartered, the charterer being the carrier and the shipowner a maritime performing party. In such a case, if the transport document indicates the name of the ship, the shipowner/maritime performing party can be traced through such information. Likewise, pursuant to Article 36(3)(d), the transport document must show the port of loading/discharge if they are specified in the contract of carriage, and this information may be useful in tracing maritime performing parties who perform or undertake to perform services within the named port of loading/discharging, such as terminal operators or stevedore companies.

4.2.3-The Contract Particulars Related to Identification of the Shipper and Documentary Shipper

As with the identification of the carrier, the contract particulars on the transport document have an important role in identifying the shipper and the documentary shipper. However, unlike the inclusion of the name of the carrier, inclusion of either the name of the shipper or the name of the documentary shipper is not listed as a mandatory contract particular of the transport document under Article 36.[441] In the *travaux préparatoires,* the inclusion of the name of the shipper on the transport document was discussed, but it was concluded that the name of the shipper should not be a mandatory contract particular, as in some cases shippers might want to keep their names confidential.[442] The omission of the name of the shipper on the transport document might not cause fatal consequences, because the shipper is the counterparty of the carrier under carriage contract, therefore even though the transport document does not contain any information about the shipper's name, it can be identified through information in the contract of carriage.[443] On the other hand, the documentary shipper is not a party to the contract of carriage, thus it cannot be identified by information in the contract of carriage. Information related to the documentary

[440] Arts 36(3)(b), 36(3)(d) of the Rotterdam Rules; Above part 4.2.1.2.
[441] Art 36 of the Rotterdam Rules; Williams (n 125) 198.
[442] UN Doc., A/63/17 para 115; Sturley and others (n 26) para 7.036; Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 170.
[443] It must be noted that the reason of not mentioning the same argument in respect of the carrier is that for the application of the rules regulated in Article 37(1)-(2) the inclusion of the name of the carrier on the transport document has crucial importance. The thesis analyses the identification of the carrier on the basis of application of Article 37 and the information on the contract of carriage itself does not trigger the application of Article 37. See Chapter 5.2.

shipper can only be found on the transport document, which means that identification of the documentary shipper is entirely based on information in the transport document.

Although Article 36 does not list the names of the shipper and documentary shipper, under Article 31(1), the contractual shipper is required to provide some information for the compilation of the contract particulars and the issuance of transport document, and "the name of the party to be identified as the shipper" is stated as one of the mandatory information to be provided by the shipper.[444] The provision does not use the phrase "name of the shipper" intentionally, as the expression "the name of the party to be identified as the shipper" can refer to either the contractual shipper or the documentary shipper.[445] Furthermore, regarding the documentary shipper, pursuant to Article 1(9), "to be named as shipper on the transport document" is one of the preconditions for being qualified as a documentary shipper under the Convention.[446] Therefore, not only the identity, but also the existence of the documentary shipper depends on the information on the transport document. Consequently, where there is a documentary shipper, because of the combined effect of Article 1(9) and Article 31(1), the name of the documentary shipper must be shown on the transport document as a mandatory contract particular. On the other hand, where there is no documentary shipper, because of the effect of the requirement in Article 31(1), the transport document must indicate the name of the shipper. Therefore, depending on the information shown on the transport document, the shipper or the documentary shipper, or in some cases even both of them, can be identified through examination of contract particulars included on the transport document.[447]

4.2.4-The Contract Particulars Related to Identification of the Consignee

The name and address of the consignee are included on the list of the contract particulars in Article 36, and according to Article 36(3)(a), if named by the shipper,

[444] Art 31(1) of the Rotterdam Rules.
[445] Sturley and others (n 26) para 6.035; Fujita, 'Shipper Obligations and Liabilities under the Rotterdam Rules' (n 32) part V.2; Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 170; Lorenzon, 'Obligations of the Shipper to the Carrier' (n 32) para 31-02.
[446] Art 1(9) of the Rotterdam Rules; Chapter 7.1.2.
[447] For instance, in some cases the person named as the shipper can be qualified as the documentary shipper, whereas the person named as the consignee can be qualified as the contractual shipper. For further details, see Chapter 7.2.

the transport document must indicate the name and address of the consignee.[448] As understood from the wording of the provision, the inclusion of the name and address of the consignee on the transport document is not a mandatory requirement unless the shipper provides such information to the carrier. Namely, if the shipper does not provide any information about the name and address of the consignee, the transport document can be issued without showing such information; however, if the shipper gives those details, they must be indicated on the transport document.[449] At this stage, the questions are whether the shipper has to provide information about the name and address of the consignee to the carrier, and if yes, when this obligation arises.

Sturley and Lorenzon state that the shipper is not obliged to provide the name of the consignee to the carrier, and inclusion of such information on the transport document depends on the shipper's wish.[450] This interpretation would be correct if the wording of Article 36(3)(a) is considered alone, as the phrase "if named by the shipper" seems to imply that the issue depends on the shipper's wish. However, Williams states that although Article 36(3)(a) requires the inclusion of the name of the consignee only if it is named by the shipper, the Article should be read in conjunction with Article 31(1), which requires that the shipper must provide information about the name of the consignee, if any.[451] The author of this thesis agrees with Williams and argues that providing information about the name of the consignee does not depend on the shipper's wish. As it is one of the obligations of the shipper under Article 31(1), if the shipper fails to provide such information, he will be in breach towards the carrier under Article 30(1).[452]

Unlike Article 36(3)(a), Article 31(1) does not say anything about the inclusion of the address of the consignee. Therefore, to perform its obligation under Article 31(1), the shipper is not obligated to provide the address of the consignee; merely providing the name of the consignee will be sufficient. Furthermore, in respect of the time when the

[448] Art 36(3)(a) of the Rotterdam Rules.
[449] Sturley and others (n 26) para 6.036; Lorenzon, 'Transport Documents and Electronic Transport Records' (n 157) para 36-10.
[450] Sturley and others (n 26) para 7-041; Lorenzon, 'Transport Documents and Electronic Transport Records' (n 157) para 36-10.
[451] Arts 31(1), 36(3)(a) of the Rotterdam Rules; Williams (n 125) 198 n 19.
[452] Art 30(1) of the Rotterdam Rules; Baughen, 'Obligations Owed by the Shipper to the Carrier' (n 32) 182; Hooper, 'Obligations of the Shipper' (n 32) 888.

shipper's obligation arises, Article 31(1) uses the phrases "in a timely manner" and "for the compilation of the contract particulars and issuance of the transport document". From these phrases it is clearly understood that the shipper's obligation arises in a timely manner before the issuance of the transport document.[453] Consequently, when Article 36(3)(a) is considered together with Article 31(1), it is submitted that because of Article 31(1), the shipper is obliged to provide information about the name of the consignee, if any, before the issuance of the transport document, and because of Article 36(3)(a), when the shipper gives such information, the name of the consignee must be shown on the transport document.

Additionally, it should be noted that paper bills of lading currently used in practice contain a consignee box at the top left of the front of the bill.[454]If the name of the consignee is included in the consignee box, the consignee could be identified by this information. However the consignee, within the meaning of the Convention, does not have to be the person named as the consignee in the consignee box. As Article 1(11) defines the consignee as the person entitled to receive delivery of the goods from the carrier, being the consignee is not based on being named as the consignee in the consignee box.[455] Particularly where there is a negotiable transport document issued to order and transferred to a third party through endorsement and delivery, the person who holds the transport document would qualify as the consignee, instead of the person named in the consignee box. Although Article 36 does not list endorsement as a contract particular, it is expressly stated as a contract particular in Article 1(23), and if the transport document contains such information, the consignee may be identified according to the endorsement.[456]

Pursuant to the Convention, only negotiable transport documents may contain endorsement as a contract particular, and endorsement can either be done in blank or to name or order of such other person.[457] Scrutton states "indorsement is effected

[453] Baughen, 'Obligations Owed by the Shipper to the Carrier' (n 32) 182; Stevens (n 32) para 11.45.
[454] For instance, see BIMCO Conlinebill 2000; BIMCO Congenbill 2007; BIMCO Multidoc 1995.
[455] Art 1(11) of the Rotterdam Rules; Chapter 8.1.
[456] Arts 1(23), 36 of the Rotterdam Rules; Above part 4.1.
[457] Arts 1(15), 47(2) and 57(1) of the Rotterdam Rules; Chapter 3.4.1-2; Chapter 8.2.3-4. See also Sturley and others (n 26) para 10.012 *et seq.*; Williams (n 125) 216 *et seq*. It must be added that not all negotiable transport documents require endorsement to be transferred. As shown in Article 57(2), a bearer or blank endorsed transport document and a document issued to order of a named person and transferred to this named person, does not require endorsement.

either by the shipper or consignee writing his name on the back of the bill of lading, which is called an 'indorsement in blank', or by the writing 'Deliver to I, (or order), F', which is called an 'indorsement in full'".[458] Accordingly where there is endorsement in blank, the bill of lading will not show the name of the transferee; however where there is endorsement in full (i.e. special endorsement), the bill will show the name of the transferee. Therefore in the latter situation, the endorsement would be used as a tool to identify the consignee. Consequently, when a negotiable transport document is endorsed to someone's name or order and then transferred to the transferee, even if the transport document names another person as the consignee in the consignee box, the information in the consignee box would have no effect on the identification of the consignee, but the information on the endorsement chain would have.

4.3- Deficiencies in the Contract Particulars

With regard to the information listed in Article 36, Article 39(1) expressly states that absence or inaccuracy of any of the listed contract particulars does not affect the legal character or validity of transport documents.[459] Although Article 39(1) does not say anything about the information mentioned in Article 31(1), i.e. the inclusion of the name of the shipper/documentary shipper and the consignee, it seems that absence or inaccuracy of such information has no effect on the legal character or validity of the transport document as well. This is because under the Convention, a document qualifies as a transport document if all requirements indicated in Article 1(14) are satisfied,[460] and none of the information in Article 31(1) is required as a precondition for qualifying as a transport document.[461] Therefore omission of such information

[458] *Scrutton* (n 24) para 10-001. The passage on this book was quoted by Singapore Court of Appeal in *Keppel Tatlee Bank Ltd v Bandung Shipping Pte. Ltd* [2003] 1 Lloyd's Rep 619, 622. In Oxford Dictionary (7th edn 2009), 'endorsement in blank' and special endorsement' are defined as follows: "An endorsement in blank is the bare signature of the holder and makes the bill payable to bearer. A special endorsement specifies the person to whom (or to whose order) the bill is payable." See also *Benjamin* (n 136) para 18-022.

[459] Art 39(1) of the Rotterdam Rules; Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 177. The author points out that if the transport document is too incomplete it might be treated as an invalid document under the applicable national law. See also Sturley and others (n 26) para 7.061; *Carver* (n 54) para10-046; Diamond (n 81) 504; Williams (n 125) 202.

[460] Art 1(14) of the Rotterdam Rules; Chapter 3.2.

[461] Art 31(1) of the Rooterdam Rules; Above parts 4.2.3-4.

does not seem to have any effect on the existence and validity of the transport document.

Moreover, it must be pointed out that Article 39(1) refers only to the particulars in Article 36 paragraphs (1)-(3), therefore it does not apply to the deficiencies related to signature.[462] Although Article 38 requires that a transport document must be signed, there might be unsigned transport documents, and the Convention includes neither an express nor an implied provision about the legal character or validity of unsigned transport documents.[463] The issue is left to the applicable national law, which means the validity of unsigned transport documents might vary from state to state. In the report of the British Maritime Law Association, it was stated that under English law, it is undecided whether signature is essential to the validity of a transport document.[464] In order to determine the legal consequences of an unsigned bill of lading, a distinction must be made between the bill of lading as a contract of carriage and the bill of lading as a receipt. Under English law, the formation of a contract of carriage is governed by the principles of general contract law, which are based on three elements: offer, consideration and acceptance, and when those elements are satisfied, contract will be concluded.[465] A contract can be concluded either orally or in writing, and a signature is not an essential element of the contract unless the parties have agreed that the contract will be concluded upon signature.[466]

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[462] Lorenzon, 'Transport Documents and Electronic Transport Records' (n 157) para 38-01; Sturley and others (n 26) para 7.057; Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 175.
[463] UN Doc., A/CN.9/WG.III/WP.62 para 23; UN Doc., A/CN.9/616 para 12; UN Doc., A/CN.9/621 para 291; UN Doc., A/63/17 para 124; Sturley and others (n 26) paras 7.057-7.058; Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 175, 177.
[464] British Maritime Law Association, 'Response to Questionnaire Prepared by CMI Working Group on Issued of Transport Law' http://www.bmla.org.uk/documents/issues_transport_law.htm accessed 10.09.2012. In the report it was pointed out that in practice, bills of lading are always signed or otherwise authenticated on behalf of the carrier.
[465] *The Swan* [1968] 1 Lloyd's Rep 5, 12-13; *The Rhodian River* [1984] 1 Lloyd's Rep 373; *The Double Hapiness* [2007] 2 Lloyd's Rep 131, 136; *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2011] EWHC 56 (Comm), para 63. See also *Scrutton* (n 24) para 1-017; Aikens and others (n 154) para 7.5; *Halsbury's Laws of England* (5th edn, LexisNexis 2012) vol, 22 para 231 *et seq*.
[466] For the form of contracts see *Beckham v Drake* (1841) 9 M & W 79, 92; *Lidgett v Williams* (1854) 14 LJ Ch 459, 466; *The Ardennes* [1951] 1 KB 55; *Evans v Merzario* [1976] 1 WLR 1078; *Mayhew Foods Limited v Overseas Containers Ltd.* [1984] 1 Lloyd's Rep 317, 319; *TTMI Sarl v Statoil ASA* [2011] EWHC 1150 (Comm) para 27. For the necessity of signature for the formation of the contract see *Von Hatzfeldt-Wildenburg v Alexander* [1911-13] All ER Rep 148, 151; *Atlantic Marine Transport Corp v Coscol Petroleum Corp (The Pina)* [1992] 2 Lloyd's Rep 103; *Oceanografia SA de CV v DSND Subsea AS (The Botnica)* [2007] 1 All ER (Comm) 28, 46-47. See also *Carver* (n 54) para 3-001.

On the other hand, section 4 of COGSA 1992, which regulates the evidentiary effect of the bill of lading, expressly requires a signature.[467] As Lord Aikens points out, the omission of the signature may affect the evidentiary function of the bill of lading.[468] Accordingly it can be stated that under English law, if the bill of lading does not contain a signature, it might not be treated as conclusive evidence against the carrier for the shipment or receipt of the goods; however it can still be effective as a contract of carriage. Therefore the absence of signature only has an effect on the evidentiary function of the bill of lading, and not on the validity of bill of lading as a contract of carriage. It should be added that under the UCP 600, it is explicitly required that the bill of lading must be signed by carriers, masters, or their agents.[469] Under the UCP 600, an unsigned bill of lading is not treated as good tender and banks will refuse to pay against such documents.

Consequently, subject to the absence of signature, the omission of any other contract particular does not have an effect on the legal character and validity of the transport document, but may have an effect on identification, as identification of the parties is substantially based on the information indicated on the transport document.

Lastly, the Convention does not provide any sanction against the parties where one or more contract particulars listed in Article 36 are not included on the transport document. Parties who do not want to be found may intentionally exclude relevant contract particulars from the transport document. For instance, a carrier who does not want to be easily found may intentionally avoid including its name on the transport document and accordingly might prevent the application of Article 37(1).[470] However, although, the name of the carrier is not indicated on the transport document, if the

[467] S. 4(b) of COGSA 1992; "A bill of lading which… (b) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading, shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment."

[468] Aikens (n 154) para 3.53 n 100. The authors state "if a bill of lading is unsigned there may be evidential difficulties in showing it evidences receipt of goods of a contract…" See also *Scrutton* (n 24) para 8-015; ET Laryea, *Paperless Trade: Opportunities, Challenges and Solutions* (Kluwer Law International, 2002) 73. On the other hand, in a case Canada Federal Court held that an unsigned bill of lading is not a bill of lading at all. See *The Maurice Desgagnes* [1977] 1 Lloyd's Rep. 290, 296.

[469] For multimodal transport document see Art 19(a)(i) of the UCP 600; for bills of lading see Art 20(a)(i) of the UCP 600; for non-negotiable sea waybills see Art 21(a)(i); for charterparty bills of lading see Art 22(a)(i) of the UCP 600; for other documents see Art 24(a)(i), Art 25(a)(i) and Art 25(c).

[470] Art 37(1) of the Rotterdam Rules; Chapter 5.2.1.3-4.

name of the ship is indicated, application of Article 37(2) might arise and the registered owner of the ship might be treated as the carrier.[471] Therefore in such cases, Article 37(2) might be deemed an implied sanction upon registered owners; as registered owners would know that they could be liable as the carrier against cargo owners, if the true carrier's name is not included on the transport document.[472] In order to prevent being held liable as the carrier, registered owners may wish to put special clauses in contracts that they conclude with carriers, requiring them to identify themselves on the transport document.[473] And where there are sub-contracts, again special clauses could be written in the sub-contracts, and ultimately carriers can be pushed to identify themselves on the transport document.

It must however be kept in mind that in some cases, Article 37(2) might be used as a way for carriers to escape being sued, rather than being an indirect sanction. Particularly, where there is no direct connection between carriers and registered owners carriers might act in bad faith and intentionally exclude their names from the transport document.[474] It can be said that depending on the facts of each case Article 37(2) may either be a sanction on carriers or a way to escape being sued as carriers.

In respect of the contract particulars that must be furnished by the shipper under Article 31(1), it seems that Article 30(1) provides sanctions on the shipper.[475] Even though Williams states that there is no "safety net" provision for the omission of particulars that must be provided by the shipper, Article 30(1) can clearly be deemed as a safety net provision.[476] Because under Article 31(1), the shipper is expressly under an obligation to furnish information to the carrier about the contract particulars listed in Article 36(1), the name of the party to be identified as the shipper, the name of the consignee, and the name of the person to whose order the transport document is to be issued. And if it fails to provide such information and the carrier suffers loss or damage, then under Article 30(1), it will be liable against the carrier for breach of its

[471] Art 37(2) of the Rotterdam Rules; Chapter 5.2.2.
[472] Lorenzon, 'Transport Documents and Electronic Transport Records' (n 157) para 36-07; Sturley and others (n 26) para 7.035; Williams (n 125) 202.
[473] CMI Yearbook 2001, 497; Diamond (n 81) 508; Berlingieri, 'Revisiting the Rotterdam Rules' (n 81) 626.
[474] UN Doc., A/CN.9/526 para 59.
[475] Arts 30(1), 31(1) of the Rotterdam Rules.
[476] Williams (n 125) 205.

obligation.[477] Also, the Convention imposes strict liability upon the shipper where the information to be compulsorily provided by him as required in Article 31(1), is inaccurate.[478] Accordingly, if the shipper fails to provide the information required in Article 31(1), it will be liable against the carrier, unless it proves that it was not at fault. However, if the information provided by the shipper is inaccurate, the shipper's liability will be strict; i.e. it cannot escape liability even if it proves that it was not at fault.[479] Therefore, because of the effect of Article 30(1)-(2), the shipper can be forced to provide accurate information related to the name of the shipper/documentary shipper and consignee.

[477] Fujita, 'Shipper Obligations and Liabilities under the Rotterdam Rules' (n 32) part IV-V; Lorenzon, 'Obligations of the Shipper to the Carrier' (n 32) para 31-02; Baughen, 'Obligations Owed by the Shipper to the Carrier' (n 32) 182; Hooper, 'Obligations of the Shipper' (n 32) 889.
[478] Arts 30(2), 31(2) of the Rotterdam Rules.
[479] UN Doc., A/CN.9/621 para 240; Sturley and others (n 26) para 6.039; Lorenzon, 'Obligations of the Shipper to the Carrier' (n 32) paras 31-02, 31-03; *Carver* (n 54) paras 10-038, 10-039; Berlingieri, 'Revisiting the Rotterdam Rules' (n 81) 614 *et seq.;* Diamond (n 81) 491 *et seq*.; Fujita, 'Shipper Obligations and Liabilities under the Rotterdam Rules' (n 32) part IV.4-V; Baughen, 'Obligations Owed by the Shipper to the Carrier' (n 32) 185, 189; Hooper, 'Obligations of the Shipper' (n 32) 888; Stevens (n 32) para 11.49 *et eq*.

CHAPTER 5: IDENTIFICATION OF THE CARRIER UNDER THE ROTTERDAM RULES

Identification of the carrier has been one of the major problems cargo claimants come across in practice.[480] It arises particularly where there are charterparties and/or sub-contracts of carriage; many actors are involved in the carriage process, and because of the sub-contract chain, it would be significantly difficult to identify the carrier.[481] Bills of lading contain some information about the identity of the carrier, but often, not quite enough information to identify the contractual carrier with some degree of certainty. In practice, some bills of lading expressly indicate the name of the carrier, some bills are signed by or on behalf of the master without mentioning the name of the carrier, some bills only include identity and/or demise clauses, whereas some bills contain the name of the carrier, as well as an identity or/and demise clause.[482] Cargo claimants can easily find carriers and bring actions against them only where bills of lading expressly point to the name of the carrier, without any inconsistency. However, in all other cases, cargo claimants may face difficulties in identifying the carrier and suffer serious problems, such as because of the time bar restrictions, they may lose their rights to recover damages by commencing proceeding against the wrong party.[483] Although the sea Conventions currently in force contain provisions for the definition of the word "carrier", they do not provide any specific provision on the identification of the carrier.[484] Unlike those Conventions, the Rotterdam Rules introduce a specific Article, which is welcome, to resolve the problems related to the identification of the carrier.[485]

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[480] Tetley, *Marine Cargo Claims* (n 24) 565; *Scrutton* (n 24) para 6-036.

[481] Ć Pejovic, 'The Identity of Carrier Problem under Time Charterers: Diversity Despite Unification of Law' (2000) 31(3) JMLC 379, 379-380; Gaskell and others (n 283) para 3.28; DCG Sian, 'Unravelling the Identity of the Carrier' (1994) 6 SAcLJ 182, 183.

[482] Identity and demise clauses have the same effect, and they provide that the contract is between the merchant and the owner or demise charterer of the ship; the person issuing the bill of lading has acted merely as an agent thereby it does not have any personal liability. See *Carver* (n 54) para 9-104. The authors state that the purpose of identity and demise clauses is "to create the effect that whatever the face of the bill of lading may say, the contract of carriage is with the owner". For further about the identify and demise clauses see W Tetley, 'The Demise of the Demise Clause?' (1999) 44 McGill LJ 807 *et seq*; L Roskill, 'The Demise Clause' (1990) 106 LQR 403 *et seq*.; Tetley, *Marine Cargo Claims* (n 24) 601 *et seq*.; Pejovic, 'The Identity of Carrier Problem' (n 481) 401 *et seq*.

[483] Chapter 2.1.1, 2.2.1, 2.3.1, 2.4.1.

[484] Below part 5.1.

[485] Article 37 of the Rotterdam Rules; Below part 5.2. See also Berlingieri, 'Revisiting the Rotterdam Rules' (n 81) 626.

This Chapter analyses identification of the carrier on the basis of this new Article, and is structured as follows: the first part examines the definition of the word "carrier" under previous Conventions and the Rotterdam Rules, while the second part analyses identification of the carrier in accordance with the rules in Article 37 and consists of three sub-headings. The first sub-heading examines Article 37(1), the preconditions for its application, and will highlight the problems related to the paragraph in detail. Also, as Article 37(1) has similarities with the decision English case *The Starsin,*[486] and in order to present a better understanding, English law will be used extensively. The second and third sub-headings analyse Article 37(2) and Article 37(3) respectively, and again, the preconditions for the application of, as well as the problems associated with, the paragraphs will be presented in detail.

5.1- The Notion of "Carrier" under the Rotterdam Rules

All carriage of goods by sea Conventions contain provisions for the definition of the word "carrier". Article I(a) of the Hague and Hague-Visby Rules states that the term carrier "includes the owner or the charterer who enters into a contract of carriage with a shipper".[487] There is no specific provision on the identification of the carrier, and the definition does not clearly indicate who the carrier is. According to this definition, the owner or charterer, or both, could qualify as the carrier.[488] In respect of the owner and the charterer, to qualify as a carrier, the provision requires a contractual relationship between either of them and the shipper.[489] Because of the use of the word "includes", the definition implies that the carrier could be a person other than the owner and the charterer, such as a freight forwarder or an NVOCC; however it is not clear whether such persons must have concluded a contract of carriage with a shipper.[490] Under this definition, the carrier could be only one person or multiple people, and could either have a contractual relationship with the shipper or not. Consequently the definition is

[486] [2003] 1 Lloyd's Rep. 571 (HL).
[487] Art I(a) of the Hague and Hague-Visby Rules.
[488] Pejovic, 'The Identity of Carrier Problem' (n 481) 384.
[489] Gaskell and others (n 283) para 3.13; Wilson (n 261) 225.
[490] Tetley, *Marine Cargo Claims* (n 24) 565 n 2; Pejovic, 'The Identity of Carrier Problem' (n 481) 384; Cooke and others (n 225) para 85.60; *Scrutton* (n 24) para 20-029; *Halsbury's Laws of England* (5th edn, LexisNexis 2015) vol 7, para 373 n 3.

neither clear nor exhaustive, creating complexities as to the identification of the carrier and causing varying degrees of interpretation among countries.[491]

The Hamburg Rules contain definitions for both the carrier and actual carrier, and provide that the carrier and actual carrier are jointly and severally liable.[492] Under Article 1(1), the carrier is defined as "any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper".[493] Compared to the Hague and Hague-Visby Rules, the Hamburg Rules definition is broader, as it refers to *any person*, irrespective of whether it is the owner or the charterer.[494] Furthermore, the definition refers to the contracting carrier; i.e. to qualify as a carrier under the Hamburg Rules, such person must have entered into a contract of carriage with a shipper. Tetley stated that by imposing joint and several liability on the carrier and actual carrier, the Hamburg Rules resolve the problem of the identity of carrier.[495] However, even if the definition of the carrier in the Hamburg Rules is clearer than contained in the Hague and Hague-Visby Rules, the Hamburg Rules also do not contain any specific provision for identifying the carrier. Therefore the Hamburg Rules do not completely resolve the problem, particularly where the transport document contains inconsistent information or does not provide the name of the carrier at all; identification of the carrier would still be problematic.

Similar to the Hamburg Rules, the Rotterdam Rules also make a distinction between the contractual carrier and non-contractual carrier, and impose joint and several liability upon these persons.[496] Pursuant to Article 1(5), the carrier is defined as "a person that enters into a contract of carriage with a shipper".[497] To qualify as a carrier within the meaning of the Rotterdam Rules, there must first be a person. Although,

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[491] For identification of the carrier in comparative law see Tetley, *Marine Cargo Claims* (n 24) 568 *et seq*.; Pejovic, 'The Identity of Carrier Problem' (n 481) 385 *et seq*.; Kozubovskaya-Pelle, Wang (n 26) 382 *et seq*. For identification of the carrier under English law, see below parts 5.2.1.1-2.
[492] Arts 1(1), 1(2), and 10(4) of the Hamburg Rules. For further explanations on actual carrier, see Chapter 6.1.
[493] Art 1(1) of the Hamburg Rules.
[494] Pejovic, 'The Identity of Carrier Problem' (n 481) 384; Wilson (n 261) 225; R Force, 'A Comparison of the Hague, Hague-Visby and Hamburg Rules: Much Ado About (?)' (1996) 70 Tul. L. Rev. 2051, 2056.
[495] Tetley, *Marine Cargo Claims* (n 24) 599.
[496] Arts 1(5), 1(7), and 20 of the Rotterdam Rules. In this chapter only the contractual carrier will be examined. For explanations on the non-contractual carrier i.e. the maritime performing party, see Chapter 6.
[497] Art 1(5) of the Rotterdam Rules.

the term "person" is used in many provisions,[498] the Convention does not include a definition of the word. It can be implied from the wording used throughout the Convention that the word "person" embraces not only natural persons, i.e. a human being, but also legal persons such as companies or entities.[499]

Secondly, there must be a contract of carriage as defined in Article 1(1); namely, there must be a contract under which the carrier, against payment of freight, undertakes to carry the goods from one place to another either by sea only, or by other modes of transport in addition to a sea leg.[500] For instance, if the contract does not involve a sea leg or if the goods are carried for free, there will not be a contract of carriage for the purpose of Article 1(1), therefore the contracting person will not qualify as a carrier under Article 1(5).

Lastly, the contract of carriage must be concluded with a shipper, who is defined in Article 1(8) as "a person that enters into a contract of carriage with a carrier".[501] From the three preconditions above, it can be concluded that the "carrier" is not limited to the owner and charterer, and refers also to the contractual carrier; therefore if the person does not have a contractual relationship with the shipper, it will not qualify as the carrier under the Rotterdam Rules. Furthermore, in an attempt to provide a solution and bring uniformity to the identification of the carrier issue, the Convention takes a further step and introduces a specific provision, Article 37, which contains rules for identification of the carrier where the transport document contains inconsistency and the name of the carrier is not indicated in the transport document.[502] In the following part this provision will be analysed in detail, to determine whether it will effectively resolve the issue of identification of the carrier.

5.2- Identification of the Carrier under the Rotterdam Rules

[498] For instance, the term "person" is also used in the definitions of performing party (Art 1(6)(a)), maritime performing party (Art 1(7)), shipper (Art 1(8)), documentary shipper (Art 1(9)), holder (Art 1(10)), consignee (Art 1(11)).
[499] Sturley and others (n 26) para 5.145; Atamer (n 29) 475.
[500] Art 1(1) of the Rotterdam Rules; Chapter 3.2.1.
[501] Art 1(8) of the Rotterdam Rules; Chapter 7.1.1.
[502] Art 37 of the Rotterdam Rules; Below part 5.2.

Due to its crucial importance,[503] identification of the carrier had been considered from the start of the preparatory work on the Rotterdam Rules by the CMI, and was the most controversial issue during the works of the CMI and the Working Group.[504] In the previous drafts, identification of the carrier was included as a subparagraph within the draft Article 8.4 on deficiencies in contract particulars.[505] Until the 18th session the Working Group, the draft provision only regulated the situation where contract particulars did not indicate the name of the carrier; i.e. only the presumption in Article 37(2) was adjusted. In that session, the governments of Italy and the Netherlands proposed that transport documents might identify a person as the carrier on the face side, whereas on the reverse side, there might be an identity or demise clause inconsistent with that identification. Therefore they felt that the Convention should provide a solution for such conflicts, with identification of the carrier regulated by a new Article headed "Identity of the Carrier".[506] That suggestion was taken into account and identification of the carrier was regulated as an independent provision with modifications under draft Article 38 (now Article 37).[507] Article 37 consists of three paragraphs, each providing a different rule for the identification of the carrier, as will be presented in the below.

5.2.1- Identification of the Carrier under Article 37(1)

In the *travaux préparatoires*, it was questioned how the carrier would be identified if the transport document contained identity and/or demise clauses, which are inconsistent with other information related to identification of the carrier.[508] In such cases identification of the carrier would become more complex, and to prevent complexities, the Convention introduces Article 37(1).[509] Lorenzon states that most of

[503] Chapter 2.1.1, 2.2.1, 2.3.1, 2.4.1.
[504] CMI Yearbook 1998, 169-171; CMI Yearbook paras 186-187, 214, 257, 283; UN Doc., A/CN.9/526, paras 56-60; UN Doc., A/CN.9/621 paras 278-288.
[505] UN Doc., A/CN.9/WG.III/WP.21 para 156; UN Doc., A/CN.9/526 para 56; UN Doc., A/CN.9/WG.III/WP.56, 35.
[506] UN Doc., A/CN.9/WG.III/WP.79 paras 3, 4, 7.
[507] UN Doc., A/CN.9/616 paras 17-28; UN Doc., A/CN.9/WG.III/WP.81, 31. Even the most critical scholars consider Article 37 as useful to resolve the identification issue. See Diamond (n 81) 508; Thomas, 'An Analysis of the Liability Regime' (n 95) 71-72; Kozubovskaya-Pelle, Wang (n 26) 389.
[508] UN Doc., A/CN.9/526 para 56; UN Doc., A/CN.9/WG.III/WP.62 para 33; UN Doc., A/CN.9/WG.III/WP.79 paras 3-4; UN Doc., A/CN.9/616 paras 18-19, 28.
[509] UN Doc., A/CN.9/621 para 280; Berlingieri, 'A Review of Some Recent Analyses' (n 305) 1011.

Article 37(1) is in line with the House of Lords decision in *The Starsin*[510] and furthermore, Tettenborn points out that the aim of Article 37(1) is to universalise the decision reached in this case.[511] Therefore to present the rationale behind Article 37(1) and provide a better understanding of identification of the carrier under Article 37(1), *The Starsin* and the current position under English law will be explained, before analysing Article 37(1).

5.2.1.1- *The Starsin*[512]

Identification of the carrier has arisen before English courts in many cases. Prior to *The Starsin*, this depended on the interpretation of the bill of lading as a whole; i.e. not only signature and other implications on the face of the bill were taken into account, but terms and conditions located on the reverse of the document were considered, and in some cases where the bill of lading included a definition, identity of carrier or demise clause, these clauses were given greater weight.[513] However, in *The Starsin*, the bills were not interpreted as a whole; it was stated that a reasonable reader does not read the terms on the back of bills where the carrier is clearly and unambiguously identified on the front of the bill.[514]

In this case the fact was that the vessel *Starsin* was carrying a number of parcels of timber and plywood from Malaysian ports to Antwerp and Avonmouth, but because

[510] [2003] 1 Lloyd's Rep 571 (HL).
[511] Lorenzon, 'Transport Documents and Electronic Transport Records'(n 157) para 37.01; A Tettenborn, 'Freedom of Contract and the Rotterdam Rules: Framework for Negotiation or one-size-fits-all?' in R Thomas (ed) The Carriage of Goods by Sea under the Rotterdam Rules (Informa 2010) para 4.33.
[512] *Homburg Houtimport B.V. v Agrosin Private Ltd. and Others (The Starsin)* [2000] 1 Lloyd's Rep 85 (QB (Com Ct)); [2001] 1 Lloyd's Rep 437 (CA); [2003] 1 Lloyd's Rep 571 (HL).
[513] *The Berkshire* [1974] 1 Lloyd's Rep 185,188-189- in this case, the bill of lading was signed by an agent of the charterer's agent "as agent", but the bill also contained a demise clause, which indicated the shipowner as the carrier. The court gave greater effect to the demise clause and held that the shipowner was the carrier. *The Venezuela* [1980] 1 Lloyd's Rep 393, 394-396- in this case, the bill was signed by the charterer's agent for the master, but there was also a definition clause which defined the time charterer as the carrier. The definition clause was given greater weight and it was held that the charterer was the carrier. *The Ines* [1995] 2 Lloyd's Rep. 144,145, 150- in this case, the bill of lading was signed by the agent of the charterer with the words "Signed as agents for the carrier Maras Linja", but also included a demise clause, which indicated the shipowner as the carrier. The demise clause was given greater weight than the signature box and it was held that the shipowner was the carrier. See also *The Vikfrost* [1980] 1 Lloyd's Rep 560; *The Jalamohan* [1988] 1 Lloyd's Rep 443.
[514] Para 15 (Lord Bingham); paras 45-47 (Lord Steyn); paras 71, 75, 82,85 (Lord Hoffmann); para 188 (Lord Millett).

of negligent stowage the goods were seriously damaged by water during the voyage. In order to recover their damages, the cargo owners sued the shipowners and demise charterers. However, at the time of this voyage, the vessel was time-chartered to Continental Pacific Shipping Ltd (CPS) and 17 bills of lading were issued and signed on behalf of CPS by different loading port agents. On the front of each of the bills of lading, in large letters, was a heading that the bill was a "Liner Bill of Lading", and all the bills were on CPS's own pre-printed forms with the marked name and logo of CPS. Furthermore, on the face of the bills there were signature boxes filled in with the typed words "As Agent for Continental Pacific Shipping (the carrier)",[515] and below these typed words there were rubber stamps which indicated the names of the companies that signed the bills on behalf of CPS and acted as port agents for it. Also the signature boxes expressly showed that neither the master, agent of the shipowner nor the time charterer signed the bills on behalf of the shipowner; all the bills were signed on behalf of CPS by its port agents.

The contractual terms were located on the small pre-printed form at the back of the bills, and apart from the information about the carrier on the face, there were some clauses related to identification of the carrier on the reverse of the bills. Clause 1 provided a definition for the term "carrier", and stated that the "carrier" is the person on whose behalf the bill of lading has been signed. Furthermore, an identity of carrier clause (cl 33), which indicated that the contract of carriage was "between the merchant and the owner of the vessel named herein", and a demise clause (cl 35), which stated that the bill of lading shall only take effect as a contract of carriage "with the owner or demise charterer", were contained on the back of each bill.[516] On the face of the bills, CPS's name and logo was printed in large font, and the signature boxes included the signatures of CPS's agents, along with typed or stamped words indicating that the bills were signed on behalf of CPS whilst on the back of the bills, the clauses provided that the owner of the vessel was the carrier, without stating the

[515] There were some minor differences among the signature boxes; in some bills CPS was indicated as "the carrier" (e.g. The Makros Hout Bills) whereas in others it was named as "carrier" (e.g. The Fetim Bills).

[516] Identity and demise clauses have the same effect and provide that the contract is between the merchant and the owner or demise charterer of the ship; the person issuing the bill of lading has acted merely as an agent, therefore it does not have any personal liability. See *Carver* (n 54) para 9-104. The authors state that the purpose of identity and demise clauses is "to create the effect that whatever the face of the bill of lading may say, the contract of carriage is with the owner". For further information on identity and demise clauses see sources in n 482.

name of the owner. At first sight, it seemed the information on the face of the bills and the clauses on the back of the bills were in harmony, and the bills were designed as owner's bills.[517] A reasonable reader, who did not know whether the vessel had been owned, demise or time chartered, could easily think there was no inconsistency among the terms in the bills, therefore CPS was the owner of the vessel and the carrier. That would have been true if CPS had been the owner of the *Starsin;* however CPS was the time charterer of the vessel. Therefore, while the information on the face of the bills indicated CPS (time charterer) as the carrier, the information on the reverse showed the shipowner as the carrier. Due to this inconsistency, the identification of the carrier issue arose, and to identify the carrier, the House of Lords discussed whether the bills were the owner's bills or the charterer's bills.

The House of Lords concluded that the bills were the charterer's bills, therefore the time charterer (CPS) was the carrier. The House of Lords reached this conclusion by considering two essential rules of construction.[518] Firstly, their Lordships applied "business sense", which means reading and interpreting the bill of lading as a reasonable businessman would.[519] It is accepted that in its usual form, a bill of lading has two sides and information related to the goods, the vessel and the journey is indicated on the face, i.e. the business side of the bill, whereas information related to the contract of carriage is located on the reverse, i.e. the contractual side of the bill.[520] In the present case, the bills were in the usual form and it was emphasised that businessmen expect to identify the carrier by reading the business side of the bill of lading, and CPS is plainly identified as the carrier on the face of the bills, therefore any reasonable businessman looking at the face of the bills would think CPS was the carrier.[521]

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[517] Paras 68-69, 71 (Lord Hoffmann); paras 178, 180 (Lord Millett).
[518] Although Lord Bingham listed four rules, in their decision the House of Lords relied significantly on two essential rules (i.e. applying business sense and giving predominant effect to the typed words), therefore only these two essential rules are examined. See paras 10-13 (Lord Bingham).
[519] Para 10 (Lord Bingham); para 45 (Lord Steyn); para 82 (Lord Hoffmann); para 188 (Lord Millet).
[520] ICC Position Paper No.4, 1994. It is highlighted that "the expression 'the front of the document; means the side showing the details of the goods, vessel and voyage, and the expression 'the back of the document' means the side showing the details of the contract of carriage."
[521] In this respect, the decision of the House of Lords is criticised on the grounds that making a distinction between the front and back of the same document might be artificial, since commercial men even with an elementary knowledge, are aware that bills of lading might include contractual terms that might not be consistent with the terms on the front. See Aikens and others (n 154) para 7.69.

The House of Lords strongly relied on Article 23 of the UCP 500,[522] which states that the name of the carrier must be indicated on the face of the bill of lading, otherwise banks will not accept the document.[523] It was stated that in practice, banks generally do not examine the small printed contractual terms located on the reverse of bills, and even if the carrier is identified on the reverse, if it is not identified on the front of the bill, banks will refuse the document.[524] Although, it was argued by the claimant that Article 23 of the UCP 500 is only relevant to banking practice where there is a letter of credit and does not apply to the relationship between carrier and cargo owner, their Lordships rejected this argument on the grounds that the interpretation of the bill must be objective and uniform.[525]

The second and arguably more vital principle applied in the case by their Lordships, is the distinction between typed and pre-printed words. Under English law, it has long been accepted that terms specifically added to standard form contracts by the particular contracting parties for the particular voyage, have greater weight than generic pre-printed terms, which are drafted to cover many situations and are not specifically tailored to the particular contract by the contracting parties.[526] This rule was applied in *The Starsin,* and it was underlined that typed, stamped and written

[522] Article 23 of the UCP 500 is now contained in Article 20 of the UCP 600. Article 23 of the UCP 500 contained the phrase "on its face to indicate the name of the carrier"; however unlike Article 23 of the UCP 500, Article 20 of the UCP 600 does not contain the words "on its face". But Article 14(a) of the UCP 600, which regulates the rules for examination of the documents, contains the phrase "on their face". It was stated "the term remained in the UCP in relation to the examination of documents in general, the Drafting Group did not see any reason to repeat it in other articles, such as the transport, insurance and commercial invoice articles, as was the case in UCP 500. Banks are not obliged to go beyond the face of a document to establish whether or not a document complies with a requirement in the UCP." See ICC, *Commentary on UCP 600, Article-by-Article Analysis by the UCP 600 Drafting Group* (ICC Publication No 680-2007) 62. See also T Rodrigo, 'UCP 500 to 600: A Forward Movement' (2011) 18(2) eLaw J. 1, 10; J Ulph, 'The UCP 600: Documentary Credits in the 21st Century' (2007, Jun) JBL 355, 362-363; Todd, *Bills of Lading* (n 321) paras 9.6, 9.9; D Doise, 'The 2007 Revision of the Uniform Customs and Practice for Documentary Credits (UCP 600)' (2007) 1 IBLJ 106, 111-112. The author points out that the drafting of the UCP has been simplified, unlike previous versions of the UCP, the phrase "appear on its (their) face" is not repeated in the UCP 600; only Article 14(a) of the UCP 600 contains this phrase.

[523] Art 23 of the UCP 500. Also in ICC Position Paper No.4, 1994 it was emphasised that the name of the carrier must be seen on the face of the bill, since the banks will not examine the contractual terms and conditions located on the reverse of the bill. See also Gee, 'Cargo Damage Claims' (n 407) 10, 17.

[524] Para 16 (Lord Bingham); para 77 (Lord Hoffmann).

[525] Para 16 (Lord Bingham); para 80 (Lord Hoffmann); para 188 (Lord Millett).

[526] *Robertson v French* (1803) 4 East. 130, 136; *Glynn v Margetson & Co*., [1893] AC 351, 358; *Universal Steam Navigation Co. Ltd. v James McKelvie and Co*., [1923] AC 492, 500; *Varnish & Co. Ltd*. v *Owners of the Kheti (The Kheti)* (1949) 82 Ll. L. Rep. 525; *GH Renton & Co Ltd v Palmyra Trading Corpn of Panama* [1956] 1 QB 462, 501; *United British SS. Co. v Minister of Food* [1959] 1 Lloyd's Rep 11. See also *Scrutton* (n 24) para 1-084; *Halsbury's Laws of England* (5th edn, LexisNexis 2012) vol 23, para 412.

terms have priority over standard printed terms.[527] As a result, the effect of pre-printed identity and demise clauses was overridden through the unambiguous typed and stamped terms. As a result of giving greater importance to the typed words, their Lordships also gave predominant importance to typed terms placed in the signature box. Under English law, it is accepted as a general rule that the terms in the signature box have determinative importance;[528] because, as Lord Hoffman and Lord Hobhouse highlighted, typed or stamped terms located in the signature box indicate a special agreement between the parties.[529] In the present case, the signature boxes contained the printed word "signature", manuscript signatures of port agents along with the typed or stamped words "As agent for Continental Pacific Shipping (The Carrier)" and the names of the signatories. These terms were specifically chosen by the particular contracting parties for the particular journey, therefore their Lordships concluded that because of their special agreement function, predominant effect must be given to the terms placed in the signature box.

Additionally, with standard paper bills of lading, written, typed terms (such as information about the journey) and some the printed terms (such as printed headings and logos) are located on the face of the bill of lading whereas pre-printed contractual terms are placed on the reverse.[530] Therefore, it can be said that the outcomes of the second principle are parallel to the outcomes reached from the application of the first principle.[531] Under both principles, the front of the bill of lading prevails over the back of the bill, and because of the second principle, among the information placed on the face of the bill, the typed, written or stamped words, particularly the terms placed in the signature box, are given priority over printed terms. Consequently, the House of Lords stated that a reasonable reader does not read the terms on the back of the bills in cases where the carrier is clearly and unambiguously identified on the front of the bill thereby the reverse of the bills was ignored and a predominant effect was given to the typed/written terms located on the face of the bills.[532]

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[527] Para 45 (Lord Steyn); para 144 (Lord Hobhouse). It was pointed out that standard printed terms cannot be negotiated or amended by the shipper, therefore the terms chosen by the particular parties must prevail over standard terms.
[528] *Universal Steam Navigation Co. Ltd. v James McKelvie and Co.* [1923] AC 492, 500.
[529] Para 81 (Lord Hoffman); para 128 (Lord Hobhouse).
[530] Para 75 (Lord Hoffmann); ICC Position Paper No.4, 1994.
[531] Para 189 (Lord Millett).
[532] Para 15 (Lord Bingham); paras 45-47 (Lord Steyn); paras 71, 75, 82,85 (Lord Hoffmann); para 188 (Lord Millett).

5.2.1.2- Current Position under English Law

Currently under English law, it is accepted that identification of the carrier is a matter of construction, and written, typed and stamped terms are given greater weight than printed terms.[533] Where there is inconsistency between typed or written terms, the terms designed to apply to specific issues are given greater weight than general terms.[534] The signature box and the information next to it are given special effect, and if the signature box is not ambiguous, the signature and the terms next to it will have a determinative role on identification of the carrier; however, if there is ambiguity in the signature box, then identification of the carrier depends on the interpretation of the bill as a whole. [535]

As seen above,[536] under English law, the signature, the words next to it and the authority of the signatory have crucial importance in identifying the carrier.[537] It is accepted that a bill of lading can be signed by the master, agent of the shipowner, charterer or agent of the charterer:

A- Signature by the Master: Under English law, it is assumed that the master, as the servant or agent of the shipowner, has either actual or apparent authority to sign documents on behalf of the shipowner.[538] However where there is a bareboat charterparty, the master is commonly the employee of the bareboat charterer; thereby,

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[533] Above part 5.2.1.1.
[534] *Adamastos Shipping Co. Ltd. v Anglo-Saxon Petroleum Co. Ltd*., [1958] 1 Lloyd's Rep 73; *Marifortuna Naviera Sa v Government of Ceylon* [1970] 1 Lloyd's Rep 247, 255-256; *Scrutton* (n 24) para 1-085.
[535] *The Berkshire* [1974] 1 Lloyd's Rep 185, 187; Coghlin and others (n 433) para 21.7 *et seq*.; *Halsbury* (n 433) para 354; *Carver* (n 54) para 4-042 *et seq*.
[536] Above part 5.2.1.1.
[537] *Carver* (n 54) para 4-036 *et seq*.; *Scrutton* (n 24) para 6-026 *et seq*.; Gaskell and others (n 283) para 3.28 *et seq*.; S Girvin, H Bennett, 'English Maritime Law 2000' [2002] LMCLQ 76, 84-87; Girvin, *Carriage o Goods by Sea* (n 263) para 12.08 *et seq*.; Sian (n 481) 182; C Debattista, *Bills of Lading in Export Trade* (Tottel 2009) paras 8.22-8.25; Coghlin and others (n 433) para 21.1 *et seq*.; Pejovic, 'The Identity of Carrier Problem' (n 481) 395 *et seq*.; Gee, 'Cargo Damage Claims' (n 407) 10; S Gee, 'The Starsin Again (Implications)' The London Shipping Law Centre, Wednesday 4th February 2004, 4-6.
[538] *Sandeman v Scurr* (1866) LR 2 QB 86, 96-98; *Turner v Haji Goolam* [1904] AC 826; *Wehner v Dene Steamship Co*., [1905] 2 KB 92, 98; *Wilston Steamship Co. v Andrew Weir & Co.* (1925) 22 LlL Rep 521, 522-523; *The Hector* [1998] 2 Lloyd's Rep 287, 293; *The Rewia* [1991] 2 Lloyd's Rep 325 (CA), 333; *Laemthong International Lines Company Ltd v Artis and others* [2005] EWHC Civ. 519 para 6; *Halsbury* (n 433) paras 329-330, 357; *Scrutton* (n 24) paras 3-023-26, 6-026 *et seq*.; *Carver* (n 54) para 4-036; Coghlin and others (n 433) para 21.11; Pejovic, 'The Identity of Carrier Problem' (n 481) 385; Sian (n 481)188-189.

its signature binds the bareboat charterer, not the owner.[539] Therefore, subject to demise charterparties, where a bill is signed by the master with or without the qualification words "for the owner" or "for the ship" etc., it is presumed that the bill is the owner's bill, and the shipowner will be liable as the carrier against the cargo interest. In some cases, even though the master does not have actual authority, he might still have apparent authority to bind the shipowner with his signature. For example, although the master is the servant of the shipowner, if there is a voyage or time charterparty which confers capacity on the master to sign the bill of lading on behalf of the charterer only, the master will bind either the charterer with the actual authority given by the charterparty, or the shipowner with the apparent authority arising from his employment contract. In such cases, if the shipper or holder of the bill of lading does not know that the master has not had actual authority to sign the bill on behalf of the shipowner, the owner will be bound by the master's signature on the basis of apparent authority.[540] On the other hand, if capacity to sign on behalf of the charterer is indicated on the bill of lading or if the shipper/holder has knowledge of the master's capacity and the master has signed the bill of lading on behalf of the charterer rather than the owner, the charterer will be bound by the master's signature.[541]

B- Signature by the Charterer, its Agent or Agent of the Shipowner: A signature by the charterer, its agent or agent of the shipowner may bind the shipowner as the carrier. It is possible that instead of the master's own signature, the bill of lading might be signed for or on behalf of the master by the charterer or its agent. For instance, if the charterer or its agent is given capacity by the authorisation of the master in the charterparty to sign the bill of lading, and the bill is signed for or on behalf of the master, then the owner will be bound as the carrier by such a

[539] *Baumwoll Manufactur von Carl Scheibler v Furness* [1893] AC 8; *The Stolt Loyalty* [1993] 2 Lloyd's Rep 281, 284. See also *Carver* (n 54) para 4-035. In bareboat charterparties, whole possession and control of the ship is transferred to the charterer and the owner is not responsible for employing the crew and equipping the ship. For further information on bareboat charters, see below part 5.2.2.

[540] *Mitchell v Scaife* (1815) 4 Camp 298, 302; *Sandeman v Scurr* (1866) LR 2 QB 86, 96-98; *Smidt v Tiden* (1874) LR 9 QB 446*; Cox v Bruce* (1886) 18 QBD 147, 151; *Armagas Ltd. v Mundogas S.A.* [1986] AC 717, 777.

[541] In *Manchester Trust Ltd v Furness Withy & Co* [1895] 2 QB 539, 547, where it was pointed out that if there is an express incorporation clause in the bill of lading related to the authority of the master, it is assumed that the third party is notified by this provision and the master's signature will bind the charterer, not the owner. *The Emilien Marie* [1874-80] All ER Rep Ext 2236, 2245; *Harrison v Huddersfield Steamship Co Ltd* (1903) 19 TLR 386; *Elder Dempster v Paterson, Zochonis* [1924] AC 522 (HL); *The Hector* [1998] 2 Lloyd's Rep 287; *The Venezuela* [1980] 1 Lloyd's Rep 393, 396-397.

signature.[542] Furthermore, the shipowner will also be bound as carrier if the bill of lading is directly signed by its agent, the charterer, or an agent of the charterer, where those persons are given authority to sign the bill of lading directly on behalf of the owner rather than for or on behalf of the master.[543] On the other hand, where the bill of lading is signed on behalf of the charterer as principal instead of the shipowner, the charterer will be bound by the signature, and will qualify as the carrier.[544]

It must be added that qualifying words next to a signature, such as "for the master", "on behalf of the master (or owner)", or "as agent", have crucial importance on the issue of identification of the carrier.[545] For instance, in *The Rewia,*[546] the bills of lading were signed by the agent of the charterer with the words "for the master" added, and it was held that the bills were the owner's bills. Legatt LJ emphasised that "a bill of lading signed for the master cannot be a charterer's bill unless the contract was made with the charterers alone, and the person signing has authority to sign, and does sign, on behalf of the charterers and not the owners".[547] However, although the bills of lading in *The Starsin*[548] were again signed by the agent of the charterer, it was held that the bills were charterer's bills. This is because unlike *The Rewia*, the bills were not signed "for the master"; the qualifying words next to the signature indicated that

[542] Article 30(a) of the NYPE 93 allows the charterer to sign bills of lading on behalf of the master if there is prior written authority by the owner. See also *Wilston Steamship Co. v Andrew Weir* (1925) 22 LlL Rep. 521; *The Berkshire* [1974] 1 Lloyd's Rep 185, 188; *The Rewia* [1991] 2 Lloyd's Rep 325, 333; *The Hector* [1998] 2 Lloyd's Rep 287, 289-290.

[543] *Tillmanns & Co. v SS Knutsford Ltd* [1908] 2 KB 385, 393. In this case, it was pointed out that because of the implication in the charterparty, the charterer could either present the bill to the captain for signature or it could directly sign the bill for the captain and owners. See also *The Berkshire* [1974] 1 Lloyd's Rep 185; *The Vikfrost* [1980] 1 Lloyd's Rep 560; Sian (n 481) 185. It must be added that the doctrine of apparent authority also applies where the document is issued by a charterer, its agent or owner's agent on behalf of the owner. In such cases, if the cargo interest is not aware of the unauthorised action of the issuer, the owner will be bound by virtue of apparent authority. In this way, the reliance of the innocent cargo interest is protected. See *The Nea Tyhi* [1982] 1 Lloyd's Rep 607, 610-611; *The Saudi Crown* [1986] 1 Lloyd's Rep 261, 264-265; *The Starsin* [2000] 1 Lloyd's Rep 85, 96-98; *Alimport v Soubert Shipping Co Ltd* [2000] 2 Lloyd's Rep 447, 448. See also s.4 of COGSA 1992.

[544] *Samuel v West Hartlepool Co* (1906) 11 Com. Cas 11; *The Okehampton* [1913] P. 173,178, *The Roberta* (1937) 58 L1LR 159; *Walker (Hiram) & Sons Ltd v Doves Navigation and Bristol City Line of Steamships Ltd* (1949) 83 LlL Rep 84. See also Coghlin and others (n 433) para 21.14; Pejovic, 'The Identity of Carrier Problem' (n 481) 396; Sian (n 481) 197.

[545] *Harrison v Huddersfield Steamship Co Ltd* (1903) 19 TLR 386; *Universal Steam Navigation Co Ltd. v James McKelvie & Co.* [1923] AC 492, 495-496,499; *The Rewia* [1991] 2 Lloyd's Rep 325 (CA), 336. Similarly, under the UCP 600, qualifying words next to the signature are given vital importance, and it is required that if the document is signed by an agent, qualifying words must indicate on whose behalf the bill has been signed. See Arts 19(a)(i), 20(a)(i), 21(a)(i), 22(a)(i), and 23(a)(i) of the UCP 600.

[546] [1991] 2 Lloyd's Rep 325 (CA).

[547] Ibid 333, 336.

[548] [2003] 1 Lloyd's Rep 571.

the bills were signed "As Agent for Continental Pacific Shipping (the carrier)", the time charterer; therefore it was held that the bills were charterer's bills. In both cases, even though the bills were signed by agents of the charterers under authority given by the charterparties, because of the variation in the words next to the signature, in *The Rewia* the bills were specified as owner's bills whereas in *The Starsin* they were specified as charterer's bills. Consequently, under English law, depending on the qualifying words next to the signature and the authority of the signatory, the identity of the contracting carrier can vary, and although a signature and the qualifying words next to it are not conclusive, depending on the particular facts, they might be determinative.[549]

5.2.1.3- Requirements for the Application of Article 37(1)

Application of Article 37(1) may arise where the transport document contains inconsistent information related to identification of the carrier. The provision is worded as follows;

> "If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification."[550]

In order for Article 37(1) to apply, there are two preconditions that must be satisfied: firstly, a carrier must be identified by name in the contract particulars; and secondly, there must be inconsistency between that identification and other information in the transport document. The first precondition refers to two issues: (i) identification by name; and (ii) the contract particulars. As to point (i), Article 36(2)(b) expressly requires that the name of the carrier must be indicated in the transport document.[551] As indicated above, it was pointed out in the preparatory works that the name must be the actual name of the carrier rather than a vague trade name, such as a logo that does not show the actual name of the carrier.[552] Therefore if the transport document does

[549] N Jacobs, 'The Identification of the Contracting Carrier: In Defence of the Demise Clause' in *Who is the Carrier in the Voyage to Troy? (The Hector and The Starsin),* The London Shipping Law Centre Wednesday 26th February 2003, 2.
[550] Art 37(1) of the Rotterdam Rules.
[551] Art 36(2)(b) of the Rotterdam Rules; Chapter 4.2.1.1.
[552] UN Doc., A/CN.9/621 para 280; Chapter 4.2.1.1.

not contain any name at all, or although it contains a name if that name is not the actual trade name of the carrier, then the first requirement is not satisfied and Article 37(1) does not apply. It is submitted that although Article 36(2)(b) requires inclusion of both the name and address of the carrier for the application of Article 37(1), the omission or inclusion of the address of the carrier does not seem to have any effect. As Article 37(1) merely requires the inclusion of the name of the carrier as a precondition, it neither refers to Article 36(2)(b) nor mentions the inclusion of the address of the carrier.[553] However, even though the address of the carrier is not a requirement for the application of Article 37(1), where the carrier is identified, in order to get in touch with him and serve any writs, of course the address needs to be known.

As to point (ii), Article 1(23) defines "contract particulars" as "any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record".[554] The definition addresses any information in transport documents or electronic transport records, but does not refer to information in contracts of carriage itself. Therefore it seems that in order to apply Article 37(1), the existence of a contract of carriage is not sufficient; there must be a transport document or electronic transport record within the meaning of Article 1(14) and Article 1(18) respectively.[555] Accordingly, if a document does not qualify as a transport document, for instance if it is issued by the performing party rather than the carrier, or if it does not evidence the carrier's receipt of the goods or a contract of carriage, there will be no transport document under the Convention, and Article 37(1) will not apply. Moreover, pursuant to Article 35, if the parties have agreed or there is custom, usage or practice of the trade not to use a transport document, then the carrier is not obliged to issue a transport document.[556] In such cases, because of the absence of a transport document, the claimant cannot apply to Article 37(1).

Regarding the second requirement, i.e. the presence of inconsistent information, the provision provides that where the name of the carrier is expressly indicated in the

[553] Atamer, Süzel (n 26) 171.
[554] Art 1(23) of the Rotterdam Rules; Chapter 4.1.
[555] Arts 1(14), 1(18) of the Rotterdam Rules; Chapter 3.2.
[556] Arts 35 of the Rotterdam Rules; Chapter 3.3.

contract particulars, the other information inconsistent with that identification will not have any effect. For instance, where a person is identified as a carrier on the transport document which also includes an identity clause without showing the actual name of the carrier, if the court concludes that the identity clause contradicts with that identification, the identified person will be treated as the carrier, with the identity clause having no effect. On the other hand, where a person is identified as a carrier and the transport document does not involve any other information related to identification of the carrier, there will be no need to apply Article 37(1). As the provision aims to protect cargo interests' rights against inconsistent information, if there is no inconsistency, there is no interest to be protected.[557]

From the abovementioned explanations, it can be seen that although the wording of Article 37(1) looks similar to the result reached by the House of Lords in *The Starsin,* there are certain distinctions between these two laws. Firstly, Article 37(1) does not make any distinction between the front and back of the transport document. The key elements are whether a person is identified by name as the carrier in the contract particulars and whether there is an inconsistency with that identification. However, in the first proposed Article it was suggested that "If a person is on the face of a transport document or electronic record identified as the carrier, any information on the reverse side of the transport document or electronic record expressly or impliedly identifying a different person as the carrier shall have no legal effect."[558] As seen, the first proposed Article is significantly different from the current version of Article 37(1), and has greater similarity to the decision in *The Starsin*. In the first proposed Article, as in *The Starsin*, a distinction was made between the front and reverse of the transport document by giving priority to the face of the transport document. On the other hand, in the final version, instead of making distinction between the front and back of the transport document, the existence of an inconsistency is required as a precondition. It could be said that the diversity between the Convention and *The Starsin* is appropriate; as the Convention introduces the term "transport document" instead of using the term "bill of lading", and more importantly, the Convention introduces regulations about electronic transport records, which do not have a reverse

[557] Sturley and others (n 26) para 7.048; Kozubovskaya-Pelle, Wang (n 26) 384, 386.
[558] UN Doc., A/CN.9/WG.III/WP.79 para 4.

side.[559] It is possible that this new terminology might create documents with new forms and the location of contractual and commercial terms might be replaced. For instance, demise clauses were originally printed on the business side of bills of lading but have also been printed on the contractual side of the bills.[560] Because of the new terminology, if the Convention enters into force, alterations like this might happen and the locations of the terms might change.

The second and arguably more significant difference is that whilst the decision in *The Starsin* gives priority to typed/written/stamped words over printed terms, particularly the terms in the signature box, the Convention does not draw any distinction between the typed/written/stamped words and the printed boilerplates.[561] Under the Convention, the terms in the signature box and forms of the terms (typed, written, stamped or printed) do not have any predominant effect on the identification of the carrier. As a result, it is submitted that unlike *The Starsin*, Article 37(1) provides a limited solution. For example, assume that a transport document is issued on company A's printed form but the actual trade name of company B is typed in the signature box as the carrier, whereas the actual trade name of company A is indicated as carrier within the printed contractual terms or plainly printed on the heading or logo scheme. Who will be the carrier: company A or company B? If the applicable law is English law, according to the ratio in *The Starsin,* the typed, written and stamped terms in the signature box have priority upon the printed terms, and because of the predominant effect of typed words in the signature box, the conclusion will be that company B is the carrier. If the Rotterdam Rules apply, it will not be possible to identify the carrier in accordance with Article 37(1). This is because in this example, both persons are identified by name in the contract particulars and Article 37(1) does not give predominant effect to typed words over printed terms, therefore it is not clear which identification will prevail.

However, it should be noted that with regard to identification of the carrier, if the Rotterdam Rules had been applied in *The Starsin,* the conclusion reached would have

[559] Arts 1(14), 1(18) of the Rotterdam Rules; Chapter 3.2. The modification in para 4, in UN Doc., A/CN.9/WG.III/WP.79 was made to cover both transport documents and electronic transport records. See UN Doc., A/ CN.9/WG.III/WP.81, 31 n 118-119.
[560] *The Berkshire* [1974] 1 Lloyd's Rep. 185. See also Roskill (n 482) 406; *Carver* (n 54) para 9-104.
[561] [2003] 1 Lloyd's Rep 571 para 11 (Lord Bingham); Above part 5.2.1.1. See also Tettenborn (n 511) para 4.33; *Carver* (n 54) para 4.042; Cooke and others (n 225) paras 18.68-18.69.

been the same. As in the case, CPS was plainly identified by name as the carrier, while the demise and identity of carrier clauses referred to the shipowner as the carrier without identifying him by name. The requirements stated in Article 37(1) would have been met through the identification of CPS as the carrier by name and the existence of identity/demise clauses inconsistent with that identification. Therefore, pursuant to Article 37(1), the identification of the carrier in the identity and demise clauses would have been overridden by the unambiguous identification by name, and the conclusion would also have been that CPS was the carrier.

5.2.1.4- Criticism of Article 37(1)

Article 37(1) provides a conclusive presumption in favour of claimants, therefore where a person is identified by name as a carrier in the contract particulars, it will be deemed as the carrier within the meaning of Article 1(5), and be held liable against the cargo interest.[562] Although the named person has not actually contracted with the shipper or its name has been accidently indicated as carrier, because of the conclusive presumption, the named person may not apply identity or demise clauses to prove that another person is the carrier.[563] The paragraph introduces a novelty, as for the first time an international sea convention provides a specific provision on identification of the carrier where there is inconsistency. It is clear that by introducing such a provision, the Convention takes a step further in resolving the identification of the carrier problem; however because of the wording of the paragraph, it seems that application of Article 37(1) is notably limited, and in some respects might even be problematic.

The first problem might arise regarding the requirement of inconsistency. It is not clear how to universally determine if there is inconsistency or not.[564] It seems the issue will depend on the interpretation by the national courts. Under English law, identity and demise clauses are effective, unless the carrier is clearly and

[562] Article 1(5) of the Rotterdam Rules; UN Doc., A/CN.9/621 para 279. In the draft Article, the term "the carrier" was used, and it was suggested that "the" already implies identification. Therefore, the word "the" was replaced with the word "a".
[563] UN Doc., A/CN.9/621 para 280. In this session, it was suggested that Article 37(1) should be deleted, and instead of conclusive presumption, a rebuttable presumption should be included. However, that suggestion was rejected on the grounds that there might be inconsistencies on the front and reverse side of the transport documents, and the paragraph will be useful to resolve such problems. See also Atamer, Süzel (n 26) 169; Sturley and others (n 26) para 7.048.
[564] Kozubovskaya-Pelle, Wang (n 26) 384, 386.

unambiguously identified.[565] If, for example, the charterer is clearly identified as the carrier on the face of the bill of lading and the shipowner is indicated as the carrier by an identity clause on the reverse of the transport document, under English law there will be no inconsistency because of the effect of *The Starsin.*[566] The identity clause will not be given any effect and there will be no need to apply Article 37(1). Furthermore, in some jurisdictions, for example under French law, identity and demise clauses are not permissible, whereas in other jurisdictions, for example under Belgian law, there may be more than one party who can be treated as the carrier.[567] In respect of these states, there would be no inconsistency, therefore the application of Article 37(1) will not arise.

As Tettenborn highlighted,[568] the second problem might arise because of the use of the phrase "contract particulars". Pursuant to Article 1(23), the term "contract particulars" has wide meaning, and in the *travaux préparatoires* it was expressly pointed out that "contract particulars" refers to any information that is shown in a transport document.[569] In order to qualify as a contract particular, the location of the information does not have any effect, as the definition does not refer to any side; it simply embraces all information located on the transport document.[570] At this point, the following questions may come into mind: what will happen where a person is identified as the carrier on the face of the transport document, and demise and/or identity clauses are also indicated on the face of the transport document, including the actual name of the shipowner? Which information will be given priority? What will happen if different persons are identified by name as carrier on the face and the reverse of the transport document? Which person will be held liable as carrier for the entire voyage: both of them, or only the person identified by name on the face of the document, or only the person identified by name on the reverse of the document? It must be noted that similar questions were raised by Lorenzon and Tettenborn, and as an answer, Berlingieri suggested that these issues are marginal and a Convention

[565] In the following cases demise and identity clauses were held valid: *The Vikfrost* [1980] 1 Lloyd's Rep 560 (CA) 562, 568; *The Berkshire* [1974] 1 Lloyd's Rep 185, 188; *The Jalamohan* [1988] 1 Lloyd's Rep 443, 450.
[566] [2003] 1 Lloyd's Rep 571 (HL); Above part 5.2.1.1.
[567] Pejovic, 'The Identity of Carrier Problem' (n 481) 389; Tetley, *Marine Cargo Claims* (n 24) 584.
[568] Tettenborn (n 511) para 4.33.
[569] Art 1(23) of the Rotterdam Rules; UN Doc., A/CN.9/510 para 153; Chapter 4.1.
[570] Chapter 4.1.

cannot deal with such situations.[571] However, as Tetley pointed out,[572] identity and demise clauses may contain the actual name of the shipowner, or the logo on the transport document might provide the actual name of the carrier, and therefore the author of this thesis believes that these questions will possibly arise in practice but unfortunately, Article 37(1) does not provide any answer to them. It seems the applicable national law will have a decisive role and if, for instance, English law is the applicable law, the face of the transport document, signature and information in the signature box will have a decisive role on the identification of the carrier.[573]

It should be noted that the first proposed draft Article used the phrases "on the face of a transport document" and "on the reverse side of the transport document", and it was stated that the face of the transport document prevails, even though another person is expressly identified as the carrier on the reverse side.[574] If the first proposed draft had been accepted, it at least would resolve problems about multiple identifications on the front and back of the transport document by giving priority to the face of the transport document. However, neither the first proposed draft nor the current version of Article 37(1) seem to provide a solution for cases where different persons are identified by name as carrier on the same side of the transport document.

The third problem might arise if the claimant is also the shipper.[575] The shipper is the counterpart of the carrier under a contract of the carriage, and pursuant to Article 41(1), in the hands of the shipper the transport document is a mere receipt of goods.[576] Although, the transport document is only a receipt, it may still be applied as a tool to identify the carrier, and a problem may arise where the contract of carriage identifies a person as the carrier, whereas the transport document identifies another person as the carrier. Article 37(1) only regulates inconsistencies in contract particulars, i.e. within the transport document; however it does not say anything about inconsistencies between the transport document and the contract of carriage itself. Therefore, identification of the carrier again depends on national law. Under English law, the

[571] Lorenzon, 'Transport Documents and Electronic Transport Records' (n 157) para 37-02; Tettenborn (n 511) para 4.33; Berlingieri, 'A Review of Some Recent Analyses' (n 305) 1011.
[572] W Tetley, 'Bills of Lading' (2004) 35 J. Mar. L & Com. 121, 127.
[573] Above parts 5.2.1.1-2.
[574] UN Doc., A/CN.9/WG.III/WP.79 para 4.
[575] Art 1(8) of the Rotterdam Rules; Chapter 7.1.
[576] Art 41(a) of the Rotterdam Rules; n 157; Chapter 3.1.a.

general rule is that if there is contradiction between the terms of the contract of carriage and the terms of the bill of lading, the terms of the contract of carriage are given priority;[577] i.e. according to the general rule, the person identified as the carrier in the contract of carriage would qualify as the carrier. However, the general rule does not apply where the parties expressly or impliedly show their intention to give priority to terms of the bill of lading or to supersede to an antecedent contract, or there is custom or usage.[578] By the same token, under English law, if the person holding the transport document is also the charterer, the charterparty applies to the relationship between the carrier and the claimant/charterer.[579] The Rotterdam Rules do not apply to charterparties,[580] therefore if there is a charterparty contract, the carrier cannot be determined in accordance with Article 37(1).

The fourth problem might emerge if the transport document is signed on behalf of the person identified as the carrier, without authorisation.[581] Pursuant to Article 38, the transport document must be signed by the carrier or another person acting on behalf of the carrier.[582] The Convention does not provide any answer to problems caused by an unauthorised signature, therefore the issue will be determined in accordance with applicable law. For example, where the transport document is signed by the master on behalf of the charterer and the charterer's name is expressly indicated as the carrier, because of the effect of the conclusive presumption in Article 37(1), at first glance it would be said that the charterer is the carrier. However, if English law is applicable, the outcome would be different. As explained before, under English law it is accepted that the master has apparent authority to sign the bill of lading on behalf of the

[577] *Crooks v Allan* (1879) 5 QBD 38, 40; *Wagstaff v Anderson and Others* (1880) 5 CPD 171, 177; *Rodocanachi v Milburn* (1886) 18 QBD 67, 75,78; *Leduc v Ward* (1888) 20 QBD 475; *The Ardennes* [1951] 1 KB 55, (1950) 84 LIL Rep 340, 344-345; *Pyrene Co. Ltd. v Scindia Navigation Co. Lrd* [1954] 2 QB 402, 419; *Geofizika DD v MMB International Ltd* [2010] EWCA Civ 459. See also Debattista, 'The Bill of Lading as the Contract of Carriage' (n 416) 653; *Carver* (n 54) para 3-005; Aikens and others (n 154) paras 7.34-7.36.
[578] *Armour & Co Ltd v Leopold Walford (London) Ltd* [1921] 3 KB 473, 476; *The Hector* [1998] 2 Lloyd's Rep 287, 299; *Electrosteel Castings v Scan-Trans Shipping & Chartering Sdn Bhd* [2003] 1 Lloyd's Rep 190*; Hardwick Game Farm v Suffolk Agricultural, etc Association* [1969] AC 31; *British Crane Hire Co v Ipswich Plant Hire* [1975] QB 303.
[579] *Rodocanachi v Milburn* (1886) 18 QBD 67, 79-80; *Turner v Haji Goolam* [1904] AC 826; *Moel Tryvan Ship Company v Kruger & Co.* [1907] 1 KB 809, 815; *President of India v Metcalfe Shipping Co Ltd* [1969] 2 QB 123. See also *Scrutton* (n 24) para 6-002 *et seq.*; *Carver* (n 54) para 3-011; Cooke and others (n 225) paras 18.2, 18.206-207; Aikens and others (n 154) para 7.20 *et seq*.
[580] Art 6 of the Rotterdam Rules.
[581] Zunarelli, 'The Carrier and The Maritime Performing Party in the Rotterdam Rules' (n 26) 1016.
[582] Art 38 of the Rotterdam Rules; Chapter 4.2.1.3.

shipowner.[583]Although the master's authority may have been limited, or the master has authority to sign the bill of lading only on behalf of the charterer, if the third party does not have actual notice of this, it is accepted that the master has apparent authority, therefore its signature binds the shipowner.[584] However, if the master's capacity to sign the bill on behalf of the charterer is expressly indicated on the bill or the third party is aware of the master's capacity to sign on behalf of the charterer then the master's signature binds the charterer not the shipowner. Accordingly, if the charterer proves that the master does not have authority or the shipowner proves that the master has neither actual nor apparent authority and the third party is aware of that then they will not be bound by the master's signature.[585] In order to apply Article 37(1), one of the prerequirements is to the identification of a person by name in the contract particulars as a carrier. However, if the signatory does not have authority and the person on whose name the document is issued proves that the signatory has acted without authorisation the application of Article 37(1) would be prevented. Although Article 37(1) provides a conclusive presumption against the person named as the carrier, by taking a step back and proving that the signatory has acted without authorisation, the contract particulars on the name of the carrier would be invalidated. Therefore, due to the absence of one of the preconditions of Article 37(1), the application of Article 37(1) would not arise. More importantly, in such cases, the document issued by an unauthorised person may not even be deemed as a transport document within the meaning of Article 1(14); therefore the application of Article 37(1) would not arise.

Additionally, the Rotterdam Rules do not touch on the validity of unsigned transport documents. The issue is left to the applicable law, thus where there is an unsigned transport document, the application of Article 37(1) will depend on whether the transport document is valid under the applicable law or not.[586] In conclusion, although

[583] Above part 5.2.1.2.
[584] Ibid.
[585] See *The Starsin* [2000] 1Lloyd's Rep 85 (QB (Com Ct)) 92-93; *Carver* (n 54) 182 *et seq*.; Coghlin and others (n 433) para 21.11 *et seq*.
[586] UN Doc., A/CN.9/WG.III/WP.62 para 23; UN Doc., A/CN.9/616 para 12; UN Doc., A/CN.9/621 para 291; UN Doc., A/63/17 para 124. See also Sturley and others (n 26) para 7.057-7.058; Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 175, 177. For the position under English law, see Chapter 4.3.

Article 37(1) introduces a solution, it has limited scope, therefore the above-mentioned problems will have to be resolved by the applicable law.

5.2.2- Identification of the Carrier under Article 37(2)

Where Article 37(1) does not apply, the carrier may be identified in accordance with the rule in Article 37(2), which is worded as follows:

> "If no person is identified in the contract particulars as the carrier as required pursuant to article 36, subparagraph 2 (b), but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner."[587]

In order to apply Article 37(2), the following preconditions must be satisfied: firstly, no one is identified as the carrier in the contract particulars pursuant to Article 36(2)(b); and secondly, the contract particulars must show that the goods have been loaded on board a named ship. Considering the first precondition, it can be seen that unlike Article 37(1), Article 37(2) refers to Article 36(2)(b), which requires the inclusion in the transport document of both the name and address of the carrier.[588] The wording of Article 37(2) is ambiguous, as it is not clear whether the phrase "no person is identified" refers to Article 36(2)(b) only in respect of the name of the carrier, or whether it refers to both the name and address of the carrier. This issue was questioned in the *travaux préparatoires*, where the uncertainty as whether the draft article requires omission of both the name and address of the carrier, or only the omission of the name of the carrier, was pointed out.[589] In a later session, it was suggested that instead of the phrase "fail to identify", the phrase "fail to indicate the name and address of the carrier" should be preferred; however that proposal was not approved.[590] In the ninetieth session, two different suggestions were proposed:

[587] Art 37(2) of the Rotterdam Rules.
[588] Arts 36(2)(b), Art 37(1) of the Rotterdam Rules; Above part 5.2.1.3; Chapter 4.2.1.1.
[589] UN Doc., A/CN.9/WG.III/WP.62 para 33.
[590] UN Doc., A/CN.9/WG.III/WP.70, 3.

Variant A was based on the former draft Article 40(3), and used the phrase "fail to identify the carrier"; however, Variant B was based on the proposed draft of the governments of Italy and the Netherlands, and preferred to use the phrase "no person is identified", and further referred to draft Article 37(2) (now, Article 36(2)).[591] Variant B was eventually accepted, and although the problem was presented, the draftsmen ignored the ambiguity.[592]

Atamer plausibly asserts that in order to resolve that ambiguity, Article 37(1) and Article 37(2) should be considered together.[593] As mentioned above,[594] Article 37(1) does not refer to Article 36(2)(b), and even if the address is omitted, if a person is identified as the carrier in the contract particulars, instead of Article 37(2), application of Article 37(1) would arise. In the other words, only omission of the address of the carrier does not make Article 37(2) applicable, as if the carrier is identified by name on the transport document, application of Article 37(1) may arise irrespective of whether the transport document indicates the address of the carrier. On the other hand, if the transport document does not include the name and address of the carrier or indicates the address of the carrier but not its name, then application of Article 37(2) may arise. Accordingly, although Article 37(2) refers to Article 36(2)(b), for the satisfaction of the first precondition, omission of the address of the carrier only is insufficient; the key factor is the absence of the name of the carrier. Therefore, if the transport document does not identify the carrier by name or merely provides identity or demise clauses which do not show the actual name of the carrier, application of Article 37(2) will arise when other preconditions are also satisfied.[595]

As for the second precondition, Article 37(2) requires the contract particulars to show that the goods have been loaded on board a named ship. Under Article 36(3)(b), it is required that the transport document must contain the name of the ship, if the ship is specified in the contract of carriage.[596] Article 37(2) does not refer to Article 36(3)(b), and it is not clear whether the draftsmen accidentally failed to address Article 36(3)(b),

[591] UN Doc., A/CN.9/WG.III/WP.32, 41; UN Doc., A/CN.9/WG.III/WP.56, 34; UN Doc., A/CN.9/WG.III/WP.79 para 5; UN Doc., A/CN.9/WG.III/WP.81, 31.
[592] UN Doc, A/CN.9/621 para 288.
[593] Atamer, Süzel (n 26) 176.
[594] Above part 5.2.1.3.
[595] Lorenzon, 'Transport Documents and Electronic Transport Records' (n 157) para 37-02.
[596] Art 36(3)(b) of the Rotterdam Rules; Chapter 4.2.1.2.

or they did it intentionally. It could be that Article 37(2) had been discussed from the beginning of the preparatory work in the CMI and the Working Group, but Article 36(3)(b) was added in the forty-first session.[597] Therefore, it may be said that the draftsmen omitted to refer to Article 36(3)(b). Or, it could be that the draftsmen intentionally did not refer to Article 36(3)(b); as Article 36(3)(b) does not make any distinction between shipped on board and received for shipment transport documents, the key element is whether the name of the ship is specified in the contract of carriage or not.[598] However, Article 37(2) requires the contract particulars to indicate that "the goods have been loaded on board a named ship"; i.e. Article 37(2) refers only to shipped on board transport documents that show the name of the ship, whereas Article 36(3)(b) applies to both received for shipment and shipped on board transport documents.

While the phrase "received for shipment" was included in the former draft Article, in the latter work it was deleted.[599] The exclusion of received for shipment transport documents does not seem to have much practical effect on the application of Article 37(2). Because of the door-to-door nature of the Convention, the goods can be received at the premises of shippers, therefore most of the transport documents may be labelled as received for shipment, and such transport documents usually do not contain the name of the ship. This is because the name of the ship is generally not known at the time of the issuance of the received for shipment transport document. However, even if the name of the ship is known and indicated in the contract particulars, and furthermore the goods are actually loaded and carried on that ship, if a transport document is labelled as received for shipment, it can be submitted that Article 37(2) does not apply because of the use of the terms "the goods have been loaded on board" in the provision.[600]

Lastly, as Sturley pointed out,[601] in some cases the ship named on the shipped on board transport document might be different from the ship that actually carried the

[597] UN Doc., A/CN.9/658/Add.1 para 14; UN Doc., A/63/17 paras 112, 114, 119, 121.
[598] For further details about shipped on board and received for shipment transport documents, see Chapter 3.2.3.
[599] CMI Yearbook 1999,108; CMI Yearbook 2001, 496.
[600] Atamer, Süzel (n 26) 178.
[601] UN Doc., A/CN.9/WG.III/WP.62 para 32; MF Sturley, 'Phantom Carriers and UNCITRAL's Proposed Transport Law Convention' (2006) LMCLQ 426, 435.

goods, and it is not clear whether Article 37(2) refers to the inclusion of the name of the actual carrying ship. For instance, after the issuance of the shipped on board transport document but before starting the voyage, the vessel might be substituted and the goods might be actually carried by a substitute vessel. Likewise in case of transhipment, the goods are transferred and reloaded to another vessel during the voyage, however, only the name of the first vessel might be indicated in the transport document.[602] Sturley suggested that for the application of Article 37(2), the actual carrying vessel should be considered, as the transport document can be misstated or unauthorised, therefore only the owner of actual carrying vessel can provide sufficient information about the identity of the carrier.[603] Under the Convention, the ship is defined as "any vessel used to carry goods by sea" and it seems that the definition supports Sturley's suggestion.[604] However, Zunarelli stated that the purpose of the presumption in Article 37(2) is to protect the transport document holder's reliance on the information indicated in the transport document therefore even if the goods have not been loaded on board the ship, the presumption will still apply.[605] The author of this thesis believes that taking the actual carrying vessel into account would be a more proper interpretation, as the definition of "ship" refers to the actual carrying vessel. More importantly, as Fujita rightfully emphasised, the presumption in Article 37(2) should be used as a device to reach the true carrier through the registered owner, and if the ship is not the actual carrying vessel, the registered owner would not have any connection with the carrier, therefore it cannot rebut the presumption;[606] such an outcome would be extremely unfair to the registered owner.

In conclusion, it is submitted that by excluding received for shipment transport documents, it seems that Article 37(2) uses the most proper wording, as putting a rebuttable presumption on the registered owner of the vessel named in the received for shipment transport document would be unfair. This is because shipped on board transport documents are issued after the goods have already been loaded, which means that subject to extraordinary cases, the named and actual carrying vessel will mostly be the same. However, received for shipment transport documents are issued

[602] Pejovic, 'The Identity of Carrier Problem' (n 481) 401.
[603] Sturley, 'Phantom Carriers' (n 601) 435, 438.
[604] Art 1(25) of the Rotterdam Rules.
[605] Zunarelli, 'The Carrier and The Maritime Performing Party in the Rotterdam Rules' (n 26) 1016.
[606] Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 173.

when the goods are received, therefore it is highly probable that the ship named in the transport document and the actual carrying ship will not be the same.

5.2.2.1- The Rebuttable Presumption under Article 37(2)

Article 37(2) introduces a rebuttable presumption against the registered owner of the named vessel, where all the preconditions have been satisfied. In the *travaux préparatoires*, the presumption was one of the most controversial issues, and many suggestions were made in order to protect cargo interests' rights.[607] Some delegates suggested that if the carrier is not identified in the contract particulars, he should not be able to apply the limitations under the Convention; others suggested that the shipper is in a better position than the registered owner to determine the true carrier, as it is the carrier's counterpart.[608] After extensive discussions, a rebuttable presumption against the registered owner of the named ship was finally accepted.[609]

Although, Article 37(2) uses the term "registered owner", the Convention does not contain a definition of this term; the issue is left to national law. Under English law, the registered owner is defined as "the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship…"[610] It must be added that in some cases the registered owner and the owner of the vessel may be different persons.[611] However, for the application of Article 37(2), the key factor is whether or not the person is qualified as the registered owner under the applicable law. From the wording of section 170(1) of the Merchant Shipping Act 1995, it is understood that if there is a registered ship, the person named in the registry is the registered owner, even if legal ownership belongs to someone else; but if the

[607] CMI Yearbook 1996, 391-393; CMI Yearbook 1998, 169-171; UN Doc., A/CN.9/WG.III/WP.21 para 156; UN Doc., A/CN.9/WG.III/WP.62 paras 27-34; UN Doc., A/CN.9/WG.III/WP.70 para 2; UN Doc., A/CN.9/526 paras 56-60; UN Doc., A/CN.9/616 paras 20-26; UN Doc.A/CN.9/621 paras 281-286.
[608] CMI Yearbook 1996, 391-393; CMI Yearbook 2000, 214-215; UN Doc., A/CN.9/WG.III/WP.62 paras 28, 32; UN Doc., A/CN.9/616 para 22; Sturley, 'Phantom Carriers' (n 601) 436 *et seq*.
[609] UN Doc, A/CN.9/621 para 288.
[610] S. 170(1) of Merchant Shipping Act 1995.
[611] For instance, even though the registered owner has already sold the ship, it may still be shown as the registered owner in the registry. In Merchant Shipping (Registration of Ships) Regulations 1993, SI 1993/3138, Reg. 1(2), the term "owner" is defined as "in relation to a ship or share in a ship, the person owning the ship, or as the case may be, a share in the ship, *whether or not registered* as owner" (emphasis added). See A Mandaraka-Sheppard, *Modern Maritime Law Volume 2: Managing Risks and Liabilities* (3rd edn, Informa 2013) chapter 5, para 1.1; *Halsbury's Laws of England* (5th edn, LexisNexis 2008) vol 93, para 306.

ship is unregistered, the person owning the ship will qualify as the registered owner.[612] Additionally, there may be cases where the ship is under dual registration. For instance under English law, in some circumstances,[613] bareboat charterers are allowed to register the chartered ship in their names during the charter period. [614] It is accepted that private law provisions (such as ownership, lien) do not apply to the ships registered in accordance with the rules related to bareboat charter registration, therefore in such cases, the determination of who the registered owner is will depend on the law of the country of original registration.[615] Under English law, it is required that in the registry entry for a bareboat chartered ship, the name and address of the charterer and the owner, and the country of original must be included.[616] Therefore cargo claimants can identify the country of original and the registered owners through such information.

Where the registered owner is identified and sued by the cargo interest, it will be treated as the carrier under the rebuttable presumption in Article 37(2). The registered owner can rebut the presumption either by indicating that the ship is under bareboat charter, identifying the bareboat charterer and providing its address, or by identifying the true carrier and providing its address. In satisfaction of the first option, firstly there must be a bareboat charter agreement; secondly, at the time of the carriage the ship must be under bareboat charter; and thirdly, the registered owner must identify the bareboat charterer and indicate its address.

As the counterpart of the charterer under the bareboat charterparty, the registered owner can easily prove the existence of the bareboat charter party. However,

[612] S. 170(1) of Merchant Shipping Act 1995. There might be unregistered ships, but it is unlikely for them to perform international carriage, as port authorities will not allow ships to enter their ports without the provision of information about the ship's nationality. And pursuant to s. 1(1) of Merchant Shipping Act 1995, nationality can be only obtained by registration. Therefore within the context of this work, there is no need to explain unregistered ships. See RMF Coles, EB Watt, *Ship Registration: Law and Practice* (2nd edn 2009) para 1.2; Atamer, Süzel (n 26) 180.
[613] According to s. 17 of Merchant Shipping Act 1995, where the ship is registered in the name of the owner in another state, it can also be registered in the name of the British bareboat charterer in the UK.
[614] S. 17 of Merchant Shipping Act 1995; Coles, Watt (n 612) para 4.1 *et seq*.; M Davis, *Bareboat Charters* (2nd edn, LLP 2005) para 34.1 *et seq*.; A Odeke, 'An Examination of Bareboat Charter Registries and Flag of Convenience Registries in International Law' (2005) 36(4) Ocean Development & Int.Law 339; S Harwood (ed), *Shipping Finance* (3rd edn, Euromoney Institutional Investor Plc 2006) 10, 476.
[615] *Halsbury* (n 611) paras 237, 357; Davis (n 614) para 34.1; Odeke, 'An Examination of Bareboat Charter Registries (n 614) 345.
[616] Merchant Shipping (Registration of Ships) Regulations 1993, SI 1993/3138, Sch 4 para 6.

problems may arise regarding the usage of the phrase "at the time of carriage", as the Convention applies to door-to-door carriage, and furthermore under Article 12, it is stated that the period of responsibility of the carrier starts when the goods are received and ends when the goods are delivered.[617] It is not clear whether the phrase "at the time of carriage" refers to the whole carriage or only the sea leg. The answer might be found in the first part of Article 37(2). As mentioned above,[618] with door-to-door carriage, the goods are received at the premises of shippers against received for shipment transport documents, but Article 37(2) only applies to shipped on board transport documents. Therefore, it is submitted that the phrase "at the time of carriage" refers to the period of sea carriage.[619]

Additionally, in order to be discharged from the presumption, other than indicating the name of the bareboat charterer, the registered owner must also indicate the address of the charterer.[620] This is because unlike information about registered owners, there is usually no registry of information about bareboat charterers;[621] therefore it would be difficult for claimants to obtain the address of the bareboat charterer.[622] Accordingly, where the registered owner can prove all the foregoing requirements, it will be released from the presumption, even if the bareboat charterer is not the true carrier.

As a second option, pursuant to Article 37(2), the registered owner can rebut the presumption by identifying the actual carrier and providing its address.[623] The second sentence of Article 37(2) starts with the word "alternatively"; i.e. the provision offers the registered owner two options and he is free to apply any of them in order to rebut the presumption. However, it should be noted that the registered owner's right to

[617] Arts 1(1), 12 of the Rotterdam Rules.
[618] Above part 5.2.2.
[619] Atamer, Süzel (n 26) 184.
[620] As with the address of the carrier, the term "address" should refer to the domicile of the charterer, not any other location, as the address should provide the claimant with the necessary information to connect with the defendant and serve any writs. See Chapter 4.2.1.1.
[621] Unless the bareboat charter has been registered as in the case of s. 17 of Merchant Shipping Act 1995.
[622] Williams (n 125) 202.
[623] In the former drafts, the registered owner could only rebut the presumption by proving the existence of a bareboat charterparty, but in the later works, it was pointed out that the registered owner's options should not be such limited therefore, the second option was introduced. See UN Doc., A/CN.9/WG.III/WP.21 para 157; UN Doc., A/CN.9/526 para 59; UN Doc., A/CN.9/WG.III/WP.62 para 33; UN Doc., A/CN.9/WG.III/WP.79 para 5; UN Doc., A/CN.9/WG.III/WP.81, 31; UN Doc., A/CN.9/621 para 284, 288; Sturley, 'Phantom Carriers' (n 601) 438.

rebut the presumption is limited to these two options; i.e. it cannot defeat the presumption any other way.[624] Also, in cases where the registered owner is treated as the maritime performing party, even if it rebuts the presumption in Article 37(2), it could be held liable against cargo interests as the maritime performing party.[625] Even if the registered owner is not the true carrier, if it cannot rebut the presumption in accordance with the rules showed in Article 37(2), it will be treated as the carrier and can thus be held liable against the cargo interest under the Convention.

Moreover, there might be cases where the transport document is issued by an unauthorised person. As mentioned above (part 5.2.1.2), under English law, even though the document is issued by an unauthorised person if the shipper, endorsee or consignee is not aware of the unauthorised action, due to the effect of apparent authority, the document will still have contractual effect. The authority of the issuer is not a precondition of Article 37(2), therefore even if the transport document is issued by an unauthorised person, as long as it satisfies the preconditions in Article 37(2), the registered owner would be subject to the rebuttable presumption. For instance, assuming there is a sub-chartered ship and a shipped on board transport document which shows the name of the ship but does not show the name of the carrier, is signed by the agent of the sub-charterer. Although the agent does not have authority to sign the transport document, the registered owner would be subject to the rebuttable presumption in Article 37(2).

However, under English law, only innocent cargo interests are protected therefore if they are aware of the unauthorised action of the issuer then the document will not have any contractual effect. In such cases, the document would not be deemed as a transport document within the meaning of Article 1(14), as the requirements of being issued by a carrier and evidencing or containing a contract of carriage in Article 1(14) have not been satisfied. Therefore, the application of Article 37(2) will not arise. Furthermore, it should be pointed out that if the name of the ship provided on the transport document is intentionally or mistakenly written wrong, or even if the goods have not been loaded on the ship, if the transport document is mistakenly labelled as a

[624] Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 173; Sturley and others (n 26) para 7.051.
[625] Atamer, Süzel (n 26) 180. See Art 1(7) of the Rotterdam Rules; Chapter 6.

shipped on board transport document, the registered of owner could prevent the application of Article 37(2). As in such cases, by taking a step back and invalidating the contract particulars on the name of the ship or the form of the transport document, the satisfaction of preconditions in Article 37(2) would be prevented, therefore the registered owner would not be subject to the rebuttable presumption. However, wherever the preconditions of Article 37(2) are met, the presumption can only be rebutted where either of the two options indicated in Article 37(2) applies.

Where the registered owner rebuts the presumption by showing the name and address of the bareboat charterer, the rebuttable presumption passes on to the bareboat charterer. In the third sentence of Article 37(2), it is expressly stated that the bareboat charterer can rebut the presumption "in the same manner" as the registered owner. The phrase "in the same manner" refers to all options registered owners have.[626] Accordingly, the bareboat charterer can rebut the presumption by proving that there was a sub-bareboat charterparty at the time of the carriage, identifying the sub-bareboat charterer and indicating its address; or alternatively, it can rebut the presumption by identifying the carrier and providing its address. As with the registered owner, if the bareboat charterer cannot rebut the presumption on the basis of these two options, it will be treated as the carrier, even if it is not the true carrier.

5.2.2.2- Criticism of Article 37(2)

Introducing a rebuttable presumption is a great novelty, and in respect of the following issues, the provision would be significantly functional. Firstly, the provision might put commercial pressure on carriers to identify themselves. As registered owners who do not wish to be subject to the rebuttable presumption in Article 37(2) may include specific clauses in their charterparty contracts requiring carriers to identify themselves.[627] Secondly, the presumption aims to protect the rights of cargo claimants where no person is identified in the transport document, but the document shows that the goods have been loaded on board a named ship. Where the

[626] UN Doc., A/CN.9/WG.III/WP.21 para 158; Atamer, Süzel (n 26) 191; Sturley and others (n 26) para 7.051.
[627] Diamond (n 81) 508; Berlingieri, 'Revisiting the Rotterdam Rules' (n 81) 626; Chapter 4.3.

preconditions in Article 37(2) are satisfied,[628] cargo claimants can at least find an actionable person within the time bar, and if the registered owner or bareboat charterer cannot defeat the presumption, it will be treated as the carrier and held liable by the claimants.[629] Furthermore, although claims and disputes arising from breach of any obligation under the Convention have to be brought within the 2-year time bar, Article 65 provides a special extension for cargo claimants who Article 37(2) apply to.[630]

Pursuant to Article 65, even after the expiration of the 2-year time bar, the claimant can still bring an action against the carrier within 90 days, or a longer period under the applicable law, of the identification of the true carrier. Currently under English law, because of the effect of the compulsory application of the Hague-Visby Rules, the carrier must be sued within the 1-year time bar.[631] But if the claimant sues the wrong person, it is allowed to substitute a new defendant by renewing its writ, provided the 1-year time bar has not yet expired.[632] If the UK adopts the Rotterdam Rules in the same method as the Hague-Visby Rules, the 2-year time bar would apply.[633] Therefore, claimants could take advantage of the 90-day period, as English law would not provide an extension period longer than 90 days. It must be pointed out that Article 65 refers to Article 37(2); therefore only claimants that Article 37(2) applies to, will be able to take advantage of the extended time period in Article 65. Accordingly, Article 65 will not apply where the carrier is identified in accordance with the rules in Article 37(1) or Article 37(3).[634] As seen, indicating the actual name of the carrier in the contract particulars prevents the application of Article 65, therefore carriers who

[628] Above part 5.2.2.
[629] Sturley and others (n 26) para 7.051.
[630] Art 65 of the Rotterdam Rules. For further details on Art 65 of the Rotterdam Rules, see Sturley and others (n 26) paras 7.056, 11.021; Baatz, 'Time for Suit' (n 85) para 65-02; Atamer, Süzel (n 26) 191.
[631] Section 1(2) of COGSA 1971 states that the Hague-Visby Rules shall have the force of law, therefore under English law the time bar is 1-year as regulated in III(6) of the Hague-Visby Rules. See *Kenya Railways v Antares Co. Pte. (The Antares (Nos. 1 and 2))* [1987] 1 Lloyd's Rep 424, 428; *Winbau Maschinenfabric Hartman S.A. and Another v Mackinnon Mackenzie & Co (The Chanda)* [1989] 2 Lloyd's Rep 494, 503. See also *Scrutton* (n 24) para 20.019; Cooke and others (n 225) para 85.24.
[632] S. 35 of Limitation Act 1980; *Jones v Jones* [1970] 3 All ER 47; *The Sardinia Sulcis and Al Tawwab* [1991] 1 Lloyd's Rep 201; *Payabi and another v Armstel Shipping Corp and another (The Jay Bola)* [1992] 3 All ER 329. In this case, it was pointed out that the renewal must be within the time period of the suit, since with the expiration of the time period, the claimant will lose the cause of action and the defendant will be realised from liability.
[633] Chapter 1.3.
[634] Arts 37(1), 37(3) of the Rotterdam Rules; Above part 5.2.1; Below part 5.2.3.

do not want to be subject to the extended time bar might prefer to indicate their names on the transport documents.[635]

On the other hand, because of the following reasons, Article 37(2) may not be very useful in practice. Firstly, the provision has limited scope of application, as Article 37(2) will only be applicable where there is a shipped on board transport document indicating the name of the ship. Under Article 36(3)(b), the inclusion of the name of the ship is tied with whether or not it is specified in the contract of carriage.[636]Accordingly, the name of the ship does not have to be shown on the transport document, and if it is not so indicated, even if there is a shipped on board transport document, Article 37(2) does not apply. Therefore, although the name of the ship is known at the time of issuance of the transport document, in order to prevent the application of Article 37(2), carriers acting in bad faith may intentionally not include the name of the ship in the transport document. If neither Article 37(1) nor Article 37(2) applies, the carrier will be identified in accordance with the rules of the applicable law, and under English law, where no person is clearly and unambiguously identified as the carrier, the bill of lading is interpreted as a whole.[637] Furthermore, the application of Article 37(2) depends on the existence of a shipped on board transport document; however, pursuant to Article 35, there might be cases where no transport document is issued.[638] Therefore if there is no transport document, even if the name of the ship is indicated in the contract of carriage, the claimant cannot apply Article 37(2) and cannot take advantage of the extended time period in Article 65.

Secondly, the application of the presumption might be problematic where the transport document is in the hands of the shipper or the document is in the form of non-negotiable transport document.[639] In such cases, even if a ship's name is indicated in the contract particulars, application of the presumption might be prevented by applying the evidentiary effect of the contract particulars. The name of the ship is not listed as conclusive evidence under Article 41(a) and (c) therefore even if the

[635] Sturley and others (n 26) para 7.056.
[636] Art 36(3)(b) of the Rotterdam Rules; Chapter 4.2.1.2.
[637] Above part 5.2.1.2.
[638] Art 35 of the Rotterdam Rules; Chapter 3.3.
[639] Art 1(16) of the Rotterdam Rules; Zunarelli, 'The Carrier and The Maritime Performing Party in the Rotterdam Rules' (n 26) 1017. For further details on non-negotiable transports document, see Chapter 3.4.3-4.

transport document shows the name of the ship it can be rebutted.[640] Where the name of the ship is rebutted, then one of the requirements in Article 37(2) will not be satisfied, therefore the presumption cannot apply.

Thirdly, the provision states that the registered owner can rebut the presumption by providing information about the name and address of the bareboat charterer. However, as Atamer pointed out, in practice there might be other agreements that registered owners transfer possession and control of the ship to another person, as with bareboat charterparties.[641] Although these types of agreements are differently named, their effect might be the same or similar with bareboat charters. For instance, in cases of finance charters or leases, the financier, e.g. a bank or any other financial institution, purchases a vessel and leases it to a shipping company, usually under a long-term contract.[642] During the period of charter, the risks and rewards of ownership of the chartered vessel are transferred from the owner/financier to the charterer, and the charterer has whole possession and control over the ship; i.e. although the financier retains the ownership of the vessel, it does not have any role over the business of managing or operating the vessel.[643] The question may arise whether the banks and finance institutions, as registered owners, can rebut the presumption in Article 37(2) by proving the existence of such an agreement.[644] As with bareboat charterparties, [645] under such agreements, registered owners do not perform the carriage; they might not even have a direct or indirect connection with the true carriers.

Unfortunately, the preparatory works do not shed light on this issue. If the aim of the presumption in Article 37(2) is considered,[646] it is submitted that the provision should be interpreted widely, and registered owners should be allowed to rebut the presumption by proving the existence of such agreements.[647] It must be pointed out that the definition and scope of the term "bareboat charter" may have a key role to

[640] Art 41(a), (c) of the Rotterdam Rules; n 157; Chapter 3.1.a.
[641] Atamer, Süzel (n 26) 182.
[642] Davis (n 614) para 35; Harwood (n 614) 1, 30 *et seq*.
[643] *Baumwoll Manufactur von Carl Scheibler v Furness* [1893] AC 8. See also Davis (n 614) para 35.5 *et seq*.; *Scrutton* (n 24) 79, note 1; M Stopford, *Maritime Economics* (Taylor & Francis 1997) 217-218.
[644] Atamer, Süzel (n 26) 182.
[645] UN Doc., A/CN.9/WG.III/WP.62 para 28; Sturley and others (n 26) para 7.052.
[646] As Fujita points out, the aim of the rebuttable presumption is to find the true carriers via the registered owners. See Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 173.
[647] Atamer, Süzel (n 26) 183.

play here. For instance, under English law the term "bareboat charter" is defined as "the hiring of the ship for a stipulated period on terms which give the charterer possession and control of the ship, including the right to appoint the master and crew."[648] Where English courts are to determine the existence of a bareboat charter, they will consider whether the charterer, during the period of charter, has whole possession of the ship, i.e. whether it becomes the *de facto* owner of the ship and has control over the ship.[649]And with finance charters and leases, the charterer and lessee have complete possession of and control over the vessel, therefore under English law, finance charters and leases are considered as a type of bareboat charter.[650] Accordingly, if English law is applicable, where there is a finance charter or lease, banks and financial institutes can rebut the presumption in Article 37(2) by providing information about the name and address of the finance charterer or the lessee. Lastly, it should be noted that even if Article 37(2) is interpreted narrowly, meaning that financiers/registered owners cannot rebut the presumption by applying the first option, they can still rebut the presumption by applying the second option, which requires registered owners to show the name and address of the true carrier. However, if financiers/registered owners do not have a relationship with true carriers, it would be difficult for them to show who the true carriers are, and this may cause injustice.

Fourthly, Article 37(2) states that the registered owner and the bareboat charterer will not be treated as the carrier where they identify the true carrier and its address. It is not clear how the registered owner and bareboat charterer can identify another person as the carrier, what evidence needs to be shown, and how it can be guaranteed that the identified person is the true carrier. Furthermore, what will happen if the registered owner or bareboat charterer identifies a person as the carrier and is released from liability, but in fact the identified person is not the true carrier? Also, it is not clear what the burden of proof on the claimant is, if at all there is one, or whether the

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[648] S. 17(11) of Merchant Shipping Act 1995. For further, Davis (n 614) para 1.1 *et seq.*; *Scrutton* (n 24) paras 1-015, 4-001 *et seq*.; A Odeke, *Bareboat Charter (Ship) Registration* (Kluwer Law International 1998) 41 *et seq*.; Odeke, 'An Examination of Bareboat Charter Registries' (n 614) 344; Sian (n 481) 185.

[649] *Meiklereid v West (1876) 1 QBD 428; Baumwoll Manufactur von Carl Scheibler v Furness* [1893] AC 8, 14; *Baumwoll v Gilchrist* [1892] 1 QB 253, 259; *Wehner v Dene Steamship Co.* [1905] 2 KB 92; *Sea and Land Securities v William Dickinson* (1942) 72 Lloyd's Rep 159,163; *Medway Drydock and Engineering Co Ltd v MV Andrea Ursula, The Andrea Ursula* [1971] 1 Lloyd's Rep 145; *The Giuseppe di Vittorio* [1998] 1 Lloyd's Rep. 136, 156; *Chimbusco Pan Nation Petro-Chemical Co Ltd. v The Owners and/or Demise Charterers of the Ship or Vessel "DECURION"* [2013] 2 Lloyd's Rep 407, 415.

[650] Davis (n 614) para 1.6; *Scrutton* (n 24) 79, note 1-2.

person identified by the registered owner or bareboat charterer is automatically treated as the carrier. If it is assumed that the claimant must prove that the identified person is the carrier but fails to prove it, what will happen next? From the wording of Article 37(2), it seems that after the registered owner and bareboat charterer are released from the presumption, the claimant cannot reapply the presumption. And furthermore, if the 2-year time bar has expired, the claimant would have already lost its right to bring an action against the true carrier. Additionally, under Article 37(2), the bareboat charterer is allowed to rebut the presumption in the same manner as the registered owner. Although this is a rare occurrence in practice, there might be a few sub-bareboat charterparties. In such cases, it is not clear whether or not all sub-bareboat charterers will be subject to the rebuttable presumption. If it is accepted that sub-bareboat charterers can also be subject to the presumption and they rebut it in the same manner as the registered owner, then it seems that claimants will struggle for many years to find the true carrier.[651]

Lastly, as in the case of Article 37(1), where there is an unsigned transport document, the legal character and validity of the document, and therefore the application of Article 37(2), will depend on the applicable law.[652]

From the above-mentioned problems, it can be concluded that Article 37(2) would only provide a limited solution for the issue of identification of the carrier.

5.2.3- Identification of the Carrier under Article 37(3)

Although the preconditions in Article 37(1) or Article 37(2) may have been satisfied, the claimant does not have to apply these provisions. If the claimant wishes it could identify the carrier in accordance with the rule regulated in Article 37(3), which is worded as follows:

> "Nothing in this article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier."[653]

[651] Sturley, 'Phantom Carriers' (n 601) 437.
[652] Above part 5.2.1.4.
[653] Art 37(3) of the Rotterdam Rules.

In the *travaux préparatoires*, it was said that Article 37(2) aims to protect the rights of the claimants where the carrier has not been identified in the contract particulars; thus, the provision should not prevent claimants who believe that another person is responsible for their damages, from bringing a claim against such person.[654] It is emphasised that it would be contrary to the aim of the provision if the claimant knows the identity of the carrier but cannot sue him because of the effect of either Article 37(1) or Article 37(2).[655] Accordingly, paragraph 3 was proposed to protect the rights of the claimant against the true carrier, and prevent the true carrier from applying the presumption in Article 37(2) as a defence.[656] In the first draft article, only paragraph 2 was referred, but later on it was pointed out that the aim of paragraph 3 is to give freedom to the claimant to bring an action against any relevant person; therefore, not only paragraph 2 but also paragraph 1, should be referred in paragraph 3.[657] As a result, the final provision refers to both paragraph 1 and paragraph 2, therefore the claimant is free to bring an action against the person believed to be the true carrier, or it can apply either Article 37(1) or Article 37(2) if the preconditions have been met.[658]

5.2.3.1- Criticism of Article 37(3)

Although giving the claimant a right to sue any relevant person other than the person addressed in Article 37(1) and Article 37(2) is reasonable, it seems that in practice, Article 37(3) might not apply very often because of the following reasons. Firstly, Article 37(1) provides a conclusive presumption in favour of the claimant, therefore the person named as the carrier would be automatically treated as the carrier, without requiring any further proof from the cargo interest.[659] Likewise, Article 37(2) introduces a rebuttable presumption against the registered owner of the named ship or the bareboat charterer, therefore they –not the claimant- must rebut the presumption that the burden of proof is on the registered owner or the bareboat charterer.[660] On the

[654] UN Doc., A/CN.9/616 paras 23-24.
[655] Sturley and others (n 26) para 7.046.
[656] UN Doc., A/CN.9/621 para 282; Kozubovskaya-Pelle, Wang (n 26) 389.
[657] UN Doc., A/CN.9/621 paras 287-288; UN Doc., A/CN.9/WG.III/WP.81, n 122; UN Doc., A/CN.9/WG.III/WP.101, 28, n 86; UN Doc., A/CN.9/645 para 132.
[658] UN Doc., A/CN.9/WG.III/WP.81, n 122; Zunarelli, 'The Carrier and The Maritime Performing Party in the Rotterdam Rules' (n 26) 1018.
[659] Art 37(1) of the Rotterdam Rules; Above part 5.2.1.3.
[660] Art 37(2) of the Rotterdam Rules; Above part 5.2.2.1.See also Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 173.

other hand, if the claimant applies Article 37(3), it must prove that the defendant is the true carrier, i.e. the burden of proof is on the claimant.[661] The Convention does not mention how the claimant is to prove that the person sued is the carrier; it seems that this procedure is left to the applicable law.[662]

Secondly, Article 65 provides an extended time period in cases where the carrier is identified in accordance with Article 37(2).[663] However, if the claimant brings an action pursuant to Article 37(3), it cannot apply the extended time period in Article 65. Accordingly, if the person sued based on Article 37(3) is not the true carrier and the 2-year time bar has passed, the claimant will lose its right to bring an action against the carrier. Consequently, to avoid bearing such risks and the burden of proof, even though the claimant is already aware of the name and address of the true carrier, instead of applying Article 37(3), it may prefer to apply Article 37(1) or Article 37(2), where the preconditions have been met.

[661] Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 173.
[662] Sturley and others (n 26) para 7.047.
[663] Art 65 of the Rotterdam Rules; Above part 5.2.2.2.

CHAPTER 6: IDENTIFICATION OF THE MARITIME PERFORMING PARTY UNDER THE ROTTERDAM RULES

In modern international carriage, with the increase in door-to-door shipments,[664] many actors are involved in the carriage process in performing part or all of the duties of the carrier under the contract of carriage.[665] To reflect modern reality, the scope of application of the Convention is designed to cover door-to-door carriages.[666] Due to the increase in the number of actors involved in the carriage process and the extended scope of application, the Rotterdam Rules introduce two new concepts: "performing party" and "maritime performing party".[667] Performing parties do not have liabilities imposed on them, therefore they cannot be sued under the Convention. However, as will be shown, the concept of "performing party" is important in determining the maritime performing party, who has liabilities and can be directly sued by the cargo interest under the Rotterdam Rules.[668] Article 20 expressly states that the carrier and maritime performing party are jointly and severally liable, therefore a cargo interest can sue the carrier or maritime performing party or both of them together, within the 2-year time limit.[669] But to do so, the cargo interest first needs to know whether a maritime performing party has been involved in the carriage process.[670] By imposing liabilities on maritime performing parties, the Convention provides cargo interests with additional parties to sue, and furthermore, the involvement of such actors would play a role in determining the place of jurisdiction, and even in some cases, the cargo

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[664] Chapter 1.1.
[665] Van der Ziel, `The UNCITRAL/CMI Draft for a New Convention' (n 10) 269; MF Sturley, 'Scope of Coverage under the UNCITRAL Draft Instrument' (2004) 10(2) JIML 138, 148.
[666] Arts 1(1), 5 of the Rotterdam Rules; CMI Yearbook 2000, 118; UN Doc., A/56/17 paras 319-345; UN Doc., A/CN.9/510 paras 26-30; UN Doc., A/CN.9/WG.III/WP.28, 36-37; UN Doc., A/CN.9/526 para 225. It should be noted that depending on the agreement of the parties, the Convention may still apply to port-to-port or tackle-to-tackle but not shorter than this, as Article 12(3) prohibits the conclusion of a contract of carriage shorter than the tackle-to-tackle period. See Art 12(3) of the Rotterdam Rules; Fujita, 'The Comprehensive Coverage of the New Convention' (n 29) 354; Chuah, 'Impact of the Rotterdam Rules on the Himalaya Clause' (n 96) 308; ; JS Mo, 'Determination of Performing Party's Liability under the Rotterdam Rules' (2010) 18(2) Asia Pac. L. Rev. 243, 247-249; CMI's Questions and Answers on the Rotterdam Rules (10 October 2012) http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/RotterdamRules_QA_10102012.pdf , 6 accessed 21.09.2014.
[667] Arts 1(6), 1(7) of the Rotterdam Rules; Below part 6.1. See also UN Doc., A/CN.9/510 para 30; Thomas, 'An Analysis of the Liability Regime' (n 95) 56; Atamer (n 29) 478.
[668] Below part 6.1.1; Zunarelli, 'The Carrier and the Maritime Performing Party in the Rotterdam Rules' (n 26) 1021. See also Art 19 of the Rotterdam Rules; Chapter 2.1.2.
[669] Arts 20, 62 of the Rotterdam Rules; Chapter 2.1.2.
[670] For further on the importance of identification of maritime performing parties, see Chapter 2.1.2, 2.2.2, 2.3.2, 2.4.1.

interest may get a chance to sue defendants in its own jurisdiction.[671] In addition to imposing liability, maritime performing parties are given the defences that are available to the carrier under the Convention.[672] And if the Rotterdam Rules enter into force, the application of the provisions related to liabilities, defences and place of jurisdiction will all depend on the question, "who is the maritime performing party?"

In this Chapter, identification of the maritime performing party will be analysed using the following structure: the first section of the Chapter will examine the concept of "maritime performing party" under the previous Conventions and the Rotterdam Rules in detail, while the second section of the Chapter will analyse identification of the maritime performing party under the Rotterdam Rules. As the Convention does not include any specific provision on the identification of the maritime performing party, the analysis in the second section will be made in light of English case law.

6.1- The Notion of "Maritime Performing party" under the Rotterdam Rules

The Hague and Hague-Visby Rules deal with the relationship between the carrier and the shipper, but do not address third parties involved in the carriage process as a result of their relationship with the carrier.[673] Such third parties have neither obligations towards nor liabilities towards cargo interests under those Conventions, therefore they can only be sued in tort or bailment under the applicable law. This situation may cause difficulties for both cargo interests and third parties. In respect of cargo interests, it might not be easy to make a claim relying on tort or bailment,[674] whereas in respect of third parties, it would be difficult to limit their liabilities.[675]

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[671] Arts 68, 71 of the Rotterdam Rules; Chapter 2.4.1.
[672] Arts 4(1), 19 of the Rotterdam Rules; Below part 6.1.
[673] Sturley, 'The Treatment of Performing Parties' (n 96) 232; Sturley, 'Scope of Coverage' (n 665) 148.
[674] Mo, 'Determination of Performing Party's Liability' (n 666) 249; G Van Der Ziel, 'Multimodal Aspects of the Rotterdam Rules' CMI Yearbook 2009, 301, 309. Under English law, to bring an action in tort, the claimant must prove that it is the owner or that it has possessory title to the goods at the time when the goods are lost or damaged. See *Candlewood Navigation Corporation Ltd. v Mitsui O.S.K. Lines Ltd. (The Mineral Transporter)* [1985] 2 Lloyd's Rep 303, 306; *The Aliakmon* [1986] AC 785 (HL), 809; *The Starsin* [2003] 1 Lloyd's Rep 571 para 39. However, to bring an action in bailment, the claimant does not need to be the owner of the goods, but the general rule is that the claimant must be the bailor, who can either be the shipper or the consignee of the goods, depending on the type of contract of sale. See *The Albazero* [1977] AC 774 (HL), 842; *The Aliakmon* [1986] 2 Lloyd's Rep 1 (HL), 10; *The Berge Sisar* [2002] 2 AC 205 paras 7-10, 18; *East West Corp v DKBS 1912 A/S* [2003] QB 1509 paras 34-35.
[675] S Baughen, *Shipping Law* (4th edn, Routledge 2009) 56. The Hague Rules do not address the issue

To deal with such difficulties, the Hamburg Rules introduced the concept of "actual carrier" and impose liabilities and confer defences on actual carriers.[676] According to Article 1(2), the actual carrier is defined as "any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted".[677] Because of the use of the words "any person", it appears that the definition is broad enough to embrace any person, such as employees, agents or independent contractors. Even inland carriers may fall within this definition where there is a door-to-door carriage, but as a result of the port-to-port scope of application of the Convention, such persons are not covered, thus cannot be sued under the Hamburg Rules.[678] The use of the words "carriage of the goods" makes the definition puzzling; it is not clear whether it refers to any activities related to moving cargo, such as loading or unloading, or whether it refers to only the carriage itself. The drafting history does not provide any answer as to whether the draftsmen intended to introduce a broad or narrow definition.[679] Sturley argues that the language requires a broad reading, therefore the phrase must refer to every necessary aspect of moving the cargo from one place to another.[680] Accordingly, depending on whether the definition is interpreted broadly or narrowly, a stevedore company, for instance, which deals with

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of providing protection to third parties. However, the Hague-Visby Rules (Art IV*bis*) extend the carrier's defences and limits of liability to the servants and agent of the carrier, but expressly exclude independent contractors, such as stevedore companies. In order to provide protection to third parties, with the effect of the English case, *Adler v Dickson* [1955] 1 QB 158, Himalaya clause was created. As a result, third parties who fall within the listed persons in the Himalaya clause can rely on the defences and limits of liability which the carrier can invoke under the contract of carriage. Under English law, servants, agents and independent contractors can apply the Himalaya clause where the agency theory adopted by Lord Reid in *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, 474 is satisfied. Lord Reid indicated that for the application of a Himalaya clause, "(first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome." For further details, see Nikaki, 'Himalaya Clauses and the Rotterdam Rules' (n 96) 20 *et seq*.; W Tetley, 'The Himalaya Clause- Revisited' (2003) 9(3) JIML 40.

[676] Arts 1(2), 7(2), and 10(2) of the Hamburg Rules. Under the Hamburg Rules, servants, agents, and even independent contractors who qualify as the actual carrier under Article 1(2) may rely on the Himalaya protection. The Convention does not expressly exclude the independent contractor from the Himalaya protection; the issue is left to national law. See Nikaki, 'Himalaya Clauses and the Rotterdam Rules' (n 96) 21.

[677] Art 1(2) of the Hamburg Rules.

[678] Sturley, 'Scope of Coverage' (n 665) 148 n 80.

[679] JC Sweeney, `The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part IV)' (1976) 7(4) JMLC 615, 628-631.

[680] Sturley, 'Scope of Coverage' (n 665) 148 n 80.

loading or unloading of the goods, may or may not be qualified as the actual carrier under the Hamburg Rules.

The term "actual carrier" introduced by the Hamburg Rules was criticised by the draftsmen of the Rotterdam Rules. The word "actual" was found to be confusing, and it was considered that "actual" implies that the contracting carrier is not "actually" a carrier.[681] In the early drafts of the Rotterdam Rules, the concept of "performing carrier" was introduced; however this term was criticised on the ground that the performance of some of the obligations of the carrier, such as handling or stowing the goods, might not literally mean "carry" the goods.[682] Therefore, the term "performing party" was introduced. As the word "party" has a wider scope than the word "carrier", the scope of the term "performing party" is broader and it covers persons involved in the performance of the carriage that may not literally mean "carry" the goods.[683] Also, by not using the word "actual", and expressly addressing a party who "undertakes to perform", contrary to the actual carrier, the notion of performing party embraces not only persons who actually perform the carrier's duties, but also persons who merely undertake the performance.[684] Therefore where there is a sub-contract chain, all the actors involved in the process would fall within the notion of performing party.

The original CMI drafts imposed liabilities and conferred rights on performing parties, notwithstanding that the performance occurred within the maritime leg.[685] However, with the door-to-door scope of application, the Draft Instrument made the issue of imposing liability on performing parties controversial, therefore some proposals

[681] CMI Yearbook 2000, 122-123; Sturley, 'Scope of Coverage' (n 665) 149 n 82; Van der Ziel, `The UNCITRAL/CMI Draft for a New Convention' (n 10) 272.
[682] CMI Yearbook 2001, 302, 365.
[683] Fujita, 'The Comprehensive Coverage of the New Convention' (n 29) 367; T Fujita, 'Performing Parties and Himalaya Protection, Colloquium on the Rotterdam Rules, 21st September 2009' http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20Tomotaka%20Fujita%2022%20OKT29.pdf, 2 accessed 20.01.2013; Kozubovskaya-Pelle, Wang (n 26) 384.
[684] CMI Yearbook 2000, 123; CMI Yearbook 2001, 303; Zunarelli, 'The Carrier and the Maritime Performing Party in the Rotterdam Rules' (n 26) 1021. See Below part 6.1.1.2.
[685] Some delegations pointed out that providing the same rules for potential defendants would create a uniform liability regime and would prevent multiple actions against different defendants. However, FIATA (the International Federation of Freight Forwarders Associations) was not happy with that broad definition and the imposition of liabilities on the performing parties. Therefore, it suggested that performing parties should not have any liabilities, and this suggestion was supported by some other delegations. See CMI Yearbook 2001, 330-331, 341-342; UN Doc., A/CN.9/WG.III/WP.21 paras 14-18, Art 6.3 at 31; UN Doc., A/CN.9/526 paras 226-227; Sturley, 'Scope of Coverage' (n 665) 149-150.

presented related to the liability regime of performing parties.[686] Among these proposals, the US proposal was accepted.[687] According to the US proposal, only maritime performing parties were imposed liability under the Draft Instrument; i.e. maritime performing parties would be directly sued under the Draft Instrument, whereas inland performing parties would be sued in the same way as under the existing law.[688] In addition to imposing liabilities on maritime performing parties, the Convention confers the defences which are available to the carrier under the Convention to maritime performing parties, against the cargo interests.[689] It should be noted that although the Convention has door-to-door coverage, and when a door-to-door contract is concluded, the carrier would be held liable for the entire carriage, in respect of maritime performing parties the Convention has a port-to-port scope, as in the Hamburg Rules. However, while under the Hamburg Rules, both the period of liability of the actual carrier and the scope of application of the Convention is on a port-to-port basis, under the Rotterdam Rules, the Convention applies to door-to-door shipments whereas the period of liability of the maritime performing party is on a port-to-port basis.

The application of the provisions on the liabilities and defences of the maritime performing party depends on whether the third party involved in the carriage process falls within the notion of maritime performing party or not. Article 1(7) of the Rotterdam Rules defines the term "maritime performing party" as follows:

> "Maritime performing party" means a performing party to the extent that it performs

[686] The Italian proposal suggested that the Draft Instrument should apply to actions against maritime performing parties, but non-maritime performing parties should be sued on the terms applicable to their own contracts with the carriers. Inland performing parties should be sued on a subrogation-like basis; but the proposal did not clearly indicate how it would work in practice. See UN Doc., A/CN.9/WG.III/WP.25. In the 11th Session, the draftsmen discussed "options based on the treatment of performing parties". See UN Doc., A/CN.9/WG.III/WP.29 paras 159-185; UN Doc., A/CN.9/526 para 239; Sturley, 'The Treatment of Performing Parties' (n 96) 238 *et seq*.

[687] UN Doc., A/CN.9/WG.III/WP.34 paras 5-9; UN Doc., A/CN.9/544 paras 21-27.

[688] UN Doc., A/CN.9/WG.III/WP.34 paras 5-7.

[689] Arts 4(1), 19 of the Rotterdam Rules. Whenever a person qualifies as a maritime performing party, irrespective of whether it is the servant, agent or independent contractor of the carrier, it can rely on the automatic Himalaya protection under the Convention. It should be noted as a result of "the bitter with the sweet" approach, non-maritime performing parties cannot rely on the automatic Himalaya protection under the Convention. See Sturley, 'The Treatment of Performing Parties' (n 96) 235; Nikaki, 'Himalaya Clauses and the Rotterdam Rules' (n 96) 33 *et seq*.; T Nikaki, 'The Statutory Himalaya-Type Protection under the Rotterdam Rules: Capable of Filling the Gaps?' (2009) JBL 403, 410 *et seq*.

> or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area."[690]

In the following sub-section, the requirements for qualifying as a maritime performing party as per Article 1(7) will be examined in detail.

6.1.1- Qualifying as a Performing Party under the Rotterdam Rules

Performing parties do not have liabilities and cannot be sued under the Convention; however the main significance of the notion of the "performing party" is that the concept of the "maritime performing party" is based on it.[691] The wording of the definition of maritime performing party addresses that the maritime performing party is a sub-category of the performing party; therefore in order to qualify as a maritime performing party, the person firstly needs to satisfy the requirements of qualifying as a performing party.[692] Article 1(6) defines performing party as follows:

> "a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, keeping, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control."[693]

Pursuant to this definition, to qualify as a performing party under the Rotterdam Rules, there are three requirements: there must be a person other than the carrier; this person must perform or undertake to perform the carrier's obligations listed in Article 13; and it must act, directly or indirectly, at the carrier's request, supervision or control.

6.1.1.1- Being a Person Other Than the Carrier

[690] Art 1(7) of the Rotterdam Rules.
[691] Smeele (n 29) 14-15 ; H Honka, 'Scope of Application, Freedom of Contract' CMI Yearbook 2009, 255, 261; Fujita, 'Performing Parties and Himalaya Protection' (n 683) 4.
[692] *Benjamin* (n 136) para 18-014; Atamer (n 29) 475, 485; Sturley and others (n 26) para 5.156.
[693] Art 1(6)(a) of the Rotterdam Rules.

The first requirement for qualifying as a performing party is that there must be a person, i.e. either a human being or a legal person, and that person must not be the carrier, who is defined as "a person that enters into a contract of carriage with a shipper". [694] Therefore, the performing party can be any person involved in the carriage process on the carrier's side, but cannot be the carrier itself.[695]Although it is not very practical in modern international carriage, if the carrier performs the entire carriage itself without the involvement of any third party, there will be no performing party.[696] To be classed as the carrier under the Rotterdam Rules, the person must have a contractual relationship with a shipper under a contract of carriage.[697] On the other hand, the performing party is neither a party to the contract of carriage concluded between shipper and carrier, nor has any contractual relationship with the shipper; it is involved in the carriage process only because of its relationship with the carrier.[698] Therefore, to determine whether a person involved in the carriage process is a performing party or not, the relationship between that person and the shipper must be carefully examined. For instance, if there is a time or voyage chartered ship, depending on whether or not the shipowner has any contractual relationship with the shipper, it would qualify as either the carrier or the performing party under the Rotterdam Rules. If the shipowner is deemed as the person who concludes the contract of carriage with the shipper, then it will qualify as the carrier. However, if, instead of the shipowner, the charterer is treated as the carrier, then the shipowner would qualify as a performing party.

It should be noted that determination of the involvement of a performing party could be more tangled in multimodal carriages. Due to the sub-contract chain, complex contractual and non-contractual nexuses, a person who qualifies as the carrier in one contract could be qualified as the performing party under another contract. For instance, assuming the shipper concludes a door-to-door contract with an NVOCC, who later on concludes a sub-contract with a shipowner.[699] And owing to its

[694] Art 1(5) of the Rotterdam Rules; Chapter 5.1.
[695] Sturley and others (n 26) para 5.145; Smeele (n 29) 15.
[696] Smeele (n 29) 15; Chuah, 'Impact of the Rotterdam Rules on the Himalaya Clause' (n 96) 295; Sturley, 'The Treatment of Performing Parties' (n 96) 233.
[697] Arts 1(1), 1(5), and 1(8) of the Rotterdam Rules; Chapter 3.2.1; Chapter 5.1; Chapter 7.1.1.
[698] UN Doc., A/CN.9/510 para 102; Tsimplis, 'Liability of the Carrier' (n 100) para 19-01.
[699] Here, there are two separate contracts of carriage; one is the head contract, between the shipper and the NVOCC, and the other one is the sub-contract, between the NVOCC and the shipowner. Although,

contractual relationship with the NVOCC/shipper, the shipowner will qualify as the carrier under the sub-contract, not a performing party. Although the shipowner has a contractual relationship with the NVOCC under the sub-contract of carriage, it is not a party to the head contract of carriage and furthermore, it does not have any relationship with the shipper under that contract. Therefore, with regard to the head contract of carriage, the shipowner, who does not have any contractual relationship with the shipper, would qualify as the performing party.

The definition of "performing party" only excludes the carrier from its scope, therefore any other person, such as agent or independent contractor of the carrier or performing party, may fall within the definition, provided all requirements in Article 1(6) are satisfied. A question may arise regarding the position of employees of the carrier or performing party: is an employee regarded as a performing party, or can it be the carrier/performing party itself? According to Fujita and Sturley, the definition is broad enough to embrace employees, as they perform or undertake to perform any of the carrier's obligations under the contract of carriage.[700] However, Thomas argues that the definition of performing party probably does not embrace employees, who would not be classed as a person other than the carrier itself.[701]

The drafting history appears to support the first view. In the former drafts, the definition of performing party explicitly included employees, agents and sub-contractors as performing parties.[702] In a later discussion, it was pointed out that the inclusion of the employee as a performing party would mean that the master or crew could qualify as a maritime performing party who could be sued under the

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the NVOCC is classified as the carrier under the head contract of carriage, in respect of the sub-contract of carriage it is classified as the shipper. See Chapter 3.2.1.a.

[700] Fujita, 'The Comprehensive Coverage of the New Convention' (n 29) 369-371; Fujita, 'Performing Parties and Himalaya Protection' (n 683) 5-6; Sturley and others (n 26) paras 5.145, 5.152. For the same view see also Nikaki, 'Himalaya Clauses and the Rotterdam Rules' (n 96) 35.

[701] Thomas, 'An Analysis of the Liability Regime' (n 95) 57. For the same view, see Smeele (n 29) 15. Under English law, depending on the fact, an employee may or may not be regarded as the carrier itself. In *Lennard's Carrying Co. Ltd. v Asiatic Petroleum Co. Ltd.* [1915] AC 705, 713-715 the court stated that, subject to where employees are regarded as constituting part of the alter ego of the company, the word "carrier" refers to the carrier itself and does not embrace servants or agents. Also, in *The European Enterprise* [1989] 2 Lloyd's Rep 185, 191-192 a narrower view was applied, and it was stated that the word "carrier" refers to the carrier itself.

[702] UN Doc., A/CN.9/WG.III/WP.81, draft Art 1(6).

Convention.[703] Most delegates did not want such a result, even though such action is not likely in practice. On the other hand, it was considered that the exclusion of employees from the definition would cause uncertainty about the maritime performing party's responsibility for acts or omissions of its employees.[704] In the final version of Article 1(6)(a), express inclusion of employees within the definition of performing party was deleted, but they were not expressly excluded from the definition.[705] Instead of simply excluding employees from the scope of the definition, through substantive provisions the Convention provides that employees cannot be held liable under the Convention.[706] This means that even if an employee would qualify as a performing or maritime performing party, it cannot be sued under the Convention.

The existence of involvement of a performing party and whether it can be sued under the Convention will depend on the relationship between the carrier and the third party. If there is an employment relationship, the third party, even if it would be treated as a performing party, cannot be held liable; but if there is another type of relationship, such as agency, the third party would qualify as a performing party and could be sued under the Convention. The nature of the relationship between the carrier and the third party will be determined in accordance with the applicable law. Under English law, the answer to the question of who an employee, agent or independent contractor is, is not crystal clear; it is determined on a case-by-case basis by applying their

[703] UN Doc., A/CN.9/544 para 41; UN Doc., A/CN.9/621 paras 129-130, 142; UN Doc., A/CN.9/WG.III/WP.101, draft Art 1(6) n 2.

[704] In the 19th Session, the definition of performing party was redrafted, and this time employees were expressly excluded from the scope of the definition. However, it was pointed out that the definition of performing party has three different functions: "First, the definition was intended to govern parties that performed the carrier's activities under a contract of carriage, usually subcontractors, and their joint and several liability with the contracting carrier. Secondly, the definition was aimed at regulating the vicarious liability of the performing party for its employees or others working in its service. Finally, the definition, in conjunction with draft articles 4 and 19, was aimed at extending the protection of the so-called "Himalaya clause" to such employees, agents or subcontractors." Therefore, it was thought that the express exclusion of employees from the scope of the definition would cause problems. See UN Doc., A/CN.9/621 paras 128, 141-142; UN Doc., A/CN.9/WG.III/WP.101, draft Art 1(6) n 2.

[705] The express inclusion of agents and independent contractors was also deleted. It was emphasised that there is no need to expressly include such persons within the definition, as these persons are already covered in the first sentence of the definition of performing party, therefore the second sentence of draft Article 1(6) was deleted. See UN Doc., A/CN.9/621 paras 150-153; UN Doc., A/CN.9/WG.III/WP.101, draft Art 1(6) n 1-2.

[706] Articles 18 and 19(4) of the Rotterdam Rules clearly state that employees of the carrier and maritime performing party are not imposed liability, therefore they cannot be sued under the Convention. Furthermore, Article 4(1) of the Rotterdam Rules provides that employees of the carrier and maritime performing party can apply automatic Himalaya protection in any proceedings, whether founded in contract, tort, or otherwise. See UN Doc., A/CN.9/544 paras 166-170; UN Doc., A/CN.9/621 paras 77, 89-90, 97, 128-131, 151; UN Doc., A/CN.9/645 para 60; Thomas, 'An Analysis of the Liability Regime' (n 95) 59 *et seq*.; Sturley and others (n 26) paras 5.174, 5.178.

characteristic differences.[707] Employees are the parties to contracts of employment and act under direct control or supervisor of employers.[708] English courts have applied the following tests to determine whether or not a person is an employee: the "control" test, which considers whether or not the employer has the right to control the manner of carrying out the work; and more recently, the "integration" or "organisation" test, which considers whether the person is integrated in the enterprise or remains independent; as well as a "mixed" test.[709]

Unlike employees, agents do not need to perform their duties under the complete control or supervision of principals; they only need to act within lawful instructions that might be given by principals.[710] The agency relationship arises where a person has power to act on behalf of another person (i.e. the principal) and consents so to act.[711] It should be emphasised that under English law, an agent is not an employee, but sometimes an employee might be regarded as an agent of the principal.[712] Additionally, similar to agents, independent contractors also perform their services

[707] S Jones, *Tolley's Employment Handbook* (29th edn, LexisNexis 2015) para 15.03; *Carver* (n 54) para 9.303; Baughen, *Shipping Law* (n 675) 280.

[708] Under s. 230(1) of Employment Rights Act 1996, the term "employee" is defined as "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." The term "contract of employment" is defined in s. 230(2) of the Act as "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."

[709] *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* [1946] 2 All ER 345, 349-354; *Short v J& W Henderson Ltd.* (1946) 62 TLR 427, 429*; Stevenson Jordan and Harrison Ltd v Macdonald and Evans* [1952] 1 TLR 101, 111; *Morren v Swinton and Pendlebury B.C.* [1965] 1 W.L.R. 576, 582; *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 514; *Johnson Underwood Ltd v Montgomery* [2001] IRLR 269. See also BA Hepple, 'Servants and Independent Contractors' (1968) 26(2) The Cambridge Law Journal 227; *Halsbury's Laws of England* (5th edn, LexisNexis 2014) vol 39 paras 1, 4; Chuah, 'Impact of the Rotterdam Rules on the Himalaya Clause' (n 96) 299.

[710] In *Mersey Shipping & Transport Co. Ltd. v Rea Ltd* (1925) 21 Ll L Rep 375, 378, Lord Justice indicates that "servants" refer to those who are under the direct control of the contracting party whereas "agents" refer to those who are employed as sub-contractors for the purpose. See also *Barnett v South London Tramways Co* (1887) 18 QBD 815, 817; *Halsbury* (n 439) para 1; Chuah, 'Impact of the Rotterdam Rules on the Himalaya Clause' (n 96) 299-300.

[711] *Halsbury* (n 439) paras 1, 14, 29.

[712] For instance in *Sykes v Millington* [1953] 1 All ER 1098, 1100-1101, a company hired a vehicle from a haulage contractor to carry the goods. The driver's wage and insurance contributions were paid by the haulage contractor but it received its orders as to where it was to go and what it was to do from the company that hired the vehicle. The court indicated that the driver was the employee of the haulage contractor and was an agent of it in driving the vehicle for the purpose of earning the hire. See also *Halsbury* (n 439) para 1.

under their own direction and control.[713] Under English law, the distinction between an agent and independent contractor is not clear; however such distinction does not seem to have any effect on being liable under the Convention.[714] Only the distinction between an employee and agent/independent contractor is significant, as while the former cannot be sued under the Convention even if deemed as a maritime performing party, the latters can be sued as maritime performing parties under the Convention.

6.1.1.2- Performing or Undertaking to Perform the Carrier's Listed Obligations

During the preparatory works, determining the extent of the notion of the performing party was highly controversial. In the first draft of the Convention, the notion of the performing party had a narrower scope; it included persons who physically perform any of the carrier's obligations, but did not include persons who undertakes to performance.[715] However, some delegate suggested that the phrase "or undertakes to perform" should be added to the definition, in order to provide a direct action for the cargo interest against each party involved in the sub-contract chain.[716] It was pointed out that if the term "or undertakes to perform" is not included in the definition, the person who undertakes to perform the carrier's obligation(s) but then delegates it to another person, will be in a better position than the person who undertakes to perform, attempts to perform but fails to do so.[717] As an opposite view, it was said that inclusion of the term "or undertakes to perform" could cause problems, as classifying

[713] *Binding v Great Yarmouth Port and Haven Commissioners* [1923] 14 Ll.L.Rep 225, 257-258. In this case, there was a contract between Mr Binding and the Commissioners, and under this contract Mr Binding was described as a salvage contractor. The problem was whether Mr Binding was a servant or independent contractor. In order to determine the intention of the parties, the court considered the contract as a whole and held that the work was done under the control of the Commissioners who paid Mr Binding weekly; therefore Mr Binding was a servant, not an independent contractor. See also *The Starsin* [2000] 1 Lloyd's Rep 85(QB (Com Ct)), 99. For details on this case Below part 6.2 and Chapter 5.2.1.1.

[714] In the following cases, the distinction between an employee and independent contractor was discussed: *Stevenson Jordan and Harrison Ltd v Macdonald and Evans* [1952] 1 TLR 101, 111; *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497. See also SK Chatterjee, 'The UN Convention on the Liability of Operators of Transport Terminals in International Trade: the end of the Himalaya clause?' (1994) JBL 109, 118 *et seq*.; Nikaki, 'The Statutory Himalaya-Type Protection' (n 689) 413.

[715] UN Doc., A/CN.9/WG.III/WP.21, draft Art 1(17). In early drafts of the CMI Instrument, the term "performing party" embraced to "a person who performs, undertakes to perform, or procures to be performed". But, in the first draft of the Convention, the term "or undertakes to perform" was left in brackets. See CMI Yearbook 2000, draft Art 1.4 at 123; CMI Yearbook 2001, draft Art 1.3 at 357.

[716] UN Doc., A/CN.9/544 para 32.

[717] CMI Yearbook 2001, 308; UN Doc., A/CN.9/WG.III/WP.34 para 8; UN Doc., A/CN.9/544 para 36, 39.

a person as a performing party would be inappropriate if this person never intends to physically perform the carrier's certain obligations, and also, it would be difficult for claimants to determine such persons.[718] However, this argument was rejected and the phrase "or undertakes to perform" was added to the definition.[719]

According to the final version of the definition in the Rotterdam Rules, the term "performing party" includes both persons who physically perform the carrier's certain obligations, and the persons, who only undertake to perform those obligations. For instance, assuming that an NVOCC/carrier concludes a sub-contract with a charterer. The charterer has concluded a voyage charterparty with the shipowner, who has control of the ship, and is under the duty of equipping and manning the vessel. To load the vessel, the voyage charterer contracts with a stevedore company. Although the voyage charterer undertakes to perform both the loading of the goods and the ocean carriage, the shipowner in fact physically performs the ocean carriage and the stevedore company actually performs the loading. In a scenario like this, the shipowner and the stevedore would be classified as performing parties, owing to their actual performance, whereas the voyage charterer would be treated as the performing party because of his undertaking. Even if, for instance, the shipowner and stevedore fail to perform the actual performance, or the voyage charterer never intends to perform any aspect of the carriage, the requirement in Article 1(6)(a) will be met when they undertake the performance.

It should be borne in mind that the definition of performing party requires performance or the undertaking of performance, thus it does not include persons who only assist the carrier rather than perform or undertake to perform its obligations.[720] Furthermore, to be classified as a performing party, the person must have a connection with the performance of a particular contract of carriage.[721] For example, assuming that the carrier concludes sub-contracts with sub-contractors in delegating

[718] CMI Yearbook 2001, 302, 341, 398; UN Doc., A/CN.9/544, paras 37, 39.
[719] UN Doc., A/CN.9/544 para 42; UN Doc., A/CN.9/WG.III/WP.36 para 3 n 2; UN Doc., A/CN.9/WG.III/WP.56, draft Art 1(e); UN Doc., A/CN.9/WG.III/WP.81, draft Art 1(6) n 5.
[720] In the preparatory work, as an example it was stated that a security company which guards a container yard does not fall within the definition. This is because such company only assists in the performance of the carriage but does not perform or undertake to perform the carrier's obligation(s) itself. See UN Doc., A/CN.9/WG.III/WP.21 para 17; UN Doc., A/CN.9/544 para 174; Smeele (n 29) 16.
[721] Sturley and others (n 26) para 5.146.

its obligations stemmed from under different contracts of carriage. In such a case, the person who performs or undertakes to perform any of the carrier's obligations under one contract of carriage, would qualify as a performing party only for that contract of carriage. In respect of any other contract of carriage, it will not be treated as a performing party. As it does not perform or undertake to perform any aspect of that carriage, it does not have any connection to the performance of that contract of carriage.

Article 1(6)(a) requires the person to perform or undertake to perform any of the following carrier's obligations: receive, load, handle, stow, carry, keep, care, unload and deliver the goods.[722] The scope of the definition is limited to these obligations, therefore performing or undertaking to perform any other activity not listed in the definition, is insufficient to qualify as a performing party.[723] For instance, the person who performs the carrier's documentary obligation by issuing a transport document as the carrier's agent, or the person who provides certificates that are relevant to the carriage, will not qualify as a performing party, as such obligations are not addressed in the definition.[724] The obligations listed in Article 1(6)(a) are the same obligations listed in Article 13(1) as the carrier's specific obligations.[725] In the former drafts of Article 13(1), receipt and delivery of the goods were not listed as the carrier's obligations; however with the recognition of the door-to-door scope of application of the Convention, these two obligations were added.[726] Corresponding with the changes in the carrier's specific obligations, receipt and delivery of the goods are also listed in Article 1(6)(a) as the carrier's obligations that can be performed or undertaken to be performed by the performing party.

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[722] The word "keeping" was accidently omitted in the definition. However, soon after the adoption of the Convention, the omission was discovered and the correction process was invoked. The word "keeping" was added and a depositary notification was published on 11th October 2012. The corrected text took effect on January 2013, following the expiry of 90 days in which any objection was not communicated. See C.N.563.2012.TREATIES-XI.D.8 http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/CN.563.2012-Eng.pdf accessed 14.06.2013; CN.105.2013.TREATIES-XI.D.8 http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/CN.105.2013-Eng.pdf accessed 14.06.2013. See also Sturley, 'Amending the Rotterdam Rules' (n 100) 424-426.

[723] Atamer (n 29) 486.

[724] Sturley, 'Amending the Rotterdam Rules' (n 100) 424; Zunarelli, 'The Carrier and the Maritime Performing Party in the Rotterdam Rules' (n 26) 1019; Smeele (n 29) 16.

[725] Art 13(1) of the Rotterdam Rules.

[726] Draft Arts 1.7 and 5.2.1 in UN Doc., A/CN.9/WG.III/WP.21, at 12; UN Doc., A/CN.9/510 para 117; UN Doc., A/CN.9/WG.III/WP.56, at 18 n 56; UN Doc., A/CN.9/WG.III/WP.81, at 16 n 43.

6.1.1.3- Acting Either Directly or Indirectly at the Carrier's Request or under the Carrier's Supervision or Control

The person involved in the carriage process may have a direct or an indirect connection with the carrier. For instance, if a carrier contracts with a terminal operator to store the goods and concludes another contract with a stevedore to load the goods on the vessel, both the terminal operator and the stevedore will have a direct connection with the carrier. However, if the carrier only contracts with the terminal operator and the terminal operator concludes another contract with a stevedore; the terminal operator will have the direct connection with the carrier whilst the stevedore will have an indirect connection with the carrier. Irrespective of whether the person acts directly or indirectly under the carrier's mantle, it will fall within the definition of performing party as long as it acts at the carrier's request or under the carrier's supervision or control.[727] The Convention provides three options, therefore only satisfaction of one of these options will be sufficient. For instance, a terminal operator who acts under the carrier's supervision or control would qualify as a performing party, even if there is no request by the carrier.[728]

The determination of the existence of the carrier's request, supervision and control will depend on the facts in each case and the interpretation of national courts. Under English law, in *Ready Mixed Concrete,*[729] it was stated that the term "control" covers "the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done."[730]As mentioned above,[731] depending on the relationship between the carrier and the third party, whether employment, agency or sub-contract, the degree of the carrier's control would vary, and compared with an employee, the carrier has less control over the agent and independent contractor.[732] Also, in some non-maritime cases, it has been pointed out that supervision is not control; thus a person may be

[727] Sturley and others (n 26) para 5.150.
[728] Zunarelli, 'The Carrier and the Maritime Performing Party in the Rotterdam Rules' (n 26) 1022.
[729] *Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance* [1968] 2 QB 497.
[730] Ibid 515.
[731] Above part 6.1.1.1.
[732] *Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance* [1968] 2 QB 497, 518. In this case, it was stated that the independent contractor needs to be free in performance, even if there may be some control on it. See also Baughen, *Shipping Law* (n 675) 97.

supervised by a person who does not have control over his actions.[733] For instance, notwithstanding the existence of control, it is accepted that the master always has the right to supervise cargo operations; however to determine the existence of supervision, the courts will consider whether or not there is actual supervision.[734] In *Compania Sud American Vapores,*[735] the court discussed whether the master supervised the stowage operations, and it was concluded that merely seeing the stowage plan adopted by the charterer was not actual supervision.[736] However, if the stowage had been completed in accordance with the master's own stowage plan, this would have been deemed as actual supervision.[737]

As understood from the foregoing explanations, not all actors involved in the carriage process fall within the definition of performing party; only persons with a direct or an indirect connection with the carrier can be held as performing parties under the Convention. Furthermore, Article 1(6)(b) excludes persons retained by the shipper, documentary shipper, controlling party, or consignee, as opposed to by the carrier, from the scope of the definition.[738] For instance, pursuant to Article 13(2), the carrier and shipper may agree that loading and unloading of the goods will be performed by the shipper rather than the carrier.[739] Assuming the shipper contracts with a stevedore company to load the goods onto the vessel and the carrier concludes a contract with the terminal operator to store the goods. Owing to the effect of Article 1(6)(b), the stevedore company who is retained by the shipper- not the carrier- will not be classed as a performing party, whereas the terminal operator retained by the carrier, will be

[733] *Biffa Waste Services Ltd and another v Maschinenfabrik Ernst Hese GmbH* [2009] QB 725 para 56; *Hollis v Vabu Pty Ltd* [2002] 1 LRC 93, 104.
[734] *Canadian Transport v Court Line Ltd*. [1940] 67 Ll.L Rep 161, 166; *The Aliakmon* [1985] 1 Lloyd's Rep 199 (CA), 226; *The Panaghia Tinnou* [1986] 2 Lloyd's Rep 586, 591; *Transocean Liners Reederei GmbH v Euxine Shipping Co Ltd (The Imvros)* [1999] 1 All ER (Comm) 724, 729; *Compania Sud American Vapores v Hamburg* [2006] 2 Lloyd's Rep 66, 79. See also RP Grime, *Shipping Law,* (2006) All England Annual Review para 21.28.
[735] *Compania Sud American Vapores v Hamburg* [2006] 2 Lloyd's Rep 66.
[736] Ibid 70. See also *Canadian Transport v Court Line Ltd* [1940] 67 Ll.L Rep 161; C Chuah, 'Container Stowage- A Matter of Cooperation or Liability' (2008) 8(5) STL 1.
[737] *AB Marintrans v Comet Shipping Co Ltd.* [1985] 1 WLR 1270, 1280. Also in *The Eems Solar* [2013] 2 Lloyd's Rep 487 paras 102-103, the master made the stowage plan but there was no evidence showing that the stevedore paid attention to the stowage plan; therefore it was held that there was no intervention by the shipowners.
[738] Art 1(6)(b) of the Rotterdam Rules. For the notions of shipper and documentary shipper see Arts 1(8), 1(9) and Chapter 7.1; for the notions of consignee and controlling party see Arts 1(11), 1(13) and Chapter 8.1, 8.2.1.
[739] Art 13(2) of the Rotterdam Rules. Also, Article 17(i) provides that the carrier will not be liable where an agreement is concluded as per Article 13(2).

classed as a performing part where all requirements in Article 1(6)(a) are satisfied. In the preparatory works, it was suggested that the phrase "by the carrier" should be deleted, as it was found to be redundant.[740] However, it was emphasised that the inclusion of this phrase is necessary as the carrier itself is also retained by the shipper, and where the carrier contracts with a sub-contractor, it might be interpreted that the sub-contractor is indirectly retained by the shipper; therefore the carrier's sub-contractor might not be treated as a performing party.[741] To avoid such an outcome, the term "by the carrier" was remained in Article 1(6)(b).

It is the author of this thesis' opinion that it is reasonable to exclude a person retained by the cargo interest instead of by the carrier, from the scope of the definition of a performing party. As the carrier is vicariously liable[742] for the acts and omissions of the performing party under the Rotterdam Rules, and expecting the carrier to be held liable for the actions of a person not acting at its request or under its supervision or control, is unacceptable.[743] Also, pursuant to Article 34, the shipper is liable for "the acts or omissions of any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations"; accordingly the vicarious liability of the shipper and the carrier embrace only persons retained by them, not anyone else.[744]

It should be noted that in practice, there might be persons neither retained by the carrier nor the cargo interest, but are involved in the carriage process. For instance, as indicated in Article 12(2), a customs authority may be involved in the carriage process not because of its connection with the carrier or the shipper, but because of the law

[740] UN Doc., A/CN.9/621 para 143.
[741] Ibid; Sturley and others (n 26) para 5.151 n 329.
[742] The issue of liability is beyond the scope of this thesis; however identification of the performing party would have an effect on the liability of the carrier therefore, in this section it will be briefly mentioned.
[743] Art 18(a) of the Rotterdam Rules. Also, Article 18(d) states that the carrier is vicariously liable for the acts or omission of "any other person" that performs or undertakes to perform any of its obligations. The use of the word "any other person" in the provision does not include every one; it embraces only the person who "acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control". Apparently, Article 18(d) is wide enough to embrace performing parties but is not limited to them. Therefore, even if the person does not perform or undertake to perform the carrier's obligation(s) listed in Article 13(1) and hence is not classed as a performing party, the carrier's vicarious liability will arise. See Sturley and others (n 26) paras 5.175-177.
[744] Art 34 of the Rotterdam Rules; Sturley and others (n 26) para 5.151.

and regulation applicable at the port of discharge.[745] The customs authority, which does not act at the request or under the supervision or control of the carrier, will not qualify as a performing party, therefore the carrier's vicarious liability will not arise. Regarding the vicarious liability of the carrier, the current situation under English law is similar to the regulation in the Rotterdam Rules. For instance, in *The Jordan II,*[746] there was a FIOST clause which stated that shippers, charterers, or receivers load and discharge the goods from the vessel.[747] The court held that the shipowner did not undertake to perform loading, stowage and discharging; therefore unless the damaged is caused by the acts or omissions of the shipowner, its servants or agents, the shipwoner is not held responsible.[748]

However, the determination of whether the third party is a performing party or not would be problematic where the person is retained by the cargo interest but acts under the supervision of the carrier. In such cases, under English law, the carrier becomes responsible for the acts or omissions attributable to its supervision, and the liability of the cargo interest that hires the third party is limited to a corresponding degree.[749] Under the Convention, for the satisfaction of the requirements in Article 1(6)(a), the person does not have to be appointed or retained by the carrier; therefore it could be argued that the existence of only the carrier's supervision would be sufficient to make him a performing party. If such an argument is recognised and the third party becomes a performing party, the carrier would be held vicariously liable for the third person retained by the cargo interest but supervised by him. However the courts must carefully examine whether the obligation performed or undertaken by the third party

[745] Art 12(2) of the Rotterdam Rules; Sturley and others (n 26) para 5.150.
[746] *Jindal Iron and Steel Co Ltd and others v Islamic Solidarity Shipping Company Jordan Inc (The Jordan II)* [2003] 2 Lloyd's 87 (CA); [2005] 1 All ER 175 (HL).
[747] Ibid cl 17. For further explanations on this case, see S Baughen, 'Tripartite Contracts and the Missing Link' 2004 LMCLQ 129; F Lorenzon, J Graham-Wilson, 'The Jordan II: A Foregone Conclusion or Missed Opportunity?' (2005) 5(1) STL 1. Also, in the NYPE form of time charter, it is provided that the charterer must perform cargo handling, including loading, stowing, lashing, discharging so forth. See BIMCO NYPE 93, cl 8.
[748] *The Jordan II* [2003] 2 Lloyd's 87 paras 39-40,44. Also in *Brys & Gylsen v Drysdale* (1920) 4 Ll.L Rep 24, 25 the court stated "It would be an odd state of things if one were to hold that a shipowner who has no contract whatever with the stevedore, and who cannot say to the stevedore: You have broken your contract with me, and therefore I will not have you any longer in my vessel; and who has no control over what is to be paid to the stevedore, should be responsible for the failure of the stevedore to do his duty." See also *The Aliakmon* [1985] 1 Lloyd's Rep 199 (CA), 226-227; Cooke and others (n 225) para 14.36 *et seq.*
[749] *Canadian Transport v Court Line Ltd* [1940] 67 Ll.L Rep 161, 169, 172; *Compania Sud American Vapores v Hamburg* [2006] 2 Lloyd's Rep 66, 70, 75.

is the carrier's obligation or the cargo interest's obligation. As in the case of a FIOST clause, where the obligation is transferred to the cargo interest and is performed or undertaken by the person retained by the cargo interest under the supervision of the carrier, then the third party would not fall within the definition of a performing party.[750] As it does not perform or undertake to perform any of the carrier's obligations as required in Article 1(6)(a).

6.1.2- Performing or Undertaking to Perform Any of the Carrier's Obligations

As the second precondition, the definition of "maritime performing party" requires the person to perform or undertake to perform any of the carrier's obligations without addressing any specific obligation. In this respect, Article 1(6)(a) differs from Article 1(7); although both the definitions of performing party and maritime performing party use the phrase "any of the carrier's obligations", as examined above,[751] the former restricts the obligations to the extent that the carrier's core obligations as listed in Article 13(1).[752] However, apart from the obligations in Article 13(1), the carrier has other obligations.[753] If such obligations are performed or undertaken by a person other than the carrier, will that person fall within the definition of maritime performing party? The first requirement of being a maritime performing party is being classed as a performing party who performs or undertakes to perform the carrier's obligations in Article 13(1). For instance, making and keeping the ship seaworthy and cargoworthy are not listed in Articles 13(1) and 1(6)(a), therefore a person who performs or undertakes to perform such obligations, will not qualify as a performing party. But even so, will it still qualify as a maritime performing party, owing to the effect of the use of the phrase "to the extent that it performs or undertakes to perform any of the carrier's obligations" in Article 1(7)?

The different wordings related to the carrier's obligations in Articles 1(6)(a) and 1(7) makes the scope and meaning of the notion of maritime performing party puzzling,

[750] Below part 6.2.
[751] Above part 6.1.1.2.
[752] Art 13(1) of the Rotterdam Rules.
[753] For instance, the carrier's obligations applicable to the voyage by sea indicated in Article 14, and the carrier's documentary obligation regulated in Article 35.

and this would lead to different interpretations and outcomes.[754] One possibility is presented by Smeele; he states that to be a maritime performing party, the person must perform or undertake to perform the carrier's obligations directly related to the cargo handling or carriage under the contract of carriage; therefore persons only assisting in the performance of the carriage are excluded.[755] He also argues that persons who perform or undertake to perform any other obligations of the carrier, such as making and keeping the ship seaworthy, are excluded from the definition, as such obligations are merely indirectly related to cargo handling or carriage.[756] However, with regard to cargoworthiness of the ship, he submits that such obligation is closely connected with the obligation to "care for the goods" as indicated in Article 13(1); therefore persons performing or undertaking to perform obligations for cargoworthiness of the ship should fall within the definition of performing party.[757] It is not clear why he interprets seaworthiness and cargoworthiness differently. In the opinion of the author of this thesis, seaworthiness also appears to have close connection with the obligations to "carry the goods" and "care for the goods"; thus the person who performs or undertakes to perform obligations for the seaworthiness of the vessel would also fall within the definition of performing party.

Atamer disagrees with Smeele's view on the basis that it would not reflect the express intention of the draftsmen.[758] Atamer provides an illustration of seaworthiness and examines whether a shipowner, surveyor or classification society would fall within the definition of maritime performing party. He presents the following alternative arguments: (i) a person who performs or undertakes to perform any activities not listed in Article 1(6)(a), is not a performing party, therefore the shipowner, surveyor and classification society who are not performing parties are also not maritime performing parties; (ii) by performing or undertaking to carry the goods, i.e. one of the obligations listed in Article 1(6)(a), the shipowner becomes a performing party

[754] Zunarelli, 'The Carrier and the Maritime Performing Party in the Rotterdam Rules' (n 26) 1022; Smeele (n 29) 16; Atamer (n 29) 487-494.
[755] Smeele (n 29) 16; UN Doc., A/CN.9/544 para 174. A similar approach was stated by Berlingieri with regard to performing parties. He stated that the definition of performing party is restricted to persons who perform physical activities directly related to the carriage of the goods; therefore activities indirectly related to the carriage of the goods are excluded. See F Berlingieri, 'The Rotterdam Rules: The 'The Maritime Plus' Approach to Uniformity' (2009) EJCCL 49, 54-55.
[756] Smeele (n 29) 16.
[757] Ibid.
[758] Atamer (n 29) 494.

and thus a maritime performing party; but the others, who only perform or undertake to perform functions to ensure the seaworthiness of the vessel, are neither performing parties nor maritime performing parties; (iii) owing to the effect of the phrase "any of the carrier's obligations" in the definition of maritime performing party, all actors are maritime performing parties, even if they do not meet the requirements regarding to the carrier's obligations in Article 1(6)(a).[759]

Although it is not completely clear, the preparatory works appear to support Atamer's first argument. Prior to the introduction of the notion of a maritime performing party, the Draft Instrument only included the notion of a performing party, and the definition was restricted to the carrier's core obligations.[760] In a later session, the notion of maritime performing party was introduced as a sub-category of the performing party and the restriction was made on the basis of geographical activities,[761] rather than referring the carrier's obligations.[762] In order to clarify the distinction between maritime and non-maritime performing parties, it was suggested that "the carrier's obligations in connection with the sea carriage" should be considered, but in reply it was stated that the definition of performing party considers the carrier's core obligations, therefore the suggestion was not accepted.[763] Although it was pointed out that it is unclear whether the definition of maritime performing party also addresses the carrier's core obligations, this issue was not discussed further.[764] As the notion of maritime performing party is a sub-category of performing party, it could be said that to avoid repeating the same list in Article 1(7), the draftsmen intentionally used the phrase "any of the carrier's obligations"; therefore the phrase refers to any obligations listed in Article 1(6)(a).[765] However, as Atamer rightfully points out, such an interpretation would be very narrow and even the shipowner who fails to make and

[759] Atamer (n 29) 488-493.
[760] In the first drafts the carrier's core obligations covered only the following obligations: carriage, handling, custody, and storage of the goods. But subsequently the list of core obligations was extended due to the door-to-door nature of the Convention. As an example, it was indicated that the definition of performing party does not cover a shipyard that ensures the seaworthiness of the ship. See UN Doc., A/CN.9/WG.III/WP.21 para 17, draft Arts 1.7 and 5.2.1; UN Doc., A/CN.9/510 para 117; UN Doc., A/CN.9/WG.III/WP.56, at 18 n 56; UN Doc., A/CN.9/WG.III/WP.81, at 16 n 43.
[761] Below part 6.1.3.
[762] UN Doc., A/CN.9/WG.III/WP.34 paras 6, 9; UN Doc., A/CN.9/544 paras 23, 28-31; UN Doc., A/CN.9/621 para 129; Atamer (n 29) 492; Sturley and others (n 26) para 5.156; DM Bovio, 'Ocean Carriers' Duty of Care to Cargo in Port: The Rotterdam Rules of 2009' (2008-2009) 32 Fordham International Law Journal 1162, 1199, 1202.
[763] UN Doc., A/CN.9/544 para 31.
[764] Ibid.
[765] Atamer (n 29) 488.

keep the ship seaworthy would not qualify as a maritime performing party and would therefore not be held liable under the Convention.[766]

As the drafting history does not provide clear guidance, the phrase "to the extent that it performs or undertakes to perform any of the carrier's obligations" might be interpreted literally. According to a literal reading, the words "to the extent that" appears to address "any of the carrier's obligations", and this phrase might be understood as what it says; i.e. the definition would embrace not only a person who performs or undertakes to perform the carrier's obligations as listed in Article 1(6)(a), but also a person who performs or undertakes to perform any other obligations of the carrier not listed in Article 1(6)(a). Therefore, it could be argued that unlike Article 1(6)(a), the obligations performed or undertaken by a maritime performing party are not restricted to the extent of cargo-related activities; they simply embrace any obligations of the carrier imposed on it under the Convention. However, such interpretation would be very broad and for instance, a shipyard that repairs and ensures the seaworthiness of a vessel would fall within the definition of a maritime performing party. It does not seem that the draftsmen intended to introduce such a broad notion.[767]

In this author's view, a plausible conclusion can be reached by interpreting Article 1(7) as a whole, instead of merely considering the phrase "to the extent that it performs or undertakes to perform any of the carrier's obligations".[768] To determine which obligations of the carrier are to be performed or undertaken for the satisfaction of the requirement in Article 1(7), there are two stages: firstly, the person must be a performing party by performing or undertaking the obligation(s) listed in Article 13(1). If the person does not perform or undertake to perform any of the obligations in Article 13(1), it cannot be classed as a maritime performing party, even if it performs or undertakes any other obligations of the carrier. This is because where a person fails to qualify as a performing party, the first requirement of being a maritime performing party is not met. For instance therefore, a shipyard that ensures the seaworthiness of the ship, or a person who issues a transport document, cannot be classed as a

[766] Ibid 493.
[767] Sturley and others (n 26) paras 5.149, 5.156.
[768] As in the second argument indicated by Atamer. See Atamer (n 29) 489-490.

performing party nor a maritime performing party.[769] However, where the first stage is satisfied, the person is free to engage in any other activities of the carrier at the second stage. That is, as long as any of the obligations listed in Article 13(1) are performed or undertaken and thus the person becomes a performing party, further performance or undertaking to perform the obligation(s) not listed in Article 13(1) should not prevent such person from falling within the notion of maritime performing party.

Article 19, which regulates the liability of a maritime performing party and states that the maritime performing party "is subject to the obligations and liabilities imposed on the carrier under this Convention", appears to support this interpretation.[770] For instance, assuming that a shipowner, who is not the carrier, undertakes to carry the goods at the direct request of the carrier. Carrying the goods is one of the obligations listed in Article 1(6)(a), therefore the shipowner becomes a performing party, and owing to the effect of the geographical restriction, it becomes a maritime performing party within the meaning of the Convention. As a maritime performing party, the shipowner can perform or undertake to perform any other obligations of the carrier not listed in Article 13(1); such as it can undertake to issue a transport document, and if it fails, it would be held liable according to Article 19. Therefore, Article 19 ensures that whenever a person qualifies as a maritime performing party, it becomes subject to any of the carrier's obligations and liabilities under the Convention. Consequently, if the wording of Article 1(7) is interpreted as a whole, the notion of the maritime performing party would not be too narrow or too broad, and the author of this thesis believes that this interpretation best fits the needs of the shipping industry.

6.1.3- Port-to-Port Period

To qualify as a maritime performing party, the last and primary requirement is that the person must perform or undertake to perform activities within the port-to-port period. Under Article 1(7), the port-to-port period is described as "the period between the

[769] Sturley and others (n 26) para 5.149, illustrations 5.53-54. The authors state that a shipyard that repairs the vessel and a company that completes the documents for that particular cargo, do not qualify as performing parties under Article 1(6)(a).
[770] Art 19 of the Rotterdam Rules. However, according to Atamer, if Article 1(7) is considered together with Article 19, it would probably have to be assumed that the definition of maritime performing party embraces "all obligations of the carrier". See Atamer (n 29) 488.

arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship".[771] Therefore, the port-to-port period comprises, for instance, of activities occurring at ports of loading and discharge, such as loading or discharging the vessel or stowing the goods, and activities occurring during the sea journey, such as carrying or caring for the goods. Also, the port-to-port period starts from the initial port of loading and ends at the final port of discharge. Thus the person who performs or undertakes to perform activities at the port of transhipment falls within the definition of maritime performing party.[772]

For the determination of whether a person is only a performing party who has liabilities or defences conferred on it under the Convention, or a maritime performing party subject to the obligations and liabilities of the carrier and is entitled to the defences available to the carrier under the Convention, the meaning of the word "port" has crucial importance. Without knowing the scope of the term "port", it is not possible to ascertain whether the goods have arrived at the port of lading or departed from the port of discharge, meaning that the activities occur within the port-to-port period. Although, it is of vital importance in determining the involvement of the maritime performing party in the carriage process, the Convention does not define the word "port". In the preparatory works, it was pointed out that although a definition of port is necessary for the geographical approach, it would be difficult to define it under the Convention, as it widely differs depending on the geographic conditions.[773] Therefore, the meaning and scope of the term "port" is to be determined in accordance with the applicable law.

Under English law, the Merchant Shipping Act 1995 provides that unless the context requires otherwise, the term "port" includes place.[774] Although a port is also a place, the reverse is not always true; a place can only be deemed a port where it is in the

[771] Art 1(7) of the Rotterdam Rules.
[772] Sturley and others (n 26) para 5.158. The authors state that if there is an inland segment within the port-to-port period, the inland carrier may not qualify as a maritime performing party. Therefore, depending on whether the performance or undertaking is exclusively within port areas, the inland carrier may or may not become a maritime performing party.
[773] UN Doc., A/CN.9/544 paras 30-31; UN Doc., A/CN.9/621 para 148; UN Doc., A/63/17 para 80. It was said that it has become more common for local authorities to define the extent of their port areas, thus there is no practical need to provide a uniform definition for the term "port area".
[774] S. 313(1) of Merchant Shipping Act 1995.

nature of a port. In *Sailing Ship Garston Co v Hickie,*[775] Wills J pointed out that to be treated as a port, the place needs to have certain things such as moorings and buoys.[776] Likewise, in *Humber Conservancy Board v Federated Coal and Shipping Co. Ltd,*[777] in which the court tried to determine whether Spurn Point was a port or not, Scrutton LJ stated that the place must be interpreted as a locality which has some or many of the characteristics of a port.[778] The issue of whether a place falls within or outside the limits of a port is determined according to the particular context of every case. A port might have different limits, such as administrative, fiscal, legal, commercial limits and so forth, and depending on which purpose the port is defined, the limits may vary.[779] For instance, with regard to its administrative purpose, a place may fall within the limits of port A, whereas with regard to its fiscal purpose, it may fall within the limits of port B.

In *Sailing Ship Garston Co v Hickie,*[780] the court indicated the geographical limits of a port for fiscal and commercial purposes. It was stated that the fiscal limits of a port, which may extend far beyond its commercial limits, are always fixed by Acts of Parliament.[781] To ascertain the commercial limits of a port, the court considered what "port" is understood to mean by commercial and mercantile persons, such as shippers, shipowners, charterers or pilots. It was stated that in the commercial sense, the word "port" refers to "a place of safety for loading and unloading."[782] The court questioned how far the limits of a port can extend the place of loading and unloading for commercial purposes. It was said that the commercial limits of a port might be

[775] (1885) 15 QBD 580.
[776] Ibid 584.
[777] (1927) Ll.L Rep 177.
[778] Ibid 179. See also *Hull Dock Co. v Priestly* (1832) 4 B. & Ad. 187; *Tennant v Swansea Harbour Trustees* (1886) 3 T.L.R. 128; *Hunter v Northern Marine Insurance Co. Ltd*. (1888) 13 App. Cas. 717, 726; *Compania Naviera Maropan v Bowaters Lloyd Pulp and Paper Mills (The Stork)* [1955] 2 QB 68; *Trade Green Shipping v Securitas Bremer (The Trade Green)* [2002] 2 Lloyd's Rep 451.
[779] *Leonis Steamship Co. Ltd. v Rank Ltd* [1908] 1 KB 499, 519.
[780] (1885) 15 QBD 580.
[781] Ibid 584, 587.
[782] Ibid 587-589, 595. It was indicated that the phrase "commercial sense" has the same meaning as the phrases "ordinary sense", "business sense" and "common and ordinary sense", and it means how ordinary businessmen understand the term "port". See also *Leonis Steamship Co. Ltd. v Rank* [1908] 1 KB 499; *National Dock Labour Board v John Bland & Co Ltd* [1972] AC 222, 227; *The Johanna Oldendorff* [1973] 2 Lloyd's Rep 285; *Logs & Timber Products (Singapore) Pte Ltd v Keeley Granite (Pty) Ltd (The Freijo)* [1978] 1 Lloyd's Rep 257; *President of India v Olympia Sauna Shipping Co SA (The Ypatia Halcoussi)* [1984] 2 Lloyd's Rep 455.

extended to the legal limits in which the port authority[783] exercises its authority.[784] It was later emphasised that the limits of authority exercised by a port authority should be ascertained in accordance with the limits "not for fiscal purposes, but for purposes connected with the loading and unloading, the arrival and departure, of ships; the mode in which the business of loading and unloading is done, and the general usage of the place".[785] Accordingly, depending on each particular case, the commercial limits of a port may or may not overlap with the legal limits in which the port authority exercises its authority.

In respect of the Rotterdam Rules, Chuah, who criticises the absence of a definition for the term "port" under the Convention, states that in ascertaining the extent of the maritime aspect of its coverage, the Convention favours a geographical test rather than considering how the shipping industry understands cargo logistics.[786] The geographical limits may be broadened or narrowed, depending on the purposes for which the port is defined.[787] In the context of determining a maritime performing party, as the notion of maritime performing party is based on geographical restriction, it could be argued that the limits of a port should be ascertained in accordance with the geographical limits in which the port authority exercises its powers- not for fiscal purposes but for the purpose of carriage of goods, e.g. purposes connected with loading, unloading or stowing. Local authorities mostly define the geographical boundaries of their ports themselves,[788] and as long as a place, such as a warehouse, cargo consolidation or pier, is located within such geographical boundaries in which

[783] In s. 57(1) of the Harbours Act 1964, the term "port authority" is defined as "any person in whom are vested under this Act, by another Act or by an order or other instrument (except a provisional order) made under another Act or by a provisional order powers or duties of improving, maintaining or managing a harbour."
[784] *Sailing Ship Garston Co v Hickie* (1885) 15 QBD 580, 590. See also *Scrutton* (n 24) para 9.049.
[785] *Sailing Ship Garston Co v Hickie* (1885) 15 QBD 580, 595-596.
[786] Chuah, 'Impact of the Rotterdam Rules on the Himalaya Clause' (n 96) 304.
[787] *Leonis Steamship Co. Ltd. v Rank Ltd* [1908] 1 KB 499, 519; *The Johanna Oldendorff* [1973] 2 Lloyd's Rep 285, 306; *The Maratha Envoy* [1977] 1 Lloyd's Rep 217, 227.
[788] UN Doc., A/63/17 para 80. For instance, for the geographical limits of the ports of Southampton see http://www.southamptonvts.co.uk/admin/content/files/PDF_Downloads/Soton%20Byelaws.pdf , 20 accessed 07.08.2015. Also, the boundaries of UK ports with regard to the Port Security Regulations 2009 (S.I. 2009/2048) are indicated in the Consultation prepared by Department for Transport. See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/16634/consultation-document.pdf accessed 07.08.2015.

the port authority exercises jurisdiction, the person who performs or undertakes to perform the activities would qualify as a maritime performing party.[789]

Lastly, the second sentence of Article 1(7) provides that an inland carrier becomes a maritime performing party "only if it performs or undertakes to perform its services exclusively within a port area."[790] This means that subject to cases where inland carriers perform or undertake to perform their services exclusively within a port, they will not qualify as maritime performing parties under the Convention. The provision is not aimed at intervening with national laws or other Conventions on inland transportation.[791] Therefore, it ensures that inland carriers are excluded from the definition of maritime performing party and thus cannot be sued under the Convention, unless the exception in Article 1(7) emerges.[792]

The Convention does not provide a definition for the term "inland carrier"; however the extent of the term can be ascertained from the drafting history.[793] In the preparatory works, it was pointed out that by using the term "inland carrier", the draftsmen intended to include road, rail and inland waterway carriers.[794] Although it was suggested that the term "inland performing party" should be used rather than the

[789] Bovio (n 762) 1198. The author points out that the limits of the port are determined in accordance with "its geography, the modality of the subject goods, other details of the contract, and, most importantly, the law regulating the port."
[790] Art 1(7) of the Rotterdam Rules.
[791] Some delegates suggested that the liability of the inland carrier should be left to national law, whereas others suggested that inland movements within a port should fall within the definition of a maritime performing party, but movements between two physically distinct ports should fall outside the definition. See UN Doc., A/CN.9/WG.III/WP.34 para 7; UN Doc., A/CN.9/544 para 31; UN Doc., A/CN.9/WG.III/WP.36 para 4 n 9; UN Doc., A/CN.9/WG.III/WP.56, draft art 1(f) n 326.
[792] It was pointed out that in the absence of an express exception, even inland carriers who perform or undertake to perform services overwhelmingly outside port areas would have been classed as maritime performing parties to the extent that they carry goods within the port-to-port area. See UN Doc., A/CN.9/621 para 135; Sturley and others (n 26) para 5.160.
[793] For the effect of preparatory works on interpretation, see Chapter 1.3.
[794] UN Doc., A/CN.9/621 para 144. In the first proposal, it was provided that even if rail carriers perform their services within the port area, they should be excluded from the definition of maritime performing party. This proposal addressed only rail carriers; but in a later proposal, it was said that the exception should extend to road carriers too. However, it was said that excluding both rail and road carriers would be too broad, as they might exclusively provide services within port areas. Eventually, to avoid creating a broad exception, it was accepted that a rail or road carrier will become a maritime performing party only where it provide services exclusively within a port area. The first draft stated that "*a rail carrier or road carrier* is a maritime performing party only when it performs or undertakes to perform its services exclusively within the port area" (emphasis added). However in the final version of the draft article, instead of the words "a rail or road carrier", the term "inland carrier" was used. See UN Doc., A/CN.9/WG.III/WP.84 paras 2-3, UN Doc., A/CN.9/WG.III/WP.90 para 1; UN Doc., A/CN.9/621 paras 133, 137, 141; UN Doc., A/CN.9/WG.III/WP.101, draft art 1(7) n 4.

term "inland carrier", that proposal was rejected on the basis that "inland performing party" could inadvertently exclude some inland performing parties from the definition of maritime performing party.[795] It can be said that the distinction between the inland carrier and the performing party is that while the former can be a maritime performing party only if it performs or undertakes to perform services exclusively within the port area, the latter can be a maritime performing party where it performs or undertakes to perform services within the port-to-port period; i.e. the performance or undertaking within port areas does not need to be exclusive.

The determination of whether or not an inland carrier is a maritime performing party will depend on whether the performance or undertaking is exclusively within the port area. The extent of the word "exclusively" is to be determined according to the contract in every case, based on the facts.[796] For instance, assuming that an inland carrier carries the goods between terminals within the same port in one contract, and carries other goods to a place located miles away from the port area. Under the former contract, the performance is exclusively within the port area, thus the inland carrier will be a maritime performing party, whereas in the second contract, the performance is not exclusively within the port area, therefore it will not be a maritime performing party in respect of that contract. Due to the effect of use of the word "exclusively", to qualify as a maritime performing party within the meaning of the Convention, the inland carrier needs to perform or undertake to perform the entire service solely within the port area.[797] For instance, assuming that the goods are unloaded from a ship and a trucker carries them to a warehouse located outside the port area. Even if the warehouse is close to the port and thus only a small portion of carriage occurs outside the port, the trucker will not be deemed as a maritime performing party under the Convention, as the performance is not exclusively undertaken within the port area.

It should be noted that the limits of the port have vital importance in ascertaining whether the performance or undertaking is exclusively within the port area. For

[795] Stowage planners were given as an example, and it was said that "stowage planners, who might do their work exclusively from an office located outside of a port, but who were clearly maritime performing parties" could inadvertently be excluded from the definition of a maritime performing party. See UN Doc., A/CN.9/621 para 145.
[796] Sturley and others (n 26) para 5.162.
[797] Thomas, 'An Analysis of the Liability Regime' (n 95) 57; Van Der Ziel, Multimodal Aspects of the Rotterdam Rules' (n 674) 309 n 11.

instance, if the limits of the port do not include the consolidation area, a truck carrier which performs its services exclusively in the consolidation area will not be a maritime performing party, thus will not be held liable under the Convention, and *vice versa*. Consequently, to determine whether an inland carrier is a maritime performing party or not, the limits of the port need to be determined first, and if the performance or undertaking is exclusively within the limits of the port, then the inland carrier will qualify as a maritime performing party, otherwise it will not. Where an inland carrier becomes a maritime performing party, the application of Article 19, which makes a maritime performing party subject to the same liabilities as the carrier and entitles him to the defences and limits available to the carrier under the Convention, arises, and the inland carrier can be sued under the Convention.[798]

6.2- Identification of the Maritime Performing Party under the Rotterdam Rules

As indicated in an earlier Chapter,[799] not all third parties involved in the carriage process can be sued under the Rotterdam Rules-only maritime performing parties can be sued. Therefore before bringing an action, cargo interests need to be sure that the third party falls within the definition of a maritime performing party. As maritime performing parties are not parties to the contract of carriage, transport documents do not usually contain contract particulars related to them.[800] Furthermore, owing to the absence of a specific provision on the identification of the maritime performing party, and more importantly the complex wording of the definition of maritime performing party, in practice it would not be an easy process for cargo interests to identify maritime performing parties.

Although in some cases, persons involved in the carriage process could be identified through carriers, particularly where there are complex and long sub-contract chains, it

[798] Art 19 of the Rotterdam Rules; Chapter 2.1.2. It should be noted that pursuant to Article 19(1)(b), the period of responsibility of the maritime performing party embraces the port-to-port period, while the maritime performing party has custody of the goods or it is participating in the performance of any of the activities designed by the contract of carriage. Therefore, it is submitted that as a maritime performing party, the inland carrier can only be held liable under the Convention for loss, damage or delay that occurs during the port-to-port period. If loss, damage or delay occurs outside the port-to-port period, the inland carrier may be held liable in accordance with the applicable law or other Conventions.
[799] Chapter 2.1.2.
[800] But in some cases, contract particulars regarding the name of the ship (Article 36(3)(b)) and the port of loading/discharging (Article 36(3)(d)) might be useful in tracing and identifying the maritime performing party. See Chapter 4.2.2.

would be impossible to track down all third parties involved in the carriage.[801] It must be noted that the cargo interest's aim is to recover its damages as soon as possible; therefore instead of identifying all relevant third parties involved in the carriage, they could be interested in identifying third parties with better financial standing and traceable assets, such as shipowners, terminal operators, stevedore companies or even classification societies.[802] Therefore, in this section, identification of maritime performing parties under the Convention will be explained, in relation to the third parties who could potentially be sued as maritime performing parties, on the basis of some well-known English cases.

Firstly, cargo interests may want to sue the shipowner, as happened in *The Starsin.*[803] In this case, the goods were damaged by water due to bad stowage, while they were carried on board the vessel named *Starsin* on bills of lading. The vessel was time-chartered to CPS and the bills of lading were issued on behalf of the time charterer, although they also contained demise/identity of carrier clauses which identified the shipowner as the carrier. The cargo interests sued the shipowner on the basis of bills of lading contracts, and argued in the alternative that if the bills were treated as charterer's bills rather than shipowner's bills, the shipowner was liable in tort or bailment. The House of Lords held that the bills were charterer's bills, thus the time-charterer was the carrier. Regarding the shipowner, who was performing the actual carriage, it was said that he was an independent contractor.[804] Colman J., sitting in the Commercial Court, defined the term "independent contractor" as "a third party with whom a party to a contract enters into a contract under which the third party contracts to perform some or all of the obligations which that party had undertaken to perform under the head contract, in other words, a sub-contractor".[805] He then continued that when a carrier charters a ship to perform the sea carriage, he employs the shipowner to carry out the substantial part of its own contractual obligations; therefore the shipowner becomes an independent contractor for that carriage.[806]

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[801] Atamer (n 29) 497.
[802] Smeele (n 29) 19.
[803] *The Starsin* [2000] 1 Lloyd's Rep 85 (QB (Com Ct)); [2001] 1 Lloyd's Rep 437 (CA); [2003] 1 Lloyd's Rep 571 (HL). For further on this case, see Chapter 5.2.1.1.
[804] [2003] 1 Lloyd's Rep 571 (HL), paras 28-29, 55, 95, 199.
[805] [2000] (QB (Com Ct)) 1 Lloyd's Rep 85, 99. Also, in the Court of Appeal, Lord Justice Rix, Lord Justice Chadwick and Sir Andrew Morritt, V.-C agreed with Colman J. see *The Starsin* [2001] 1 Lloyd's Rep 437 (CA) paras 113,166, 198-201.
[806] [2000] (QB (Com Ct)) 1 Lloyd's Rep 85, 99.

As it is seen in *The Starsin,* the shipowner is a person other than the carrier, it performs the carrier's obligation to carry the goods under the head contract of carriage in accordance with its direct connection with the carrier under the sub-contract, i.e. the charterparty contract, and it acts during the sea carriage-i.e. it carries the goods within the port-to-port period. Therefore, it is submitted that if the Rotterdam Rules apply to a case with similar facts to *The Starsin,* the requirements in Article 1(7) will all be met thus the shipowner will fall within the definition of maritime performing party and it can be sued under the Convention. In such a case, as the bills of lading contain information about the name of the ship, and the shipowner has direct connection with the carrier, it would not be too difficult for cargo interests to trace and sue the maritime performing party/shipowner.

Secondly, according to case law, in order to recover damages, cargo interests usually bring actions against stevedores or terminal operators in tort or bailment.[807] However, if the Rotterdam Rules enter into force, such persons could be sued under the Convention if they fall within the definition of maritime performing party. In relation to identifying these parties as maritime performing parties, the main problem would arise in the determination of whether they have acted under the direct or indirect request, control, or supervision of the carrier.[808] For instance, in a case similar to *The Jordan II,*[809] the connection with the carrier and stevedore company must carefully be examined. In *The Jordan II*, the goods were damaged by defective loading, stowage, laying of dunnage, securing or discharging. The contact contained a FIOST clause, and the court held that although those duties are on shipowners, arranging and paying for those duties and being liable for them can be transferred by contract to charterers; therefore the shipowners were not responsible for the damage caused by the acts or omission of servants or agents of the cargo interests.[810]

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[807] For instance see *Midland Silicones Ltd v Scruttons Ltd* [1961] 2 Lloyd's Rep 365; *New Zealand Shipping Co. v A.M. Satterthwaite (The Eurymedon)* [1974] 1 Lloyd's Rep 534; *Salmond and Spraggon (Australia) v Port Jackson Stevedoring (The New York Star)* [1980] 2 Lloyd's Rep 317; *The Antwerpen* [1994] 1 Lloyd's Rep 213; *The Rigoletto* [2000] 2 Lloyd's Rep 532.

[808] These persons usually act within port areas, but in some cases, the determination of the limits of the port would cause problems related to identifying whether those parties are maritime performing parties or not. See Above part 6.1.3.

[809] *Jindal Iron and Steel Co Ltd and others v Islamic Solidarity Shipping Company Jordan Inc (The Jordan II)* [2003] 2 Lloyd's 87.

[810] Ibid paras 13-14, 39-40, 48-49.

In such a case, the shipowners neither concluded a sub-contract nor controlled or supervised those cargo operations, thus could not be maritime performing parties under the Convention. Even if such operations are performed under the control or supervision of the carrier by the master,[811] once the duties are transferred to cargo interests by contract, it could be argued that performing or undertaking to perform any of those duties would not be treated as performing or undertaking to perform the carrier's obligations, as required by Article 1(7).

Lastly, the cargo interest may want to sue classification societies as maritime performing parties under the Convention. However, the ambiguous wording of Article 1(7) makes the position of classification societies confusing. For instance, in a case as *The Nicholas H,*[812] determination of whether a classification society falls within the definition of a maritime performing party would be notably problematic. In *The Nicholas H*, during the voyage, cracks were found in the vessel's hull, therefore the vessel was anchored and arrangements were made with the ship's classification society (NKK) to make a survey on cracks. The surveyor of NKK recommended permanent repairs, which would have involved drydocking and unloading of the cargo. However instead of permanent repairs, temporary repairs were made at the anchored port, and when the ship was surveyed again, the surveyor recommended that the ship proceed on its intended voyage but that the repairs should be examined as soon as possible after discharge of the cargo.

Shortly after the vessel sailed, the temporary repairs failed and the vessel sank with all its cargo. The cargo owners brought an action in tort against NKK on the grounds that NKK was negligent in altering its initial recommendation for permanent repairs and permitting the shipowner to continue its voyage with only temporary repairs. Furthermore, they alleged that NKK owed them a duty of care relating to the seaworthiness of the vessel. The House of Lords discussed whether a classification society owes a duty of care to a third party cargo owner. In doing so, their Lordships considered not only the issue of whether the loss was reasonably foreseeable, but also the nature of the relationship between the cargo owners and the classification society,

[811] Above part 6.1.1.3, n 737.
[812] *Marc Rich & Co AG and others v Bishops Rock Marine Co Ltd and others (The Nicholas H)* [1995] 2 Lloyd's Rep 299 (HL).

and whether it was fair, just and reasonable to impose a duty of care on the classification society.[813]It was held that it would be unfair, unjust and unreasonable to impose such a duty on the classification society, due to the following reasons: (a) the shipowner was primarily responsible for sailing with a seaworthy vessel, whereas the surveyor only had a subsidiary role in matters of seaworthiness, therefore the surveyor's carelessness was not the direct reason of the damage; (b) there was no contract between the cargo owners and the classification society, and imposing a duty of care on the classification society towards cargo owners would cause an imbalance in the rights and liabilities of shipowners and cargo owners under the Hague-Visby Rules; and (c) the classification society acted in the public interest, and its main function was to ensure collective welfare.[814]

If the Rotterdam Rules apply to cases similar in facts to *The Nicholas H,* depending on how the court will interpret Article 1(7), a classification society may or may not fall within the definition of a maritime performing party. In a scenario like *The Nicholas H*, with regards to qualifying as a maritime performing party, the classification society satisfies the following requirements: it is a person other than the carrier; it acts under the direct request of the carrier; and it performs its services during the port-to-port period. [815] The only primary requirement remaining is whether the obligation performed by the classification society will lead it to qualify as a maritime performing party under the Convention. As examined before, in respect of the carrier's obligations performed or undertaken by the third party, the wording of Article 1(7) is ambiguous. Making the ship seaworthy is not listed in Article 1(6), but owing to the effect of the phrase "any of the carrier's obligations", if the court interprets Article 1(7) broadly, the classification society will be a maritime performing party and unlike the result in *The Nicholas H,* it would be held liable

[813] Ibid 300, 312-313.
[814] Ibid 302, 314-317. However, in cases where loss of life occurs, classification societies could be liable. See *Perrett v Collins* [1998] 2 Lloyd's Rep 255.
[815] In this case, the classification society's performance occurred during the port-to-port period. Because while the goods were being carried on the ship, due to a crack, the ship had to deviate from its journey, and after the voyage started but before it ended, the ship was surveyed at an anchored port by the classification society. However, it must be kept in mind that not every performance or undertaking of classification societies occurs within the port-to-port period. For instance, where the ship is surveyed and inspected in a drydock before starting its voyage, such performance would not be deemed to occur within the port-to port period. As the requirement of performing or undertaking to perform within the port-to-port period is not satisfied, in such cases the classification society cannot qualify as a maritime performing party.

against the cargo owners. However, if Article 1(7) is interpreted narrowly and only the obligations listed in Article 1(6) are considered the classification society will not be a maritime performing party; thus cargo owners cannot sue it under the Convention or common law, as in *The Nicholas H*. Likewise, as suggested by Smeele, if the court only considers obligations directly related to cargo handling and carriage, the classification society will not be held a maritime performing party.[816] Or if Article 1(7) is interpreted as argued by the author of this thesis,[817] the classification society will not be a maritime performing party, as it does not perform any of the listed obligations in Article 1(6) thus it does not be a performing party nor a maritime performing party.

However, the result would be different if the Rotterdam Rules apply to a case similar to *The Termagant.*[818] In this case, the goods were carried from Port Natal to Glasgow, and the cargo was unloaded for transhipment in the Thames; the carrier concluded a sub-contract with a barge owner to carry the cargo from there to a coasting steamer. Due to its unseaworthiness, the barge sank and the cargo was lost. The shippers sued the barge owner relying on unseaworthiness as a tort, and the court held the barge owner liable in tort for supplying an unseaworthy barge.[819]

As in *The Nicholas H*, in this case unseaworthiness caused the damage; however in *The Nicholas H* the third party's action did not directly inflict physical damage, whereas in *The Termagant* the third party's action was the direct cause of the physical damage. With regard to the requirements of being a maritime performing party, the barge owner satisfies the following requirements: it is a person other than the carrier; it is involved in the carriage process owing to its connection with the carrier; and it performs its services at the port of transhipment, which is deemed to be within the

[816] It should be noted that as one of the reasons not to hold the classification society liable, the majority of their Lordships highlighted that the role of classification society to make the ship seaworthy is a subsidiary one and does not involve the direct infliction of physical damage. See *The Nicholas H* [1995] 2 Lloyd's Rep 299 (HL), 302, 314.This reasoning seems to be similar with Smeele's suggestion indicated in Above part 6.1.2.
[817] Briefly, as long as one of the obligations listed in Article 1(6) is performed or undertaken within the port-to-port period and the third party is classed as a performing party, it can perform or undertake any further obligations that are not listed in Article 1(6). See Above part 6.1.2.
[818] (1914) 19 Com Cas 239.
[819] Ibid 245.

port-to-port period.[820] Unlike the classification society in *The Nicholas H,* the barge owner not only performs the carrier's obligation related to seaworthiness, it also performs the carrier's obligations to carry and care for the goods, which are closely connected with the obligation of supplying a seaworthy barge. As examined above,[821] the carrier's obligations to carry and care for the goods are listed in Article 1(6), therefore the barge owner will be classed as a performing party; and since it performs its services within the port-to-port period, it will also become a maritime performing party under the Convention.

Also, regarding seaworthiness, according to the argument proposed by the author of this thesis, once the barge owner, who acts within the port-to-port period, qualified as a performing party, it can perform or undertake to perform any other obligations of the carrier not listed in Article 1(6). Therefore, as a maritime performing party, the barge owner would be held liable for unseaworthiness under the Convention. The same reasoning would apply to cases, for instance, where an NVOCC, charterer, or freight forwarder acts as a carrier and concludes sub-contracts with the shipowner for ocean carriage. In such cases, once the shipowner carries or undertakes to carry the goods, it will fall within the definition of maritime performing party and thus can be held liable against cargo interests for unseaworthiness under the Convention.

Consequently, depending on how the definition of maritime performing party will be interpreted by national courts a third party involved in the carriage process may or may not qualify as a maritime performing party. Due to the abovementioned deficiencies in the definition of maritime performing party, it appears that the cargo interests will face difficulties on identifying maritime performing parties.

[820] Sturley and others (n 26) para 5.158.
[821] Above part 6.1.1.2.

CHAPTER 7: IDENTIFICATION OF THE SHIPPER AND DOCUMENTARY SHIPPER UNDER THE ROTTERDAM RULES

Although a contract of carriage is concluded between a carrier and shipper, and as an original party to it the shipper is one of the principal actors of the carriage process, unlike the carrier, it is not given much attention in the Conventions currently in force. The Hague and Hague-Visby Rules impose implied and express obligations and confer rights on the shipper, but do not contain a definition of the word "shipper".[822] With regard to the obligations, liabilities and rights of the shipper, the Hamburg Rules include more detailed provisions than the Hague Rules and Hague-Visby Rules, and also take a further step by including a specific provision for the definition of "shipper"; however, the shipper is still not considered in as much detail as the carrier.[823] On the other hand, under the Rotterdam Rules, the shipper is given more attention; the Convention provides a definition of "shipper" and furthermore introduces as a new concept, the notion of "documentary shipper".[824] Other than definitions, unlike the previous Conventions the Rotterdam Rules inclusively regulate the obligations, liabilities and rights of the shipper and the documentary shipper.[825] If the Rotterdam Rules enter into force, the applicability of these provisions will depend on the question: "who are the shipper and documentary shipper"?[826]

In this Chapter, the identification of the shipper and documentary shipper will be analysed as follows: in the first section, the notions of "shipper" and "documentary shipper" under previous Conventions and the Rotterdam Rules will be explained; and in the second section, identification of these persons under the Rotterdam Rules will be analysed. In the second section, as the Rotterdam Rules do not contain a specific provision on the identification of the sipper and documentary shipper, the issue will

[822] For implied obligations imposed on the shipper, see Arts III(5), IV(2)(n)-(o)-(i), IV(3), and for an express obligation, see Art IV(6) of the Hague Rules, and Hague Visby Rules. Under Art III(3) of the Hague Rules and Hague-Visby Rules, the shipper has a right to demand a bill of lading from the carrier. See also Below part 7.1.
[823] For obligations and liabilities of the shipper, see Arts 12- 13 of the Hamburg Rules. Also, pursuant to Art 14(1) of the Hamburg Rules, the shipper has a right to demand a bill of lading from the carrier, and under Art 20 of the Hamburg Rules, as with the carrier, the shipper can also apply the 2-year time bar. For the definition of the term "shipper", see Art 1(3) of the Hamburg Rules; Below part 7.1.
[824] Arts 1(8), 1(9) of the Rotterdam Rules; Below parts 7.1.1-2.
[825] Chapters 7, 13 and Arts 55, 79 of the Rotterdam Rules.
[826] For further details on the importance of identification of the shipper/documentary shipper, see Chapter 2.1.3, 2.2.3, 2.3.3, 2.4.2.

depend on the applicable law, therefore the analysis will be made in the light of English case law.

7.1- The Notions of "Shipper" and "Documentary Shipper" under the Rotterdam Rules

This section analyses the definitions of shipper and documentary shipper, and in presenting the changes under the Rotterdam Rules, the definitions applied in the previous carriage of goods by sea Conventions will be mentioned briefly.

7.1.1- The Notion of "Shipper"

The Hague and Hague-Visby Rules do not have a specific provision defining the term "shipper". Zunarelli asserts that although there is no specific provision for the definition of the term "shipper", its meaning can be gleaned from the definition of a "carrier", who is defined as the person that enters into a contract of the carriage with a shipper.[827] The definition of the carrier implies that the shipper is the contractual counterpart of the carrier under a contract of carriage. However, it cannot be said that the shipper is always the contractual counterpart of the carrier under a contract of carriage.[828] Such interpretation would cause problems, particularly with f.o.b. contracts, where although the buyer concludes a contract of carriage with a carrier, it is the seller who consigns the goods for carriage.[829] For instance, under Article III(3) of the Hague and Hague-Visby Rules, only the shipper is given the right to demand the bill of lading from the carrier; and if it is accepted that only the carrier's contractual counterpart can qualify as the shipper, then in f.o.b. contracts sellers would not be able to demand the bill of lading from the carrier.[830] As Baughen emphasises, giving the right of demanding the bill of lading on shipment to f.o.b. buyers simply because they have concluded the contract of carriage with the carrier would be inconvenient for f.o.b. sellers, who usually want to reserve the right of

[827] Art I(a) of the Hague Rules and the Hague-Visby Rules; Zunarelli, 'The Liability of the Shipper' (n 111) 350; Chapter 5.1.
[828] Van der Ziel, 'The Issue of Transport Documents' (n 230) part 2.1.
[829] Below part 7.2.
[830] Art III(3) of the Hague Rules and the Hague-Visby Rules.

disposal of the goods; this cannot have been the intention of the Conventions.[831] As a result, under the Hague and Hague-Visby Rules, in the absence of an explicit provision, it is not clear whether the term "shipper" embraces only the contractual counterpart of the carrier, or if it also includes the consignor of the goods. Therefore, determining the meaning and extent of the term "shipper" depends on the interpretation of national courts.[832]

Unlike the Hague and Hague-Visby Rules, the Hamburg Rules contain a specific provision for the definition of the word "shipper". Under Article 1(3), the shipper is defined as "any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, *or* any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea"[833] (emphasis added). According to the Hamburg Rules, only the shipper can demand the bill of lading from the carrier,[834] therefore, to protect unpaid f.o.b. sellers, the Hamburg Rules introduced the concept of the "actual shipper" within the definition of the shipper.[835] To be treated as the actual shipper under the Hamburg Rules, the only requirement is that the person must deliver the goods to the carrier either himself or through another person acting on his behalf. Instead of a separate provision, the "actual shipper" is regulated within the definition of "shipper"; therefore the definition of shipper has an extended scope, and not only the contractual shipper, i.e. the carrier's counterpart under a contract of carriage, but also the person who consigns the goods to the carrier, can qualify as the shipper. It must be pointed out that depending on the type of sale contract, the actual shipper and contractual shipper might be the same or different person(s). For instance, while in c.i.f. contracts the seller is both the contractual shipper and the actual shipper, with classic f.o.b. contracts, the seller is usually the actual shipper whereas the buyer is the contractual shipper.[836] As Zunarelli points out, the usage of the word "or" makes the definition of the shipper ambiguous; therefore it is not clear whether the contractual or actual shipper is entitled to the rights and subject to the obligations

[831] S Baughen, 'The Legal Status of The Non-Contracting Shipper' [2000] IJSL 21, 21 n 2; Aikens and others (n 154) paras 3.110, 7.79.
[832] For the situation under English law see Below part 7.2.
[833] Art 1(3) of the Hamburg Rules.
[834] Art 14 of the Hamburg Rules.
[835] Van der Ziel, 'The Issue of Transport Documents' (n 230) part 5.4.2.
[836] Below part 7.2.

regulated in the Hamburg Rules.[837] For instance, under Article 14(1), the shipper is entitled to demand the bill of lading; however, pursuant to the definition of the shipper, the carrier's counterpart under the contract of carriage or the deliverer of the goods to the carrier can qualify as the shipper. Both parties may have a legitimate interest in demanding the bill of lading, however it is not clear whom the carrier needs to give the bill of lading to.

Under the Rotterdam Rules, Article 1(8) defines the shipper as "a person that enters into a contract of carriage with a carrier".[838] Pursuant to this definition, to qualify as a shipper for the purposes of the Convention, there are two prerequisites: (i) being a person; and (ii) being the counterpart of the carrier under the contract of carriage. As to (i), "person" comprises not only natural persons, i.e. a human beings, but also legal persons, such as companies or entities.[839] To meet precondition (ii), the person must conclude a contract of carriage with a carrier, defined in Article 1(5) as the counterpart of the shipper under a contract of carriage, either on its own behalf or through its agent or employee acting on its behalf.[840] As seen, for the terms "carrier" and "shipper", the key element is the existence of a contract of carriage as defined in Article 1(1).[841] Therefore, if the contract concluded between the parties does not meet the contract of carriage requirements under the Convention, then the contracting parties under such a contract cannot be treated as the carrier and shipper.

In contrast with the Hamburg Rules, under the Rotterdam Rules, the term "shipper" has limited scope. Under the Hamburg Rules, along with the carrier's counterpart under the carriage contract, the deliverer of the goods can also be treated as the shipper, regardless of its contractual relationship with the carrier. On the other hand, under the Rotterdam Rules, the existence of a contractual relationship under a contract of carriage is the essential factor to qualify as the shipper; therefore, only being the deliverer of the goods will not be sufficient to qualify the deliverer as the shipper. As

[837] Zunarelli, 'The Liability of the Shipper' (n 111) 350.
[838] Art 1(8) of the Rotterdam Rules.
[839] n 499.
[840] Art 1(5) of the Rotterdam Rules; Chapter 5.1. See also UN Doc., A/CN.9/WG.III/WP.21 para 22.
[841] Under Art 1(1) of the Rotterdam Rules, the term "contract of carriage" is defined as "a contract in which a carrier, against the payment of freight, undertakes to carry the goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage." For further explanations, see Chapter 3.2.1.

a result, under the Rotterdam Rules, the term "shipper" embraces only the person who enters into a contract of carriage with a carrier; in the absence of such contractual nexus, the person will not qualify as the shipper.[842]

7.1.2- The Notion of "Documentary Shipper"

In practice, with some f.o.b. sale contracts, although the seller is not the one who concludes the contract of carriage with the carrier, it might want to be named as the shipper on the bill of lading.[843] In the *travaux préparatoires*, the legal position of an f.o.b. seller was questioned where the buyer concludes a contract of carriage with a carrier, but the name of the seller is indicated as shipper on the transport document.[844] It was noted that the relationship between the carrier and f.o.b. seller is not clear; therefore to reflect the needs of shipping practice, clarify the legal position of the f.o.b. seller and impose the same liabilities and obligations on it as imposed on the contractual shipper, the Rotterdam Rules introduce the concept of "documentary shipper".[845] Under Article 1(9), the documentary shipper is defined as "a person, other than the shipper, that accepts to be named as 'shipper' in the transport document or electronic transport record."[846] Pursuant to the definition, to be classified as a documentary shipper, two preconditions have to be met: firstly, as in the definition of "shipper", there must be either a natural or legal person. Furthermore, this person must not be the one who concludes the contract of carriage with the carrier, as if it did, it would qualify as the contractual shipper, not the documentary shipper.

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[842] R Thomas, 'The Position of Shipper under the Rotterdam Rules' (2010) 2 EJCCL 22, 23.
[843] Particularly where contracts of sale require payment as cash against documents, sellers are keen to be named as shipper on the transport document in order to obtain the transport document and guaranty payment for the goods. See UN Doc., A/CN.9/WG.III/WP.62 paras 5, 9; UN Doc., A/CN.9/594 paras 219-220.
[844] UN Doc., A/CN.9/WG.III/WP.21 para 119; UN Doc., A/CN.9/510 para 164; UN Doc., A/CN.9/552 para 155; UN Doc., A/CN.9/591 para 172.
[845] UN Doc., A/CN.9/WG.III/WP.55 paras 34-39. Some delegations stated that the position of the f.o.b. seller is not a matter for a Convention on carriage of the goods; it is instead a matter for a Convention on contracts of sale. However, majority of the delegations pointed out that f.o.b. sellers are generally actual shippers, and the relationship between the f.o.b. seller and carrier is not clear; therefore, the issue needs to be dealt with under the Convention. See also Thomas, 'The Position of Shipper under the Rotterdam Rules' (n 842) 25; 40th Conference of Comite Maritime International (CMI 2012 Beijing) http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Panel%204-%20final%20clean.pdf, 6 accessed 29.06.2015.
[846] Art 1(9) of the Rotterdam Rules.

As seen, the definition expressly excludes the contractual shipper from the notion of "documentary shipper"; thereby unlike the "actual shipper", the documentary shipper cannot be the same person as the contractual shipper.[847] On the other hand, other than the shipper, any other person such as servants, agents or independent contractors of the contractual shipper, freight forwarders, and so forth might qualify as the documentary shipper.[848] More importantly, under the Rotterdam Rules, to be classed as the documentary shipper, the person does not have to be the actual deliverer of the goods; i.e. being consignor of the goods is not a precondition for being the documentary shipper.[849] However, it should be borne in mind that although the consignor is not necessarily the documentary shipper, depending on the facts, the consignor and documentary shipper might be the same person.[850] For instance, where the buyer concludes a contract of carriage with a carrier and the goods are delivered by the seller, or on behalf of the seller by its agent, and the seller accepts to be named as the shipper on the transport document and is so named, the seller will be both the consignor of the goods and the documentary shipper. In this respect the "documentary shipper" differs from the "actual shipper", as under the Hamburg Rules, to be classified as an actual shipper, the person must be the deliverer of the goods.[851] In the former drafts of the Rotterdam Rules, as a similar concept to the "actual shipper", the term "consignor" was included and was defined as the "person that delivers the goods to a carrier for a carriage".[852] However, in a later session it was pointed that the consignor of the goods might either be the contractual shipper or the documentary shipper; therefore, the term "consignor" was found unnecessary and it was deleted.[853] Consequently, under the Rotterdam Rules, being the consignor of the goods is not a requirement for qualifying as a documentary shipper; the only restriction is that the person must not be the counterpart of the carrier under the contract of carriage.

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[847] UN Doc., A/CN.9/WG.III/WP.103 para 2; Above part 7.1.1.
[848] Thomas, 'The Position of Shipper under the Rotterdam Rules' (n 842) 25.
[849] Sturley and others (n 26) para 6.064.
[850] Baughen, 'Obligations Owed by the Shipper to the Carrier' (n 32) 169.
[851] Art 1(3) of the Hamburg Rules; Above part 7.1.1.
[852] UN Doc., A/CN.9/WG.III/WP.21 para 120; UN Doc., A/CN.9/WG.III/WP.21/Add.1 para 13.
[853] UN Doc., A/CN.9/510 para 77; UN Doc., A/CN.9/594 para 218; UN Doc., A/CN.9/WG.III/WP.103. A proposal was submitted by Italy, Republic of Korea and the Netherlands, and it was emphasised that the shipper and documentary shipper are different parties, but the consignor might be the same person as the shipper or the documentary shipper; therefore, it was suggested that the term "consignor" should be deleted. In the 21st session, in accordance with this proposal, the term "consignor" was deleted from the Convention. See also UN Doc., A/CN.9/645 paras 21-24.

Secondly, to qualify as a documentary shipper, there must be acceptance to be named as the shipper on the transport document. This precondition consists of three ingredients: (a) acceptance; (b) named as shipper; and (c) transport document:

(a) Acceptance: In the former drafts, the documentary shipper was mentioned as the person identified as shipper in the contract particulars and also accepts the transport document.[854] The word "accepts" was used for acceptance of the transport document, but not for acceptance to be named as shipper on the transport document. In a later session, it was noted that although the word "accepts" accurately applies to negotiable transport documents, the meaning of the word is not clear with respect to non-negotiable transport documents; therefore the word "receives" was also added into the draft article.[855] Finally, it was stated that use of the word "accepts" is ambiguous and allows for too broad an interpretation; thus to narrow the interpretation, the draft article was reworded as "accepts to be named as shipper in the transport document".[856]

However, the provision still involves ambiguities regarding use of the word "accepts". Firstly, under the provision it is not clear whether acceptance by the person must be express, or whether implied acceptance will be enough. The preparatory works do not provide an answer to this issue. Where a non-contractual person is named as shipper, it will have obligations and will be held liable toward the carrier, in addition to the contractual shipper.[857] Therefore, if the consequences of being a documentary shipper are taken into account, it can be argues that acceptance has to be express. Secondly, the provision does not say anything about the time period for accepting to be named as shipper on the transport document. The answer might be found through interpretation of Article 31(1), which requires the shipper to provide information in a timely manner about "the name of the party to be identified as the shipper in the contract particulars".[858] From this wording, it can be concluded that the contractual

[854] Draft Art 7.7, UN Doc., A/CN.9/WG.III/WP.21, 40; Draft Art 31, UN Doc., A/CN.9/WG.III/WP.32, 37.
[855] UN Doc., A/CN.9/510 para 164; UN Doc., A/CN.9/552 para 157; UN Doc., A/CN.9/WG.III/WP.56 paras 36-37; UN Doc., A/CN.9/WG.III/WP.56 draft Art 34; Zunarelli, 'The Liability of the Shipper' (n 111) 351.
[856] UN Doc., A/CN.9/591 paras 172, 175; UN Doc., A/CN.9/WG.III/WP.81, Draft Art 1(10) fn. 11; UN Doc., A/CN.9/621 para 255.
[857] Art 33 of the Rotterdam Rules; Chapter 2.1.3.
[858] Art 31(1) of the Rotterdam Rules; Chapter 4.2.3.

shipper has to provide either its name or the documentary shipper's name as shipper to be written on the transport document.[859] Accordingly, if Article 1(9) is read in conjunction with Article 31(1), it is submitted that the non-contractual person can accept being named as shipper on the transport document at the time the contract of sale is concluded, or subsequently; however acceptance has to be given before the issuance of the transport document.

Lastly, from the definition of a documentary shipper, it is not clear whether a notification of the non-contractual party's acceptance of being named shipper on the transport document is necessary, and if it is, to whom such notification has to be directed. The answer may again be found in Article 31(1), and from its wording it is submitted that the non-contractual person's acceptance of being named as shipper on the transport document has to be directed to the contractual shipper. Article 31(1) implies that for the compilation of the contract particulars and issuance of the transport document, the non-contractual party must inform the contractual shipper if it accepts to be named as shipper on the document, and the contractual shipper must then provide information about the name of the non-contractual party to the carrier in a timely manner before the issuance of the document.

It must be emphasised that the indication of the name of a person other than the shipper on the transport document might not be sufficient to prove the existence of the named person's acceptance. For example, assuming that the buyer and seller conclude an f.o.b. contract, under which the buyer must accordingly conclude a contract of carriage with a carrier, and the seller will not be involved in the carriage contract. However, the contractual shipper breaches its obligation under the contract of sale by naming the f.o.b. seller as the shipper to the carrier, without prior acceptance by the seller, and the seller's name is consequently included as shipper on the transport document. As the Convention is silent on the matter, determining whether the named person has accepted to be named as shipper on the transport document will depend on the interpretation of national courts.[860] Currently, under English law, it is generally

[859] Chapter 4.2.3. See also Sturley and others (n 26) para 6.035; Fujita, 'Shipper Obligations and Liabilities under the Rotterdam Rules' (n 32) part V.2; Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 170; Lorenzon, 'Obligations of the Shipper to the Carrier' (n 32) para 31-02.
[860] Reynolds (n 310) para 13.25.

accepted that where a person is named as shipper on the bill of lading, a contractual nexus arises between it and the carrier on the basis of the transport document.[861] And for the formulation of a contract, general principles of contract law are essential; i.e. there must be offer, consideration and acceptance.[862] Although the notion of a documentary shipper is not based on a contractual nexus, where a person qualifies as the documentary shipper, a statutory relationship arises and it will have the same obligations and liabilities towards the carrier as the shipper has.[863] Therefore, it can be argued that if the person named as the shipper on the transport document proves that it was named without its acceptance, it would not qualify as the documentary shipper.[864]

(b) Named as shipper: The provision requires the indication of the non-contractual person's name on the transport document as shipper; however, there is no clarification about the word "name". It is not clear whether the actual trade name of the non-contractual person has to be written on the transport document or whether a vague name identifying it will be sufficient. In the *travaux préparatoires*, a similar issue was discussed, in relation to the name of the carrier, and it was concluded that the name has to be the actual trade name rather than a vague name.[865] This author contends that the same explanation should be applied to the name of the documentary shipper, as including a vague name would not be enough to sufficiently identify a documentary shipper for the purposes of imposing obligations and conferring rights.

(c) Transport document: The definition of documentary shipper requires that the name of the non-contractual person has to be written on the transport document, therefore the existence of a transport document within the meaning of the

[861] *Pyrene Co Ltd. v Scindia Navigation Co Ltd*. [1954] 2 QB 402, *The Tromp* [1921] P. 337, 350; *Evergreen Marine Corp v Aldgate Warehouse (Wholesale) Ltd.* [2003] 2 Lloyd's Rep. 596, 602 para 29; *President of India v Metcalfe shipping Co Ltd* [1970] 1 QB 289 (CA), 303-304. See Below part 7.2.
[862] *The Swan* [1968] 1 Lloyd's Rep 5, 12-13; *The Rhodian River* [1984] 1 Lloyd's Rep 373; *The Double Hapiness* [2007] 2 Lloyd's Rep 131, 136; *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2011] EWHC 56 (Comm), para 63. See also *Scrutton* (n 24) para 1-017; Aikens and others (n 154) para 7.5; *Halsbury* (n 465) para 231 *et seq*.
[863] Arts 1(9), 33 of the Rotterdam Rules; Chapter 2.1.3.
[864] In *The Athanasia Comninos* [1990] 1 Lloyd's Rep 277, 280, the court stated that shippers would have been discharged from liability if they had proved that they were named as participants in the contract without their consent. See also *Scrutton* (n 24) para 2-037. The authors stated that there will be no contract unless the parties' conduct is consistent with the intention to make a contract.
[865] UN Doc., A/CN.9/621 para 280; Chapter 4.2.1.1.

Convention is compulsory for the existence of a documentary shipper.[866] For instance, if there is a document not issued by the carrier or which does not evidence a contract of carriage (e.g. a mate's receipt), such document will not be classified as a transport document under the Convention; therefore even if the name of the non-contractual person is indicated on the document, the person will not qualify as a documentary shipper.

Finally, it could be questioned whether consent of the contractual shipper is necessary for being a documentary shipper under the Convention. Under Article 1(9), consent of the contractual shipper is not stated as a precondition of being a documentary shipper. According to Sturley, "if the shipper consents to have an FOB seller named as the shipper in the document or record and that person 'accepts' to be so named, then the FOB seller is the documentary shipper …"; accordingly, the shipper's consent is necessary.[867] It seems Sturley reached this conclusion from considering the effect of Article 35, which states that if the shipper consents, the documentary shipper is entitled to obtain the transport document from the carrier.[868] However, the author of this thesis believes that Article 35 should not be considered in determining the necessity of the shipper's consent. Indication of the name of the shipper occurs prior to application of Article 35; i.e. the name must first be indicated for the transport document to be compiled, and secondly, after the transport document has been compiled, then the person entitled to obtain the transport document can be determined in accordance with the shipper's consent under Article 35.

The determination of whether or not consent of the contractual shipper is necessary seems to depend on the provider of the information. Although, pursuant to Article 35,[869] the issuer of the transport document is the carrier, it is not the provider of all contract particulars indicated in a transport document. Article 31(1) expressly indicates that the name of the party to be identified as the shipper on the transport

[866] Pursuant to Article 1(14) of the Rotterdam Rules, to qualify as a transport document, firstly, the document must be issued under a contract of carriage; secondly, the issuer of the document must be the carrier; thirdly, the document must be a receipt for the goods; and fourthly, the document must evidence or contain a contract of carriage. See Chapter 3.2.
[867] Sturley and others (n 26) para 7.023.
[868] Ibid para 7.023 n 71.
[869] Art 35 of the Rotterdam Rules; Chapter 3.3.

document must be provided by the shipper.[870]Article 31(1) implies that even if the non-contractual person accepts to be named as the shipper on the transport document, if the contractual shipper, as the provider of the information, does not consent, the non-contractual person might not be the documentary shipper. This is because the contractual shipper can prevent the non-contractual person from being named as shipper on the transport document by not passing the information to the carrier. Additionally, there might be cases where the carrier gives the transport document to the consignor of the goods to complete information, such as information about the cargo, the shipper, the consignee, and so forth.[871] In such cases, even if the consignor wants to include itself as shipper on the transport document, because of the effect of Article 31(1), it seems that without consent of the contractual shipper, the consignor cannot do so.[872] Although the same conclusion as Sturley is reached, that the shipper's consent as to the name of the documentary shipper is necessary, this conclusion is reached not because of the effect of Article 35, but as a result of the effect of Article 31(1).

In sum, to be classified as a documentary shipper under the Convention, the foregoing preconditions, i.e. being a person other than the contractual shipper and accepting to be named as shipper on the transport document, have to be satisfied. Also, other than the preconditions in Article 1(9), consent of the contractual shipper would be needed to qualify as the documentary shipper. Other than the contractual shipper, any other party can be a documentary shipper if it accepts to be named as shipper on the transport document. Under the Convention, being the consignor of the goods is not a precondition to being a documentary shipper; therefore where a non-contractual person accepts to be named as shipper on the transport document it can be classified as the documentary shipper, irrespective of whether or not it delivers the goods. Lastly, it must be added that accepting to be named as shipper on the transport document does not create a contractual relationship between carrier and documentary shipper, as their relationship is based on statutory regulation under the Convention.

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[870] Art 31(1) of the Rotterdam Rules; Chapter 4.2.3.
[871] Van der Ziel, 'The Issue of Transport Documents' (n 230) part 4; Girvin, *Carriage of Goods by Sea* (n 263) para 5.04.
[872] As pointed out, problems related to consent of the shipper could be resolved by including special stipulations in the contract of sale. See M Goldby, 'The Performance of the Bill of Lading's Functions under UNCITRAL's Draft Convention of the Carriage of Goods: Unequivocal Legal Recognition of Electronic Equivalents' (2007) 13(3) JIML 160, 166-167.

7.2- Identification of the Shipper and Documentary Shipper under the Rotterdam Rules

As examined earlier, [873] Article 36 lists neither the name of the shipper nor documentary shipper as a mandatory contract particular; however because of the effect of Article 31(1), which requires the shipper to provide information about the person "to be named as shipper on the transport document", the transport document must contain at least a name. In the preparatory works, it was pointed out that in practice, transport documents always indicate a person's name as shipper.[874] However, due to use of the word "to be named as shipper on the transport document" in Article 31(1), it would not be clear whether the named person is the contractual or documentary shipper. If it is the documentary shipper, then the carrier needs to identify the contractual shipper, as the contractual shipper's liability against the carrier does not cease only because of the existence of a documentary shipper.[875] Although it was stated in the preparatory works that in practice, the person named on the transport document is often the documentary shipper, it is impossible to make a generalisation, as the issue will vary depending on the facts and applicable law.[876]

Under English law, identification of the contractual shipper depends on the type of contract of sale, the existence of an initial contract of carriage, information on the transport document and the intention of the parties in every case.[877] There are different types of sale contracts[878] concluded in practice between seller and buyer, usually before the conclusion of the contract of carriage, and depending on the type of sale contract, either the seller or buyer is under a duty to conclude a contract of carriage with a carrier.[879] The contract of sale and the contract of carriage will have at least one party in common, therefore the type of sale contract is important to determine the carrier's counterpart under the contract of carriage.

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[873] Arts 31(1), 36 of the Rotterdam Rules; Chapter 4.2.3.
[874] UN Doc., A/63/17 para 115.
[875] Art 33(2) of the Rotterdam Rules; Chapter 2.1.3.
[876] UN Doc., A/63/17 para 115.
[877] *Pyrene Co Ltd. v Scindia Navigation Co. Ltd.* [1954] 2 QB 402, 424. See also Aikens and others (n 154) para 7.78.
[878] Although there are many types of contracts of sale, in practice c.i.f. and f.o.b. sales are commonly used, therefore in this section, only these two types of contracts of sale will be explained.
[879] *Carver* (n 54) para 4-003.

In c.i.f. sales, unless otherwise agreed, the seller is under a duty to conclude a contract of carriage with a carrier; and in order to perform its delivery obligation under the contract of sale, the goods have to be delivered to the contracted carrier, either by the seller itself or by its agent or servant.[880] Accordingly, the seller is both the deliverer of the goods and the original party of the contract of carriage, and furthermore, the seller's name is usually indicated as the shipper on the bill of lading.[881] Therefore, in c.i.f. sales, the contractual shipper and the person named as shipper on the bill of lading are usually the same person i.e. the c.i.f. seller, thus the issue of identification of the documentary shipper will not arise.

On the other hand, unlike c.i.f. sales, in f.o.b. sales, the person who contracts with the carrier, and the person who delivers the goods to the carrier might not be the same.[882] As with the c.i.f. seller, the f.o.b. seller is also obliged to deliver the goods to the carrier, either by itself or by someone acting on its behalf.[883] Unless otherwise agreed, the f.o.b. seller is not bound to make shipping arrangements and conclude the carriage contract. However, f.o.b. sales are flexible and have many variations; thus depending on the agreement between seller and buyer, either party concludes the contract of carriage with the carrier. Therefore, it is pointed out that in f.o.b. contracts, the term "shipper" may cover two different parties: the person, who consigns the goods to the carrier for shipment and to whom a bill of lading is issued,[884] and the person who has concluded a contract of carriage with the carrier.[885] Under English law, the relationships of the f.o.b. buyer and f.o.b. seller with the carrier are examined in the

[880] S. 27 of Sale of Goods Act 1979; *Ireland v Livingston* (1872) LR 5 HL 395, 406; *Houlder Bros & Co v Commissioner of Public Works* [1908] AC 276, 290; *Biddell Bros v E Clemens Horst Co* [1911] 1 KB 934, 962; *Johnson v Taylor Bros* [1920] AC 144, 155-156; *Tsakiroglou & Co v Noblee Thorl GmbH* [1962] AC 93. See also *Carver* (n 54) paras 4.004-011; *Benjamin* (n 136) para 19-025; M Bridge, *The International Sale of Goods: Law and Practice* (2nd edn, Oxford 2007) para 4.101; F Lorenzon and others, *Sassoon C.I.F. and F.O.B. Contracts* (5th edn, Sweet & Maxwell 2012) para. 3-005 *et seq*.

[881] Girvin, *Carriage of Goods by Sea* (n 263) para 1.29. However, if the seller and the buyer have agreed, instead of the seller's name, the buyer's name might be indicated as shipper on the bill of lading. See *Hansson v Hamel & Horley Ltd* [1922] 2 AC 36.

[882] For further details on f.o.b. contracts see *Carver* (n 54) paras 4-011 *et seq*.; *Benjamin* (n 136) para 20-01 *et seq*.; Bridge (n 880) para 3.01 *et seq*.; *Sassoon* (n 880) para 9-001 *et seq*.

[883] *Wimble, Sons & Co Ltd v Rosenberg & Son*s [1913] 3 KB 743; *Newman Industries Ltd v Indo-British Industries Ltd* [1956] 2 Lloyd's Rep 219. See also *Benjamin* (n 136) para 20-012; *Sassoon* (n 880) para 10-001 *et seq*.

[884] *Benjamin* (n 136) para 20-005; Aikens and others (n 154) paras 3.108-3.116. The authors highlighted that because of the receipt function of the bill of lading, as a general principle, a bill of lading is usually issued to the person who consigns the goods to the carrier for shipment.

[885] Baughen, 'The Legal Status of The Non-Contracting Shipper' (n 831) 21.

well-known case *Pyrene Co. Ltd. v Scindia Navigation Co. Ltd*.[886] In this case, Devlin J. described three different categories and indicated the party who could qualify as contractual shipper in each case.

In the first category, it is stated that under the classic f.o.b. contract where there is no advance booking, the ship is nominated by the buyer, the goods are put on board by the seller, and the seller is indicated as shipper on the bill of lading, the seller is the counterpart of the carrier under the bill of lading contract and qualifies as the shipper.[887] This is because it is generally assumed that even without a prior contractual relationship, where the name of the f.o.b. seller is indicated as the shipper on the bill of lading, a contractual relationship arises between the f.o.b. seller and the carrier on the basis of the bill of lading contract.[888] If, instead of the seller, the buyer is named as the shipper on the bill of lading, the buyer will be the shipper and counterpart of the carrier under the bill of lading contract, notwithstanding that the goods have been consigned to the carrier by the seller.[889]

Moreover, it is also pointed out that although there is no initial contract of carriage, when the seller delivers the goods alongside the ship, it impliedly invites the carrier to make a contract and by the carrier loading the goods onto the ship, it impliedly accepts the invitation, thus an implied contract of carriage arises out between the seller and the carrier.[890] Under this implied contract, the seller becomes a party to the contract of carriage, at least until the bill of lading is issued in the name of the buyer. However, when the bill of lading is issued in the buyer's name, the seller ceases to be a party to the contract of carriage, as the contractual nexus will arise between buyer and carrier on the basis of bill of lading contract. If no bill of lading is issued, then the

[886] [1954] 2 QB 402.
[887] Ibid 424; *Evergreen Marine Corp v Aldgate Warehouse (Wholesale) Ltd.* [2003] 2 Lloyd's Rep 596 paras 29-30. See also *Carver* (n 54) para 4-012; *Benjamin* (n 136) paras 20-003, 20-060; Bridge (n 880) para 3.13 *et seq*.
[888] *The Tromp* [1921] P. 337, 350; *Evergreen Marine Corp v Aldgate Warehouse (Wholesale) Ltd.* [2003] 2 Lloyd's Rep 596, 602 para 29; *President of India v Metcalfe shipping Co Ltd* [1970] 1 QB 289 (CA), 303-304. In this case, it is indicated that a bill of lading creates a contractual relationship between the carrier and the consignor to whom bill of lading is issued. See also Baughen, 'The Legal Status of The Non-Contracting Shipper' (n 831) 22, 30.
[889] *Pyrene Co Ltd. v Scindia Navigation Co Ltd*. [1954] 2 QB 402, 424. See also *Carver* (n 54) para 4-012; *Benjamin* (n 136) para 20-064.
[890] *Pyrene Co Ltd. v Scindia Navigation Co Ltd*. [1954] 2 QB 402, 426; *Scruttons Ltd. v Midland Silicones Ltd* [1962] AC 446, 471; *Heskell v Continental Express Ltd and Another* [1950] 1 All ER 1033, 1041; *Playing Cards (Malaysia) Sdn Bhd v China Mutual Navigation Co Ltd* [1980] 2 MLJ 182, 183.

seller will remain the contractual shipper under the implied contract.[891]

The second category described by Devlin J. arises where the f.o.b. seller is asked by the f.o.b. buyer to make shipping arrangements. In such situations, if the seller makes the shipping arrangements with a carrier on its own behalf, and takes the bill of lading in its name as with c.i.f. contracts, it will be regarded as the original party to the contract of carriage.[892] In such a case, there will not be any contractual relationship between the buyer and the carrier until the buyer acquires contractual rights and obligations through the transfer of the bill of lading.[893] If no bill of lading is issued or the issued bill is not transferred to the buyer, the buyer will not be a party to the contract of carriage. On the other hand, if instead of acting on its own behalf the seller acts as agent of the buyer, the buyer will be qualify as the contractual shipper.[894]

In the third category described by Devlin J., the buyer or its agent makes the shipping arrangements, but the seller puts the goods on board, obtains the mate's receipt and tenders it to the buyer or its agent; the buyer will then be able to obtain the bill of lading that names the buyer as shipper, from the carrier.[895] In such cases, it is obvious that the buyer is the original party to the contract of carriage *ab initio.* However, problems may arise where the f.o.b. buyer and carrier conclude an antecedent contract of carriage, but the name of the seller is indicated as shipper on the bill of lading.[896] As, apart from the contractual relationship between the f.o.b. buyer and the carrier, where the seller is named as shipper on the bill of lading, a contractual relationship might arise between the seller and carrier on the basis of the bill of lading contract. Therefore, despite the existence of the antecedent contract between the f.o.b. buyer and the carrier, if it is assumed that there is a contractual nexus between the f.o.b. seller and carrier, the seller might qualify as the shipper.[897]

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[891] *Carver* (n 54) para 4-012.
[892] *Pyrene Co Ltd. v Scindia Navigation Co Ltd*. [1954] 2 QB 402, 424; *The El Amria and the El Minia* [1982] 2 Lloyd's Rep 28 (CA), 32; *Scottish & Newcastle Int Ltd v Othon Ghalanos Ltd*. [2008] 1 Lloyd's Rep 642 para 34. See also *Carver* (n 54) para 4-015; *Benjamin* (n 136) para 20-065.
[893] *The El Amria and the El Minia* [1982] 2 Lloyd's Rep 28 (CA), 32.
[894] *Carver* (n 54) 162 n 116; *Benjamin* (n 136) para 20-065.
[895] *Pyrene Co Ltd. v Scindia Navigation Co Ltd*. [1954] 2 QB 402, 424. See also *Carver* (n 54) paras 4-018, 4-025; *Benjamin* (n 136) paras 20-003, 20-066.
[896] *Carver* (n 54) para 4-025.
[897] *Cho Yang Shipping v Coral (UK)* [1997] 2 Lloyd's Rep 641, 645-646. In this case, there was an antecedent contract, but the consignor was named as shipper on the bill of lading, and it was said that there was a contractual nexus between the consignor and carrier on the basis of the bill of lading

As seen from the above, under English law, the person named as shipper on the bill of lading is generally assumed to be the contractual shipper under the bill of lading contract, and depending on the facts, not only the contracting party under the contract of carriage but also the consignor of the goods can qualify as the shipper.[898] This is because under English law, because of the receipt function of the bill of lading;[899] as a general principle, it is accepted that a bill of lading is usually issued to the consignor of the goods, who delivers them to the carrier for shipment, and that a contractual relationship arises between the named shipper and the carrier on the basis of bill of lading contract.[900] However, it should be noted that in some cases, even if the seller is named as shipper on the bill of lading, the buyer might qualify as the contractual shipper instead of the seller.[901] For instance, where the bill of lading contains the name of the buyer as the consignee and the goods are deliverable to the order of the consignee, even though the bill of lading indicates the seller's name as shipper, it might be assumed that the seller has acted as agent of the buyer, therefore the buyer might qualify as the shipper.[902] Furthermore, again depending on the facts, in some cases both seller and buyer might qualify as the shipper. For instance, in *The Athanasia Comninos,*[903] C.E.G.B. was the f.o.b. buyer, who concluded the contract of

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contract, and the consignor was the shipper under the bill of lading contract. See also *Carver* (n 54) paras 4-018, 4-025. The authors point out that where the f.o.b. buyer makes the shipping arrangements but the f.o.b. seller is named as shipper on the bill of lading, the f.o.b. seller might be the original party to the bill of lading contract, whereas the f.o.b. buyer would be the original contracting party under the carriage contract, but not the one contained in or evidenced by the bill of lading.

[898] *TICC v COSCO* [2001] All ER (D) 45 (Dec). In this case, on the bills of lading, either Cycle or IFB was named as shipper, but they were in fact acting as agent of TICC who was named as consignee on the bills of lading. It was stated that Cycle and IFB were named shippers without any qualification, therefore, they were principal parties of the contract of carriage, as well as the shippers. See also *Cho Yang Shipping v Coral (UK)* [1997] 2 Lloyd's Rep 641, 646; *Boliden Ore v Dawn Maritime Corporation* [2000] 1 Lloyd' Rep 237; Aikens and others (n 154) para 7.71; Cooke and others (n 225) para 18.77.

[899] Chapter 3.2.3.

[900] There are some exceptions to the general principle. For instance, where the consignor does not have any intention to reserve the right of disposal, and asks for the issuance of a bill of lading that names another person as the shipper, then the bill of lading can be issued to that person. See Aikens and others (n 154) paras 3.108, 3.112-116.

[901] *Cho Yang Shipping v Coral (UK)* [1997] 2 Lloyd's Rep. 641, 643; *The Delfini* [1988] 2 Lloyd's Rep 599, 605; *The Albazero* [1974] 2 Lloyd's Rep 38, 44; *The Berge Sisar* [2001] 1 Lloyd's Rep. 663 para 19. See also *Carver* (n 54) para 4-013 n 103; *Benjamin* (n 136) para 20-009.

[902] *Dickenson v Lano* (1860) 2 F & F 188; *East West Corp v DKBS 1912 A/S* [2003] 1 Lloyd's Rep 239 para 34; *Union Industrielle Et Maritime v Petrosul International Ltd (The Roseline)* [1987] 1 Lloyd's Rep 18, 22 (Federal Court of Canada). See also Aikens and others (n 154) paras 7.72- 73. As the authors emphasised, particularly in cases where the seller acts as agent of the buyer (e.g. where property passes unconditionally on shipment), instead of evidencing a contract of carriage between carrier and the named shipper (the seller), the bill of lading might evidence a contract of carriage between the carrier and the consignee (the buyer).

[903] [1990] 1 Lloyd's Rep 277.

affreightment with the time charterer, and was named as consignee on the bill of lading, whereas Devco the f.o.b. seller, who delivered the goods to the carrier was named as the shipper on the bill of lading. Mustill J. stated that " [t]o show that C.E.G.B. were principals would not relieve Devco from liability, but would entail that both parties were principals *vis-a-vis* the plaintiffs."[904] Consequently under English law, in f.o.b. contracts, the person with the contractual nexus with the carrier is assumed as the shipper, and depending on the facts, the f.o.b. seller, f.o.b. buyer or both of them can qualify as the contractual shipper.

With regard to the Rotterdam Rules, if English law is applicable, the shipper and documentary shipper would be identified in accordance with the *ratio* in *Pyrene Co. Ltd. v Scindia Navigation Co. Ltd*.[905] However, a problem might arise about the concept of "documentary shipper", because as explained previously, [906] the Convention introduces the concept of "documentary shipper" to provide a legal basis for the f.o.b. seller, and expressly provides that to qualify as documentary shipper, a person other than the contractual shipper has to accept to be named as shipper on the transport document. The foregoing explanations show that under English law, the legal position of the f.o.b. seller is already regulated by common law, i.e. case law, and it is usually presumed that where the name of the seller is indicated as shipper on the bill of lading, a contractual nexus arises between the seller and carrier on the basis of the terms of the bill of lading contract. Therefore, the question might arise about the classification of the f.o.b. seller: will it qualify as contractual or documentary shipper for the purposes of the Convention?[907]

The determination of whether there is a contractual relationship between the carrier and the named shipper will depend on the facts and the interpretation of the courts. If the court decides that there is a contractual nexus between the f.o.b. seller named as shipper on the transport document and the carrier, on the basis of the terms of the transport document, the f.o.b. seller would qualify as the contractual shipper within

[904] Ibid 280.
[905] [1954] 2 QB 402, 424.
[906] Art 1(9) of the Rotterdam Rules; Above part 7.1.2.
[907] Thomas, 'The Position of Shipper under the Rotterdam Rules' (n 842) 25.

the meaning of Article 1(8) of the Convention.[908] It is submitted that in each of the three categories indicated by Devlin J. in *Pyrene,* the concept of "documentary shipper" will not arise. This is because in the first two, there is a contractual link between the f.o.b. seller and the carrier on the basis of the transport document, therefore, the seller would fall within the category of contractual shipper, rather than documentary shipper, under the Convention. Also, in the third category, the f.o.b. seller's name is not indicated as shipper on the transport document, therefore one of the requirements of being the documentary shipper[909] will not be satisfied, and there will be no documentary shipper.

However, where the f.o.b. buyer concludes an initial contract of carriage with a carrier, but the name of the seller is indicated as shipper on the transport document, then the named seller might qualify as the documentary shipper, while the f.o.b. buyer might qualify as the contractual shipper.[910] By concluding the contract of carriage with the carrier, the f.o.b. buyer would meet the requirements for qualifying as the contractual shipper, and by accepting to be named as shipper on the transport document, the f.o.b. seller would meet the requirements for qualifying as the documentary shipper. [911] Other than in situations as this, it seems that the introduction of the "documentary shipper" does not create significant changes on the identification issue under English law.

Consequently, the determination of the existence of a contractual relationship and the identification of the shipper and documentary shipper will depend on the applicable law, and under English law, the types of contract of sale and shipping document, the existence of an initial contract of carriage, information on the transport document and the intention of the parties, have crucial importance on the identification of those parties.

[908] Art 1(8) of the Rotterdam Rules; Baughen, 'Obligations Owed by the Shipper to the Carrier' (n 32) 169.
[909] Above part 7.1.2.
[910] Baughen, 'Obligations Owed by the Shipper to the Carrier' (n 32) 169; Thomas, 'The Position of Shipper under the Rotterdam Rules' (n 842) 25; Bulut, 'Being An FOB Seller' (n 172) 295.
[911] For the requirements of qualifying as shipper and documentary shipper, see Above parts 7.1.1-2.

CHAPTER 8: IDENTIFICATION OF THE CONSIGNEE UNDER THE ROTTERDAM RULES

The Rotterdam Rules include a provision for the definition of the term "consignee", contain detailed provisions related to the rights, obligations and liabilities of the consignee, regulate the transfer of the rights and obligations to the consignee where there is a negotiable transport document, and more importantly, they introduce a specific chapter, Chapter 9, setting the rules related to delivery of the goods.[912] As the consignee has various obligations, liabilities and rights, by virtue of being the consignee, it can be sued under the Convention, even though it is not an original party to the contract of carriage. Identification of the consignee may have crucial importance for carriers as under the Convention, an essential obligation of the carrier is that it must deliver the goods to the consignee.[913] Furthermore, pursuant to Article 12(1), the carrier's period of responsibility starts when the goods are received from the shipper/documentary shipper and ends when the goods are delivered to the consignee.[914] Accordingly, to properly perform its delivery obligation and conclude its period of responsibility, the carrier first needs to know who the consignee is. Also, to avoid losing their rights to sue a consignee for breach of its obligation(s) under the Convention, they must bring the action before expiration of the 2-year time bar; but evidently, they need to first identify the consignee.[915] Consequently, if the Rotterdam Rules enter into force the applicability of provisions on the obligations, liabilities and rights of the consignee will depend on the question: "who is the consignee?"

Although the Convention does not contain any provision devoted only to identification of the consignee, due to the close connection between the "consignee" and delivery of the goods, right of control, and transfer of rights,[916] in this Chapter, identification of the consignee will be analysed on the basis of these rules. The Chapter is structured as follows: in the first section, the notion of "consignee" under previous carriage of goods by sea Conventions, and the Rotterdam Rules will be

[912] Arts 1(11), 57-58, Chapter 9 of the Rotterdam Rules.
[913] Arts 11,13 of the Rotterdam Rules.
[914] Art 12(1) of the Rotterdam Rules.
[915] Art 62 of the Rotterdam Rules; Chapter 2.1.4, 2.2.4, 2.3.4, 2.4.2.
[916] Debattista, 'Delivery of the Goods' (n 34) para 43-04; Berlingieri, 'Revisiting the Rotterdam Rules' (n 81) 627; Van der Ziel, 'Delivery of the Goods' (n 34) 194.

examined; and in the second section, identification of the consignee will be analysed for each type of transport document separately.

8.1- The Notion of "Consignee" under the Rotterdam Rules

The Hague and Hague-Visby Rules do not contain any provision for the definition of the consignee, nor do they expressly mention delivery of the goods as an obligation of the carrier.[917] On the other hand, the Hamburg Rules provide a definition and state that the consignee is "the person entitled to take delivery of the goods".[918] The Rotterdam Rules provide a similar definition and define the consignee as "a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record"[919]. The essential difference between the definitions is that unlike the Hamburg Rules, as explained below, the definition in the Rotterdam Rules indicates the sources of entitlement of the right to obtain delivery.

Pursuant to Article 1(11), to qualify as consignee, there must firstly be a person, i.e. a human being or a legal person.[920] Secondly, such person must be entitled to delivery of the goods. As the second requirement, the definitions of "goods" and "delivery" have crucial importance. The Convention contains a definition of the word "goods",[921] according to which the goods must be those undertaken to be carried by the carrier under a contract of carriage; actual carriage is not necessary. On the other hand, although delivery of the goods is important in identifying the consignee, the word "delivery" is not defined under the Convention. Sturley states that because of the combined effect of Article 12, which regulates the period of responsibility of the carrier, and Article 48, which regulates the goods remaining undelivered, defining the word "delivery" would be superfluous.[922] These two provisions would certainly be helpful to determine the extent of delivered and undelivered goods, however in order to determine whether or not delivery has occurred and answer the question of what

[917] Sturley and others (n 26) para 8.001.
[918] Art 1(4) of the Hamburg Rules.
[919] Art 1(11) of the Rotterdam Rules.
[920] n 499.
[921] Art 1(24) defines the goods as "the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier."
[922] Arts 12, 48 of the Rotterdam Rules; Sturley and others (n 26) para 8.011.

constitutes delivery, the meaning of "delivery" needs to be known. As there is no definition for "delivery" under the Convention the meaning and occurrence of delivery will has to be determined under by the applicable law.

Under English law, it has been accepted that delivery occurs when the goods are completely under the dominion and control of the consignee; in the other words, even if the goods have been discharged from the ship, delivery will not take place until the carrier's right of disposition ends and the consignee has complete control over the goods.[923] It must be pointed out that under English law the delivery of the goods does not have the same meaning as the discharge of the goods from the ship. The distinction between delivery and discharge of goods is highlighted in *The Berge Sisar.*[924] The House of Lords stated that delivery of the goods is the carrier's final act in performing the contract of carriage, and that when the goods are delivered, the carrier's bailment on the goods ends. Furthermore, contrary to discharge of the goods, delivery of the goods comprises full transfer of possession of the goods.[925] In most cases, discharge of the goods occurs before delivery; however in certain cases, delivery of the goods might occur at the same time as discharge. For instance, if the carrier and shipper agree that the carrier's duty to discharge the goods is to be performed by the cargo interest.[926] Therefore, if the transport document contains an FIO clause, which shifts performance of the duty of discharge from carrier to

[923] *Meyerstein v Barber* (1866) LR 2 CP 38, 53. In this case, it was emphasised that although the goods are discharged from the ship and warehoused, as long as the carrier has a lien upon the goods, delivery cannot occur, as the consignee does not have complete control over the goods. Also in *Trafigura Beheer BV v Golden Stavraetos Maritime Inc (The Sonia)* [2003] 2 Lloyd's Rep 201, the goods were supposed to be delivered at Lagos, but the receivers reject the goods; therefore they were not discharged from the ship. The owner and the charterer then agreed to deliver the goods at port Agioi Theodori, and the goods were discharged from the ship at this port. The defendant claimed that the 1-year time bar had begun to run from the date on which the goods should have been delivered at the Lagos port. However, the Court of Appeal held that there was "delivery" of the goods within the meaning of Art. III(6) at Agioi Theodori, therefore suit was bought within the 1-year time bar. See also *British Shipowners' Co v Grimond* (1876) 3 Rett 968, 972; *Petersen v Freebody & Co* [1895] 2 QB 294, 297, 299; *Chartered Bank of India, Australia and China v British India Steam Navigation Co Ltd* [1909] AC 369, 375; *Barclays Bank Ltd. v Commissioners of Customs and Excise*, [1963] 1 Lloyd's Rep 81, 88-89; *The Berge Sisar* [2001] 1 Lloyd's Rep 663, 664, 674-676. See also Baatz, 'Time for Suit' (n 85) para 62-20 *et seq*.; Cooke and others (n 225) para 10.2 *et seq*.

[924] [2001] 1 Lloyd's Rep 663.

[925] Ibid paras 32, 36. See also *The Sonia* [2003] 2 Lloyd's Rep 201; Baatz, 'Time for Suit' (n 85) para 62-20; Cooke and others (n 225) paras 85.87, 85.113-114, 85.195-196. The authors state that "*Discharge* is a purely physical act, whether performed by carrier, charterer or receiver, whereas *delivery* is a legal concept concerned with the passing of actual or constructive possession to a consignee, a lawful holder of the bill of lading or his agent."

[926] Art 13(2) of the Rotterdam Rules.

consignee, then discharge and delivery of the goods may occur at the same time.[927] It should be noted that for performance of the delivery obligation, physical delivery of the goods to the consignee itself is not necessary; where the carrier delivers the goods to an agent of the consignee, it will be discharged from its delivery obligation.[928] However where, for instance, the goods are delivered to a port agent who acts on behalf of the carrier, delivery of the goods has not occurred by such handing over, as the goods will not be under the control of the consignee.

In order to qualify as consignee, the third requirement is that the person's entitlement must stem from either a contract of carriage,[929] or a transport document,[930] or electronic transport record.[931] By using the word "or", the provision expressly provides for alternative sources of the right to take delivery.[932] As stated in Article 35, according to circumstances, there might be no transport document issued by the carrier, therefore in such cases, the right to claim delivery of the goods will stem from the contract of carriage itself.[933] Furthermore, in some cases, even if a transport document is issued, the right to receive delivery of the goods might still stem from the contract of carriage itself. For example, assuming there is a non-negotiable transport document that requires surrender. With such a transport document, the shipper, as the carrier's counterpart under the contract of carriage, will have right of control unless it has transferred it to the named consignee in the transport document.[934] Although, for instance, the buyer's name is indicated as consignee on the transport document, if the shipper/seller is not paid by the named consignee/buyer, it can replace the consignee with another person, including itself, by exercising the right of control given to it in

[927] Cooke and others (n 225) para 10.5.
[928] Sturley and others (n 26) para 8.013.
[929] Art 1(1) of the Rotterdam Rules; Chapter 3.2.1.
[930] Art 1(14) of the Rotterdam Rules; Chapter 3.2.
[931] Art 1(18) of the Rotterdam Rules. In this thesis, electronic transport records will not be mentioned separately. In respect of identification of the consignee, the explanations in relation to paper transport documents will also apply to electronic transport documents.
[932] UN Doc., A/CN.9/510 para 75. In this session, the issue of providing alternative sources was questioned, and it was stated "the need to identify various possible sources of the consignee's entitlement to take delivery of the goods came from the fact that, in certain circumstances or in certain legal systems, the right evidenced by the transport document might be different from the right evidenced by the original contract of carriage, although the transport document would always be issued for the execution of the contract of carriage." See also *Carver* (n 54) para 1-008.
[933] According to Article 35, if the parties agree or the custom, usage or practice says not to use a transport document, the carrier is not obliged to issue one. See Art 35 of the Rotterdam Rules; Chapter 3.3.
[934] Art 51(2)(a) of the Rotterdam Rules; Below part 8.2.2.

Article 50(1)(c).[935] If the shipper replaces itself as the consignee, the right to receive delivery of the goods will stem from the contract of carriage itself, as it is an original party to the contract of carriage. However, if the shipper replaces the named consignee with someone else and transfers the right of control to that person by transferring the transport document, the new consignee's right to receive delivery of the goods will stem from the transport document. This is because the new consignee is not an original party to the contract of carriage, but acquires the right to receive delivery of the goods by obtaining right of control by the transfer of the transport document.[936] Also, where a negotiable transport document is issued, with regard to the holder, right to receive delivery of the goods stems from the transport document itself. Since where a negotiable transport document is transferred to a third party according to the method indicated in Article 57(1), the contractual rights, including the right to receive delivery of the goods will be transferred to the transferee, and as the holder of the transport document, the transferee will be entitled to receive delivery of the goods.[937] However, if the holder is also the shipper, its right to receive delivery of the goods stems from the contract of carriage, as it is entitled to receive delivery of the goods not because of transfer of the negotiable transport document, but because of being an original party to the contract of carriage.

In the preparatory works, it was noted that the sources of the right to delivery of the goods are limited to the contract of carriage, transport document and electronic transport record.[938] Therefore, although a person has a right to take delivery of the goods on the basis of another source, it will not qualify as consignee for the purpose of Article 1(11). For instance, assuming X holds a negotiable bearer transport document, thus has the right of control, but in fact Y has ownership of the goods covered by the transport document. In such a case, instead of Y, X will qualify as consignee under Article 1(11) and will be entitled to delivery of the goods, as X's right of entitlement stems from the bearer transport document, while Y only has ownership. Consequently, to qualify as consignee under the Convention, for instance, there is no need to have ownership of the goods or be named as consignee in the

[935] Art 50(1)(c) of the Rotterdam Rules.
[936] Arts 50(1)(c), 51(2)(a) of the Rotterdam Rules.
[937] Art 57(1) of the Rotterdam Rules; Below part 8.2.3.
[938] UN Doc., A/CN.9/WG.III/WP.21, 9.

consignee box; there is even no need for the existence of a transport document.[939] The concept of "consignee" is based on the right of take delivery of the goods, which stems from either a contract of carriage, a transport document or electronic transport record.

8.2- Identification of the Consignee under the Rotterdam Rules

Under Article 36(3)(a), the inclusion of the consignee's name on the transport document is required only if it is provided by the shipper, and Article 31(1) expressly states that for the compilation of contract particulars and issuance of the transport document, the shipper is obliged to provide information on the name of the consignee, if any.[940] As stated previously,[941] because of the combined effect of these two provisions, it is submitted that the shipper has to provide information about the name of the consignee, if there is one, and this name must be indicated on the transport document. Although contract particulars related to the name of the consignee on a transport document can be used to identify the consignee, it has to be noted that the named consignee does not always refer to a consignee within the meaning of Article 1(11). This is because "consignee" is based on entitlement to delivery of the goods, and merely being named as consignee on the transport document is no guarantee that the person is entitled to delivery of the goods.[942]

Although the Convention does not include an express provision on identification of the consignee, as the concept of "consignee" is based on entitlement to delivery of the goods, the provisions related to delivery of the goods would be useful to identify who the consignee is.[943] Although Diamond states that instead of the Articles on delivery of the goods (Articles 45-47), Articles on right of control and transfer of the rights (Articles 50-51, and 57) are relevant to the issue of identification of the consignee, in this author's view, these provisions are all linked; therefore, to identify the consignee

[939] Debattista, 'General Provisions' (n 50) para 1-12; Debattista, 'Delivery of the Goods' (n 34) para 43-04.
[940] Arts 31(1), 36(3)(a) of the Rotterdam Rules.
[941] Chapter 4.2.4.
[942] Above part 8.1. As mentioned previously, particularly where there is a negotiable transport document, where the document is endorsed and transferred, the transferee would become the consignee, rather than the initial person named as consignee on the consignee box. See Chapter 4.2.4.
[943] Debattista, 'Delivery of the Goods' (n 34) para 43-04; Berlingieri, 'Revisiting the Rotterdam Rules' (n 81) 627; Van der Ziel, 'Delivery of the Goods' (n 34) 194.

they all need to be considered.[944] The Convention provides different rules on delivery of the goods for each type of transport document, therefore in the following section, identification of the consignee will be analysed based on the type of transport document.[945]

8.2.1- Identification of the Consignee where there is a Non-Negotiable Transport Document that does not Require Surrender

A non-negotiable transport document is defined under Article 1(16), and accordingly, if a transport document is not negotiable, the transport document will qualify as a non-negotiable transport document.[946] Where a non-negotiable transport document is issued, the carrier is under an obligation to deliver the goods to the person identified in accordance with the rules indicated in Article 45.[947] Pursuant to Article 45(a), the carrier must deliver the goods to the consignee, but if the consignee does not properly identify itself, the carrier may refuse to deliver the goods to it.[948] The Convention uses the word "may", which means the carrier has a right (not a duty) to request the person to properly identify itself; however even if the person fails to properly identify itself, the carrier can still deliver the goods to it.[949]

Where a transport document shows the name of the consignee, who proves its identity in obtaining delivery, identification of the consignee should not cause much difficulty; as the consignee would already be known by the carrier when its name is written on the consignee box, and it is simply a case of confirming its identity.[950] However, in some circumstances, the named person on the non-negotiable transport document might not be the person entitled to obtain delivery of the goods. For instance,

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[944] Diamond, 'The Rotterdam Rules' (n 81) 509.
[945] For further explanation on the type of transport document, see Chapter 3.4.
[946] Namely, where the transport document does not include the words "to order", "someone's order", "negotiable" or any other appropriate words having the same effect under the applicable law or if such terms are included, it explicitly states "non-negotiable" or "not negotiable" it will qualify as a non-negotiable transport document. See Art 1(16) of the Rotterdam Rules; Chapter 3.4.3.
[947] Art 45 of the Rotterdam Rules.
[948] Art 45(a) of the Rotterdam Rules.
[949] Van der Ziel, 'Delivery of the Goods' (n 34) 195. It should be noted that likewise, under English law, the carrier is entitled to deliver the goods upon proof of the identity of the consignee, however, under English law, if the consignee fails to identify itself the carrier must not deliver the goods to him; otherwise, he would be liable for misdelivery against the rightful consignee. See Debattista, 'Delivery of the Goods' (n 34) para 45-05; *Scrutton* (n 24) para 1-008; *Benjamin* (n 136) para 18-194.
[950] UN Doc., A/CN.9/526 para 75.

assuming a person is named as consignee in the non-negotiable transport document but goes bankrupt before paying the shipper. In such a case the shipper, as the controlling party, can replace the consignee with someone else by applying its right of control regulated under Article 50(1)(c), and if it does so, the named consignee will not qualify as the consignee under Article 1(11).[951] In such cases, the carrier will not be aware of the replacement until the shipper notifies him; but when the shipper notifies the carrier, the consignee will be identified in accordance with the information given by the shipper.[952]

Also, as explained previously, there might be cases where no transport document is issued[953] or where a non-negotiable transport document that does not show the name of the consignee is issued,[954] for such situations, the Convention provides a specific rule in Article 45(b).[955] Pursuant to Article 45(b), if the transport document does not indicate the name and address of the consignee, the controlling party shall advise the carrier with this information, Namely, even if the carrier is unable to determine the consignee from the transport document, it will be able to obtain the necessary information from the controlling party. The controlling party is interested in the goods and does not want them to be delivered before it receives the purchase price from the buyer. Furthermore, it has a better link with the consignee than the carrier, therefore it is reasonable to identify the consignee through the controlling party.[956] But at this point, the crucial question is: who is the controlling party? Article 1(13) defines the controlling party as a "person that pursuant to Article 51 is entitled to exercise the right of control".[957]Article 1(12) states that the term "right of control" directs to "the right under the contract of carriage to give the carrier instructions in respect of the

[951] Arts 50(1)(c), 51(1) of the Rotterdam Rules; UN Doc., A/CN.9/526 para 75; Zunarelli and Alvisi (n 175) 222. In this respect, the Rotterdam Rules are similar to English law, since under English law the shipper is also allowed to replace the consignee unless its right is limited by the contract of carriage. See *Elder Dempster Lines v Zaki Ishag (The Lycaon)* [1983] 2 Lloyd's Rep 548. See also s. 1(3)(b) and s. 5(3) of COGSA 1992; *Scrutton* (n 24) para 1-008; *Benjamin* (n 136) para 18-027 *et seq*.; Debattista, 'Transfer of Rights' (n 125) para 51-03.
[952] *Benjamin* (n 136) para 18-095; Van der Ziel, 'Delivery of the Goods' (n 34) 195; Diamond (n 81) 511.
[953] Art 35 of the Rotterdam Rules; Chapter 3.3.
[954] Art 36(3)(a) of the Rotterdam Rules; Chapter 4.2.4.
[955] Art 45(b) of the Rotterdam Rules; Debattista, 'Delivery of the Goods' (n 34) para 45-07; Sturley and others (n 26) para 8.028.
[956] Sturley and others (n 26) paras 8.031, 9.008-013; Van der Ziel, 'Delivery of the Goods' (n 34) 196.
[957] Arts 1(13), 51 of the Rotterdam Rules.

goods in accordance with chapter 10".[958] When considering Chapter 10, pursuant to Article 50, the controlling party's right to exercise the right of control is limited on the basis of three types of rights: giving or modifying instructions about the goods; obtaining delivery of the goods; and replacing the consignee with another person.[959]

The indication of the name of the controlling party is not listed as a mandatory contract particular in Article 36; however, the issue of identifying the controlling party is regulated by Article 51.[960] Pursuant to Article 51(1)(a)-(b), where there is a non-negotiable transport document that does not require surrender, the shipper is the controlling party unless it designates someone else as the controlling party at the time when the contract of carriage is concluded, or by transferring the right of control. [961] As seen, the right to receive delivery of the goods can be transferred to someone else by the transfer of the right of control, without any need to transfer the non-negotiable transport document. But to make the transfer effective, the transferor needs to notify the carrier. [962]

From the combined effect of abovementioned provisions, it can be argued that where there is a non-negotiable transport document, the shipper as an original contracting party and the controlling party, is entitled to receive delivery of the goods; therefore the carrier needs to identify the shipper.[963] However, if the shipper transfers the right of control to someone else, either at the time of conclusion of the contract or at a later stage, and notifies the carrier, the new controlling party, irrespective of whether it is named as consignee on the transport document, will be entitled to delivery of the goods. This is because under Article 50(1)(b), the right of delivery is linked with the right of control, which is exercised only by the controlling party, i.e. the shipper or any other person designated by the shipper. The carrier is able to identify the new

[958] Art 1(12) of the Rotterdam Rules; Debattista, 'Rights of the Controlling Party' (n 175) para 50-04. The author indicates that the use of the words "under the contract of carriage" makes the provision ambiguous, as it is not clear whether those words make the right of control applicable only where the contract of carriage expressly grants it, or whether it is simply a declaration that the right of control exists under the contract of carriage.
[959] Art 50(1) of the Rotterdam Rules; Debattista, 'Rights of the Controlling Party' (n 175) para 50-05; Diamond (n 81) 523.
[960] Arts 36, 51(1) of the Rotterdam Rules; Diamond (n 81), 513; Debattista, 'Rights of the Controlling Party' (n 175) para 51-01 *et seq.*; Zunarelli and Alvisi (n 175) 223 *et seq*.
[961] Art 51(1)(a)-(b) of the Rotterdam Rules; Diamond (n 81) 513; Debattista, 'Rights of the Controlling Party' (n 175) para 51-09.
[962] Art 51(1)(b) of the Rotterdam Rules.
[963] Art 1(8) of the Rotterdam Rules; Chapter 7.

controlling party by the notification of the former controlling party, and is consequently able to identify the consignee through the information given by the controlling party.

Furthermore, where the carrier is unable to locate the consignee after a reasonable effort under Article 45(c)(iii), it may request instructions from the controlling party.[964] Article 45(c)(iii) covers all situations where no negotiable transport document is issued and the carrier cannot locate the consignee.[965] For instance, there might be inconsistency between the named consignee on the transport document and the named consignee in the contract of carriage, and the carrier is unsure which consignee to deliver the goods.[966] Under English law, where there is inconsistency between information on the transport document and information in the contract of carriage, as a general rule, the contract of carriage is given priority.[967] Accordingly, the consignee may be identified according to the information in the contract of carriage. However, as the Convention links the right to receive delivery of the goods to the right of control, the named consignee in the contract of carriage might not be the person entitled to obtain delivery of the goods, therefore it would be less risky for carriers to apply Article 45(c)(iii) and seek advice from the controlling party. It should be noted that Article 45(c)(iii) does not require the carrier to complete an in-depth investigation; to apply the provision, the carrier must have made a reasonable effort, i.e. it must carry out active research to identify the consignee.[968] Of course the carrier is not obliged to request instructions from the controlling party as per Article 45(c)(iii); the provision uses the word "may", thus the carrier is free to apply it.[969]

Additionally, as stated in Article 35, according to circumstances there might be no transport document issued.[970] The chapeau of Article 45 expressly states that Article 45 applies where there is no negotiable transport document, therefore the provision embraces not only cases where a non-negotiable transport document is issued, but

[964] Art 45(c)(iii) of the Rotterdam Rules.
[965] Sturley and others (n 26) para 8.032
[966] *Carver* (n 54) para 1-008. The authors state that in a significant number of cases, the named consignee in the contract of carriage might be different from the named consignee in the transport document.
[967] n 577-578.
[968] Sturley and others (n 26) para 8.033; Van der Ziel, 'Delivery of the Goods' (n 34) 196.
[969] Debattista, 'Delivery of the Goods' (n 34) para 45-10.
[970] Art 35 of the Rotterdam Rules; Chapter 3.3.

also cases where no transport document is issued at all.[971] Pursuant to Article 51(1)(a), where the carrier does not issue a transport document, the shipper is the controlling party unless he designates another person as the controlling party.[972] Accordingly, the same method explained above will apply and the consignee can be identified through the controlling party.

Consequently, it is submitted that notwithstanding that a non-negotiable transport document does not name a person as consignee or that no transport document is issued at all, the carriers would be able to identify the consignee through the controlling party. As a result of the rules in Articles 50(1) and 51(1), the right of control and thus the right to obtain delivery of the goods can be exercised only by the controlling party, who is the shipper or the person designated by the sipper. Therefore, in this regard, it seems that the Convention provides a better solution than English law. Article 45 has a broader scope of application than section 2(1) of COGSA 1992;[973] while the former applies to all cases where there is no negotiable transport document or a non-negotiable transport document that requires surrender is issued, the latter applies only if there is a transport document, i.e. a bill of lading, sea waybill, delivery order, within the meaning of the Act. Furthermore, under English law there is no concept of "right of control"; the named consignee obtains the rights (e.g. giving instructions to the carrier) only by virtue of being identified as such in the sea waybill, as if it had been a party to that contract, without any need for transfer of possession of the document.[974] However, pursuant to section 2(5) of COGSA 1992, where there is a

[971] UN Doc., A/CN.9/526 para 74; UN Doc., A/CN.9/591 para 224; Sturley and others (n 26) para 8.024; *Carver* (n 54) para 10-057; G van der Ziel, 'Rights of the Controlling Party' in MD Güner-Özbek (ed), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the Rotterdam Rules* (Springer 2011) 254; Van der Ziel, 'Delivery of the Goods' (n 34) 195.

[972] Art 51(1)(a) of the Rotterdam Rules; Zunarelli and Alvisi (n 175) 225; Sturley and others (n 26) para 9.019.

[973] Section 2(1) of COGSA 1992 regulates the rights under shipping documents and worded as follows: "Subject to the following provisions of this section, a person who becomes-—(a) the lawful holder of a bill of lading;(b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract; or (c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order, shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract."

[974] S. 1(3), 2(1)(b) of COGSA 1992; *AP Moller-Maersk A/S v Sonaec Villas Cen Sad Fadoul* [2010] EWHC 355 (Comm) para 37. See also *Carver* (n 54) paras 8-002 *et seq*.,8-013; Aikens and others (n

sea waybill, even if rights are transferred to the named consignee upon the issuance of the transport document, the rights of the original shipper will not be extinguished.[975] Particularly, because of the shipper's right to redirect the goods,[976] under current English law, the carrier may come across the problem of being instructed by both the shipper and named consignee, and therefore the carrier may face difficulties in identifying the consignee.[977] By giving right of control only to the shipper, it seems the Rotterdam Rules would resolve such problems. However, this time the carrier may face the issue of identifying the controlling party. Although Article 51(1) identifies the controlling party and identifies the shipper as the controlling party, identification of the shipper might not always be so straightforward; or even where the shipper is identified, it might not be willing to advise the carrier of the name of the consignee, and thus the carrier might not identify the consignee. [978] In such a case, of course, the carrier is entitled to apply Article 48(1)(b) and discharge its delivery obligation. [979] However if it wants to sue the consignee, it still needs to identify it, but the Convention does not provide a proper answer to the issue of identification of the consignee, unless the carrier identifies the controlling party.

8.2.2- Identification of the Consignee where there is a Non-Negotiable Transport Document that Requires Surrender

A non-negotiable transport document that requires surrender has the same features as the non-negotiable transport document that does not require surrender; the only difference is that while the former has to be surrendered to take delivery of the goods, the latter does not have to be.[980] A straight bill of lading issued to a named consignee rather than to the order of any person, seems to falls within this type transport

154) para 8.74 *et seq*.; *Benjamin* (n 136) para 18-194 *et seq*.; Thomas, 'A Comparative Analysis of the Transfer of Contractual Rights' (n 124) 443.

[975] S. 2(5) of COGSA 1992; Aikens and others (n 154) para 8.75; *Scrutton* (n 24) paras 2.023-2.026; Thomas, 'A Comparative Analysis of the Transfer of Contractual Rights' (n 124), 443; Law Com.No. 196, Scot. Law Com. No.130 (1991) para 5.23.

[976] For instance, where the shipper/seller is not paid by the consignee/buyer, it can direct the carrier to deliver the goods to someone else. See *Benjamin* (n 136) para 18.027 *et seq*.

[977] *AP Moller-Maersk A/S v Sonaec Villas Cen Sad Fadoul* [2010] EWHC 355 (Comm). See also *Scrutton* (n 24) para 2-026; Girvin, *Carriage of Goods by Sea* (n 263) para 8.21; Debattista, 'Rights of the Controlling Party' (n 175) 51.03; C Debattista, 'Cargo Claims and Bills of Lading' in Y Baatz (ed), *Maritime Law* (Informa 2014) 186; Baughen, *Shipping Law* (n 675) 24.

[978] *Carver* (n 54) para 10-057; Diamond (n 81) 513. For identification of the shipper, see Chapter 7.

[979] Art 48(1)(b) of the Rotterdam Rules; *Carver* (n 54) para 10-057.

[980] Arts 1(16), 46 of the Rotterdam Rules; Chapter 3.4.3-4; Debattista, 'Delivery of the Goods' (n 34) para 46-02; Todd, *Bills of Lading* (n 321) para 3.53; Diamond (n 81) 513.

document, but in current practice, there is no uniformity, whether or not the straight bill of lading has to be surrendered to obtain delivery of the goods.[981] For instance, under US law, where there is a straight bill of lading, the carrier may delivery the goods to the named consignee without surrender of the document.[982] Even if the consignee has the non-negotiable transport document in its possession, it does not need to surrender the document to the carrier to obtain delivery of the goods.[983] Under English law, the issue of whether a straight bill of lading needs to be surrendered or not was brought before the House of Lords in a recent case-*The Rafaela S.*[984] In this case there was an express attestation clause which required the production of the straight bill of lading to the carrier to obtain delivery of the goods.[985] It was held that presentation of a straight bill of lading is a requirement for delivery of the cargo and furthermore, as *obiter* it was said that even if there were no express attention clause, the same conclusion would have been reached.[986] Accordingly, under English law, it is accepted that where a straight bill of lading contains an express or implied term which requires production of the document, the goods can only be received upon production of the straight bill.[987]

Article 46 is designed to provide uniformity as to the surrender of the straight bill of lading, and follows the *ratio* in *The Rafaela S,*[988] and states that if the non-negotiable transport document itself indicates that it must be surrendered for delivery of the goods, then the consignee has to surrender the document to the carrier.[989] In considering identification of the consignee under Article 46, the similarities to identification of the consignee under Article 45 will be seen; however Article 46

[981] UN Doc., A/CN.9/WG.III/WP.68; UN Doc., A/CN.9/594 paras 208-211. Under English law, subject to transfer between the shipper and the named consignee, it is accepted that straight bills of lading are not transferable by endorsement. For further details on straight bills of lading see *CP Henderson & Co v The Comptoir D'Escompte de Paris,* (1873) LR 5 PC 253, 259-260; *The Rafaela S* [2005] 1 Lloyd's Rep 347 paras 1, 46,58, 59; *The Chitral* [2000] 1 Lloyd's Rep 529, 532. See also *Carver* (n 54) para 1-014; *Benjamin* (n 136) para18-024 *et seq*.; Todd, *Bills of Lading* (n 321) para 7.123.
[982] Pomerene Act USC §80110(b).
[983] *Benjamin* (n 136) para 18-096; *Carver* (n 54) para 6-018.
[984] [2005] 1 Lloyd's Rep 347 (HL).
[985] Ibid para 4(6)
[986] Ibid, paras 20, 24 45; [2003] 2 Lloyd's Rep 113 para 145. It was pointed out that to obtain delivery of goods, a straight bill of lading has to be presented to the carrier, as the carrier can know the identity of the person entitled to obtain delivery, through production of the document.
[987] Ibid paras 1, 6, 20, 45; G Treitel, 'The Legal Status of Straight Bills of Lading' (2003) 119 LQR 608, 613 *et seq*.; *Carver* (n 54) para 6-020; *Benjamin* (n 136) para 18-097; Todd, *Bills of Lading* (n 321) para 7.124.
[988] [2005] 1 Lloyd's Rep 347 (HL).
[989] Art 46 of the Rotterdam Rules; Van der Ziel, 'Delivery of the Goods' (n 34) 199.

additionally requires the consignee to surrender the non-negotiable transport document.[990] It must be added that although Article 46 does not expressly make Article 45 subject to it, it is evident from its content that Article 46 only applies to a non-negotiable transport document that requires surrender, whereas Article 45 applies to other situation, except where there is a negotiable transport document or non-negotiable transport document that requires surrender.[991]

Determination of the meaning "indicates" will depend on the interpretation of national courts.[992] If English law is applicable, because of the *obiter* from *The Rafaela S,*[993] there will be no need for an express indication of the requirement of surrender; even if the indication is based on an implied term, the goods must be delivered upon surrender of the transport document. Therefore, the word "indicates" would refer not only to express terms, but also implied terms. If the non-negotiable transport document so indicates, the carrier will deliver the goods when the consignee properly identifies itself at the request of the carrier and surrenders the document.[994] In such cases, identification of the consignee ought to be straightforward for the carrier, as where the non-negotiable transport document is presented and the consignee properly identifies itself, the carrier can confirm the identity of the person.[995] However, identification of the consignee can be problematic in the following cases: where the consignee fails to identify itself or cannot surrender the non-negotiable transport document; the named consignee and the person presenting the document are different; or the document does not indicate the name of the consignee, but someone presents the document to receive delivery of the goods.[996] Additionally, the carrier could be unable to identify who the rightful consignee is where there are multiple original transport documents, which do not name the consignee or indicate a named consignee different to the person holding the transport document, or one of the documents is in

[990] *Carver* (n 54) para 10.058.
[991] Debattista, 'Delivery of the Goods' (n 34) para 46-03; Sturley and others (n 26) para 8.024.
[992] Van der Ziel, 'Delivery of the Goods' (n 34) 199. In the *travaux préparatoires*, the use of the word "indicates" was questioned but eventually it was remained. See UN Doc., A/CN.9/594 paras 213, 215; UN Doc., A/CN.9/WG.III/WP.81, Draft Art 47; UN Doc., A/CN.9/642 paras 31-35; UN, Doc., A/CN.9/645 paras 154-156.
[993] [2005] 1 Lloyd's Rep 347 (HL) para 20; [2003] 2 Lloyd's Rep 113 para 145.
[994] Art 46(a) of the Rotterdam Rules.
[995] *The Rafaela S* [2005] 1 Lloyd's Rep 347 (HL) para 6. See also E Røsæg, 'New Procedures for Bills of Lading in the Rotterdam Rules' (2011) 17(3) JIML 181, 184. The author says "the primary identification of the receiver is by name; the presentation of the document is only an extra precaution that at most can secure that the goods are *not* delivered to the named consignor or anyone else."
[996] Diamond (n 81) 514.

the hands of the shipper, another in the hands of the named consignee, who both claim delivery of the goods at the same time. Where there are multiple original transport documents, to obtain delivery of the goods under Article 46(a) surrendering only one original transport document is sufficient, with the other original(s) ceasing to have any effect; however to transfer right of control under Article 51(2)(a), transferring all original documents is required.[997] Van der Ziel states that if Article 51(2)(a) did not require transfer of all original transport documents, there would be more than one person with control over the goods.[998] Of course, to prevent such dilemmas, it is reasonable to require transfer of all documents, but the inconsistency between Article 46(a) and Article 51(2)(a) causes mystery. The right to obtain delivery of the goods is linked to the right of control, but if all original transport documents are not transferred, then the right of control will not be effective. In that case, it is not clear how a person without having right of control can obtain delivery of the goods by surrendering only one original transport document.[999]

Article 46 does not contain a paragraph similar to Article 45(b), however, the carrier might identify the consignee by applying Article 46(b)(iii), which provides that if the consignee is not located after a reasonable effort, the carrier may request the shipper or documentary shipper to provide further instructions in respect of delivery of the goods.[1000] As seen, the provision is widely worded, and applies in all cases where the carrier cannot locate the consignee.[1001] Compared with Article 45(b), Article 46(b)(iii) is arguably weaker; Article 45(b) imposes an obligation on the controlling party to advise the carrier of the name and address of the consignee, whereas Article 46(b)(iii) does not impose such obligation; it only gives the carrier an option to request instructions from the sipper or documentary shipper. Also, while Article 45(b) refers to the controlling party, who can also be the shipper, Article 46(b)(iii) expressly refers to the shipper or documentary shipper.[1002] Therefore, the issue would be problematic if the shipper has transferred the right of control by transferring documents to the named consignee, as where the transport document is transferred, the shipper's right of control over the goods will cease; therefore it would not be possible for it to

[997] Arts 46(a), 51(2)(a) of the Rotterdam Rules.
[998] Van der Ziel, 'Rights of the Controlling Party' (n 971) 255.
[999] For similar view, see *Benjamin* (n 136) para 18.041; Diamond (n 81) 526.
[1000] Art 46(b)(iii) of the Rotterdam Rules.
[1001] Sturley and others (n 26) para 8.032.
[1002] *Carver* (n 54) para 10-058.

instruct the carrier about delivery of the goods.[1003] Although Article 28 imposes an obligation on the shipper to provide information and instructions, it is perplexing how this would be possible after the transfer of right of control.[1004]

Considering English law, for the purposes of COGSA 1992, the straight bill of lading is treated as a sea waybill, therefore because of the effect of sections 2(1)(b) and 2(5), both the shipper and named consignee will have rights against the carrier, and this would make identification of the consignee complicated.[1005] However, under the Rotterdam Rules, Article 51(2)(a) expressly states that the shipper, who is *prima facie* the controlling party, can transfer the right of control to the named consignee on the transport document by transferring the document to it without endorsement.[1006] This means that unlike English law, where the named person obtains the transport document, it can exercise the right of control and thus the right to receive delivery of the goods, whereas the shipper's right of control ends. Also Article 51(2) does not require notification addressed to the carrier to make the transfer effective, the reason being that in Article 51(2), the right of control is transferred by transfer of the transport document, and is exercised by the production of the transfer document and properly identifying itself as the controlling party; therefore the carrier can be aware of the transfer of the right of control via the transport document.[1007] However, owing to the effect of Article 46(b)(iii) which refers to the shipper/documentary shipper rather than the controlling party, it appears that the carrier may be instructed by more than one source, i.e. the shipper/documentary shipper and the controlling party. Therefore, the carrier would face difficulties related to identification of the consignee as in the current situation under English law.

8.2.3- Identification of the Consignee where there is a Negotiable Transport Document that Requires Surrender

[1003] Art 51(2)(a) of the Rotterdam Rules; UN Doc., A/63/17 para 143. The transfer of the right of control is only possible between the shipper and named consignee. See Van der Ziel, 'Rights of the Controlling Party' (n 971) 256; Diamond (n 81) 514.
[1004] Art 28 of the Rotterdam Rules. For detailed examination on to the effect of Article 28, see below part 8.2.4.
[1005] S. 2(1)(b), 2(5) of COGSA 1992; Above part 8.2.1; *The Chitral* [2000] 1 Lloyd's Rep 529, 532; *The Rafaela S* [2005] 1 Lloyd's Rep 347 (HL) para 22. See also *Carver* (n 54) para 6.023; Debattista, 'Rights of the Controlling Party' (n 175) para 51.11.
[1006] Art 51(2)(a) of the Rotterdam Rules; Debattista, 'Rights of the Controlling Party' (n 175) paras 51.13-14; Van der Ziel, 'Rights of the Controlling Party' (n 971) 254.
[1007] Art 51(2) of the Rotterdam Rules; *Benjamin* (n 136) para 18.036.

A negotiable transport document is defined in Article 1(15), pursuant to which to qualify as a negotiable transport document, the transport document must contain the words "to order", "negotiable" or any other appropriate words having the same effect under the applicable law, and must not expressly include the terms "non-negotiable" or "not negotiable".[1008] Where a negotiable transport document is issued, the carrier is under an obligation to deliver the goods to the person identified in accordance with Article 47(1), which indicates the holder of the negotiable transport document as the person entitled to claim delivery of the goods from the carrier.[1009]

At this stage, the crucial question is: "who is the holder?" The "holder" is defined in Article 1(10) as "a person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer, it is the bearer thereof…"[1010] Accordingly, to qualify as holder, there are four requirements. Firstly, there must be a person, either a natural person or legal person. Secondly, there must be a negotiable transport document as defined in Article 1(15).[1011] The definition shows that, unlike the notion of "consignee", the notion of "holder" emerges only where a negotiable transport document or negotiable electronic transport record is issued. Namely, if there is no negotiable transport document there will be no person, who can qualify as holder, but there will still be a person who can qualify as consignee. Thirdly, such person must have possession of the negotiable transport document. The word "possession" is not defined under the Convention; therefore, it is not clear whether the holder must have actual possession of the transport document. The answer will depend on the applicable law.

Under English law, the word "holder" is defined in section 5(2) of COGSA 1992, and similar to the Convention, the Act also requires the person to have possession of the bill of lading, but does not define "possession".[1012] This issue was recent brought

[1008] Art 1(15) of the Rotterdam Rules; Chapter 3.4.1.
[1009] Art 47(1) of the Rotterdam Rules.
[1010] Art 1(10) of the Rotterdam Rules.
[1011] Art 1(15) of the Rotterdam Rules; Chapter 3.4.1.
[1012] S. 5(2) of COGSA 1992. See also *Carver* (n 54) para 5-016 *et seq*.; Aikens and others (n 154) para 8.38 *et seq*.; Gaskell and others (n 283) para 4.18 *et seq*.; Girvin, *Carriage of Goods by Sea* (n 263) para 8.23 *et seq*.; *Benjamin* (n 136) para 18-144.

before the courts in *The Erin Schulte.*[1013] In this case, the United Bank of Africa (UBA) issued a documentary credit in favour of UIDC (buyer) on the application of Cirrus (sub-buyer), and this credit was confirmed by Standard Chartered Bank (SCB). Gunvor (seller) became the second beneficiary upon transfer of the credit. Because of its quality, Cirrus (sub-buyer) did not wish to buy the cargo, therefore the new buyers (Chase and UBI) were found. Gunvor presented the documents, including bills of lading indorsed in favour of SCB, to SCB, and while the bills were in the possession of the bank (SCB), the carrier delivered the goods to Chase and UBI (new buyers) in accordance with instructions given by Gunvor (seller) against an indemnity, but without production of the bills. Although, UIDC (buyer) had been paid by Chase and UBI (new buyers), it had not paid either Gunvor or SCB, with SCB paying Gunvor. SCB brought an action against the shipowner on the basis that it was the lawful holder (explained below) and thus the goods were misdelivered. The defendant claimed SCB did not have title to sue, as it was not the lawful holder. But the court rejected the defendant's claim, holding that SCB was the lawful holder within the meaning of section 5(2)(b) of COGSA 1992, because the bills were endorsed and delivered to SCB and both transferor and transferee had the intention to deliver and accept the bills of lading.[1014] Although SCB had physical possession of the bill of lading, it must be pointed out that only having physical possession of the bill does not always mean being the lawful holder. In order to be lawful holder, in addition to endorsement and transfer of the document, it is required that both transferor and transferee must have intention to deliver and accept the bill of lading; therefore, even if physical possession is transferred through endorsement by mistake, the transferee will not become the lawful holder for the purpose of section 5(2)(b).[1015]

The determination of holder may be problematic where one person has actual possession of the bill, while another person has constructive possession, particularly where an agent of the consignee is involved in the process. For instance, if the

[1013] S*tandard Chartered Bank v Dorchester LNG Ltd (The Erin Schulte)* [2013] EWHC 808 (Comm).
[1014] Ibid paras 34-35, 38, 51, 52-53. For further explanations on this case see P Todd, 'Bank as Holder under Carriage of Goods by Sea Act 1992' [2013] LMCLQ 275.
[1015] *The Erin Schulte* [2013] EWHC 808 (Comm) paras 34-38; Aikens and others (n 154) para 8.40; *Benjamin* (n 136) para 18-144. For instance, in *The Aegean Sea* [1998] 2 Lloyd's Rep 39, 59–61, the bills were mistakenly endorsed to the wrong person, therefore the transferee was not the lawful holder within the meaning of s. 5(2)(b) of COGSA, as the transferee did not intend to accept delivery of the bill.

transport document is in the hands of an agent of the consignee, who will qualify as holder: the consignee or its agent? English law state that where the agent has actual possession of the bill of lading, and its name is indicated as consignee[1016] or endorsee[1017] on the document, then it could be the holder; on the other hand, if the agent's name is not indicated on the document or the agent holds a bearer or blank endorsed document, it is unclear whether the agent or its principal will qualify as holder.[1018] It seems that the determination of whether the agent or the principal is the holder will depend on the circumstances in every individual case.

The fourth and final precondition is that to qualify as a holder, the person must obtain possession of the negotiable transport document, in accordance with the methods in Article 1(10).[1019] The provision draws a distinction between order transport documents and bearer/blank endorsed transport documents; pursuant to Article 1(10)(a)(i), if there is an order transport document, the person identified as the shipper (who can either be the contractual or documentary shipper)[1020] or consignee[1021] on the document or the person to whom the transport document is duly endorsed, will qualify as holder, as long as it has possession of the transport document. Under Article 35, the shipper, or if the shipper consents the documentary shipper, is entitled to obtain the transport document from the carrier; therefore the shipper or documentary shipper becomes the first holder of the transport document.[1022] Also, where the transport document is issued to the order of a named consignee, the shipper remains the holder of the transport document until it transfers the document to the named consignee.[1023] Furthermore, if the transport document is issued to the order of the shipper, then the

[1016] S. 5(2)(a) of COGSA 1992.
[1017] S. 5(2)(b) of COGSA 1992.
[1018] *East West Corp v DKBS 1912 A/S* [2003] QB 1509 paras 16-17, 29. In this case, it was held that although the banks are acting as agents of the claimants, where the bills of lading are endorsed and delivered to banks, they become the holders of the bills for the purpose of s 5(2) of COGSA 1992. In *Gulf Interstate Oil Corpn LLC v ANT Trade & Transport Ltd of Malta, (The Giovanna)* [1999] 1 Lloyd's Rep 867, 874, it was suggested as *obiter* that to be a holder, the cargo interest does not actually need to have the bill of lading in its possession; it is enough if the bill of lading has been endorsed and transferred to it. See *White v Jones* [1995] 2 AC 207, 265*; Primetrade AG v Ythan Ltd (The Ythan)* [2006] 1 All ER 367 paras 19, 79-81.
[1019] Art 1(10) of the Rotterdam Rules.
[1020] Arts 1(8)-(9) of the Rotterdam Rules; Chapter 7.
[1021] As mentioned previously, the consignee named in the consignee box, and the consignee as defined in Article 1(11) as the person entitled to receive delivery of the goods, might be different person. See Above part 8.1 and Chapter 4.2.4.
[1022] Art 35 of the Rotterdam Rules; Chapter 3.3.
[1023] *Carver* (n 54) para 1-007.

shipper has to transfer possession of the transport document by endorsement and delivery of the document; whereas if the transport document is issued to the order of a named consignee, then the transport document can be transferred to it by delivery of the document, without any need for further endorsement.[1024] Where an endorsement is needed to transfer possession of the transport document, it must be made by the rightful person, in accordance with the chain of endorsement, otherwise the endorsement could be ineffective. On the other hand, according to Article 1(10)(a)(ii), if there is a blank endorsed or bearer transport document, the person with possession of the transport document will qualify as the holder. With such transport documents, possession of the document is transferred only by physical transfer of the transport document to the transferee; there is no need for any further endorsement.[1025]

The issue of whether or not the holder must be the lawful holder is left to the applicable law.[1026] Under English law, the holder is required to be the lawful holder, and to become a lawful holder, the person must act in good faith.[1027] COGSA 1992 does not define "good faith", however, the Sale of Goods Act 1979 defines "good faith" as "honest conduct".[1028] The concept of "honest conduct" in the Sale of Goods Act 1979 has been applied for the purposes of COGSA 1992 under case law. For instance, in *The Aegean Sea,*[1029] the definition of good faith in the Sale of Goods Act 1979 was referred and it was pointed out that 'the meaning of the term good faith should be clear, capable of unambiguous application and be consistent with the usage in other contexts' therefore good faith connotes honest conduct.[1030] Accordingly, where, for instance, a transport document is obtained by theft, fraud, violence, or is endorsed by mistake to a person who is aware of the mistake but still obtains the document, it cannot be said that the holder has acted in good faith.[1031] Therefore, in such cases, the holder, who does not act in good faith, will not qualify as a lawful

[1024] Arts 57(1)(a), 57(1)(b)(ii) of the Rotterdam Rules; Sturley and others (n 26) para 10.013.
[1025] Art 57(1)(b)(i) of the Rotterdam Rules; Sturley and others (n 26) para 10.013A.
[1026] UN Doc., A/CN.9/510 para 91.
[1027] S. 2(1), 5(2) of COGSA 1992.
[1028] S. 61(3) of Sale of Goods Act 1979: "A thing is deemed to be done in good faith within the meaning of this Act when it is in fact done honestly, whether it is done negligently or not."
[1029] [1998] 2 Lloyd's Rep 39.
[1030] Ibid 60. See also *Carver* (n 54) para 5-025; *Benjamin* (n 136) para 18-145; Girvin, *Carriage of Goods by Sea* (n 263) para 8.27; Aikens and others (n 154) paras 8.54-56. The authors indicate that the holder must be in good faith at the time when he becomes the holder.
[1031] *Carver* (n 54) para 5-025; Aikens and others (n 154) para 8.40; Cooke and others (n 225) para 18.86.

holder for the purpose of the 1992 Act, and thus will not be entitled to obtain delivery of the goods.

Apart from the definition of "holder", Article 57(1) which regulates transfer of rights, and Article 51(3) which regulates transfer of right of control, also apply to the identification of the consignee where there is a negotiable transport document.[1032] Under Article 57(1), the rights incorporated in the negotiable transport document are transferred to third persons through the transfer of the document. According to Article 57(1), only the rights incorporated in the transport document can be transferred; the right to delivery of the goods and the right of control can also be transferred to a third party by transfer of a negotiable transport document. Similar to Article 1(10), Article 57(1) makes a distinction between order transport documents and blank endorsed or bearer transport documents.[1033] Therefore, transfer of contractual rights and transfer of possession of the transport document will occur using the same method.[1034] Furthermore, pursuant to Article 51(3), the holder of a negotiable transport document has the right of control, which can be transferred through transfer of the transport document, according to the method indicated in Article 57(1).

As expressly stated in Article 50(1)(b), the right of control embraces the right to delivery of the goods, therefore where a negotiable transport document is transferred in accordance with Article 57(1), the transferee will obtain the right to delivery of the goods, because of the effect of both transfer of the right of control in Article 51(3) and transfer of the rights in Article 57(1).

It must be borne in mind that the term "consignee" within the meaning of Article 1(11) has a broader scope than the term "holder" in Article 1(10). Notwithstanding the type of transport document, "consignee" refers to the person entitled to obtain delivery of the goods, and even if no transport document is issued as in Articles 45, it can still qualify as consignee where it is entitled to receive delivery of the goods.[1035] Being the consignee does not always mean being the holder, however, with regard to application of Article 47(1), the consignee must be the holder of the transport document. This is

[1032] Arts 51(3), 57(1) of the Rotterdam Rules.
[1033] Arts 1(10), 57(1) of the Rotterdam Rules.
[1034] Sturley and others (n 26) para 10.012 *et seq*.
[1035] Art 45 of the Rotterdam Rules; Above part 8.2.1. See also A/CN.9/642 para 55.

because by being the holder of the negotiable transport document through transfer of the document, the person obtains the right to receive delivery of the goods, and thus becomes the consignee.

As explained above,[1036] a negotiable transport document qualifies as an order document if it provides that the goods will be delivered to the order of a person named in the transport document, or as a bearer document if it does not indicate the name of the person to whom the goods will be delivered. If there is an order transport document, as indicated in Article 1(10)(a)(i), the consignee will be the shipper, the named consignee, or the final endorsee who surrenders the transport document to the carrier. In respect of order transport documents, the provision states that the carrier must deliver the goods to the holder "upon the holder properly identifying itself". This requirement is criticised by some authors[1037] on the grounds that the holder already identifies itself through the presentation and surrender of the negotiable transport document, therefore what is the point of further asking for identification? However, in this author's view, such a requirement is justifiable, as the carrier needs to be sure that the person surrendering the transport document and the person who is named in the transport document are one and the same. It should be added that such a requirement is unfamiliar under English law; besides as Debattista points out, it is ambiguous what "properly identifying" refers to; for instance, what actions must the carrier perform as checks?[1038] The requirement to properly identify itself as the consignee emerges only if the carrier asks the holder to identify itself, therefore at the request of the carrier, if the holder does not properly identify itself (it is not clear how that happens), the carrier must refuse to deliver the goods.[1039] Article 47(1) does not mention proper identification where there is a bearer or blank endorsed transport document. As the document does not name the person to whom the goods will be delivered, in such cases, the consignee will be the person who surrenders the document to the carrier, i.e.

[1036] Chapter 3.4.1-2.
[1037] Debattista, 'Delivery of the Goods' (n 34) para 47-08; *Carver* (n 54) para 6-009.
[1038] Debattista, 'Delivery of the Goods' (n 34) paras 47-08, 47-09; C Debattista, 'The Goods Carried-Who Gets Them and Who Controls Them?' UNCITRAL Colloquium on Rotterdam Rules (21 September 2009), http://www.rotterdamrules2009.com/cms/uploads/Def%20%20tekst%20Charles%20Debattista%2031%20OKT29.pdf accessed 14.01.2014; *Carver* (n 54) para 6-009.
[1039] Art 47(1)(b) of the Rotterdam Rules; Sturley and others (n 26) para 8.050. The authors state that although the wording in Article 47(1) is different to the wording in Articles 45(a) and 46(a), the intention is the same, i.e. to prevent misdelivery. Therefore the carrier has a right, not a duty, to request the holder of negotiable the transport document to properly identify itself.

the bearer, and therefore there will be no further need for the holder to identify itself. Even if the carrier requires the holder to identify itself and the holder fails to do so, the carrier does not have a right to refuse delivery of the goods, as surrender of the transport document alone is sufficient to obtain delivery.

Lastly, where there are multiple original negotiable transport documents, the first person surrendered the document to the carrier will be the consignee, and the other originals will cease to have any effect.[1040] However, as in the situation in Articles 46(a) and 51(2)(a), the requirements in Articles 47(1)(c) and 51(3)(b) are inconsistent; while the former requires the surrender of one original transport document, the latter requires transfer of all original documents.[1041] Again, the inconsistency here causes confusion and makes identification of the consignee complicated. This is because pursuant to Article 1(11), the consignee is the person entitled to obtain delivery of the goods and under Article 50(1), the right to obtain delivery of the goods is listed among the rights that may only be exercised by the controlling party. Therefore it is not clear how a person who does not hold all originals and thus does not qualify as the controlling party and cannot exercise the rights in Article 50(1), can obtain delivery of the goods only by surrendering one original document.

Consequently, where there is a negotiable transport document, the identity of the consignee is self-evident from the negotiable transport document itself, and the document tells the carrier whether the person surrendering it is entitled to receive delivery of the goods or not.[1042] The rule in Article 47(1) is based on the legitimate function of the negotiable transport document, which is at the core of the document of title function, and means that the person entitled to receive delivery of the goods is identified from the transport document itself.[1043] The essential tools of the legitimate function are to the presentation and surrender of the negotiable transport document; namely, where a person presents the negotiable transport document, it proves that it

[1040] Art 47(1)(c) of the Rotterdam Rules.
[1041] Arts 46(a), 47(1)(c), 51(2)(a), and 51(3)(b) of the Rotterdam Rules; Above part 8.2.2.
[1042] Van der Ziel, 'Delivery of the Goods, Rights of the Controlling Party' (n 175) 600.
[1043] Ibid; Sturley and others (n 26) paras 8.008; 8.048; Pejović, 'Article 47(2) of the Rotterdam Rules' (n 359) 350.

has the physical possession of the transport document, and when it surrenders the document to receive delivery of the goods, it will have properly identified itself.[1044]

It should be added that the method of identification of the consignee in Article 47(1) is in line with the current position under English law, which is also based on the document of title function of the bill of lading.[1045] According to this function,[1046] the bill of lading represents constructive possession of the goods, and where the holder obtains possession of the bill of lading, according to section 5(2) of COGSA 1992 it also obtains constructive possession of the goods; therefore it is entitled to delivery of the goods.[1047] In conclusion, under both the Convention and English law, where there is a negotiable transport document that requires surrender, the consignee is the lawful holder of the negotiable transport document, therefore the consignee will be identified through surrender of the transport document.

8.2.4- Identification of the Consignee where there is a Negotiable Transport Document that does not Require Surrender

In practice, because of factors such as extensive banking processes, sometimes the negotiable transport document might not be available for surrender when the goods arrive at the place of destination.[1048] If the carrier waits for production of the transport document, this might lead to extra costs (e.g. storage costs) or delays; however, if it delivers the goods without surrender of the transport document, even if it delivers the

[1044] UN Doc., A/CN.9/WG.III/WP.68 para 10; Sturley and others (n 26) paras 8.049; 8.082; Debattista, 'Delivery of the Goods' (n 34) paras 47-14; 47-17.
[1045] Debattista, 'Delivery of the Goods' (n 34) paras 47-07; 47-08; Diamond (n 81) 517.
[1046] Under English law, there is no definition of "document of title" but according to case law, "document of title" means that having possession of the bill of lading is equivalent to possession of the goods themselves, and where the bill of lading is transferred, constructive possession of the goods is also transferred from transferor to the transferee. See *Lickbarrow v Mason* (1794) 5 TR 683, 685; *Barber v Meyerstein* (1870) LR 4 HL 317; *Cole v North Western Bank* (1875) LR 10 CP 354, 362; *Sanders Bros v Maclean & Co* (1883) 11 QBD 327, 341*; Burgos v Nascimento; McKeand* (1908) 100 LT 71, 73; *The Prinz Adalbert* [1917] AC 586, 589; *The Delfini* [1990] 1 Lloyd's Rep 252 (CA), 268; *The Future Express* [1992] 2 Lloyd's Rep. 79, 100. See also *Carver* (n 54) para 6-001 *et seq*.; *Benjamin* (n 136) para 18-006 *et seq*.; Girvin, *Carriage of Goods by Sea* (n 263) para 8.01 *et seq*.; Aikens and others (n 154) para 6.1 *et seq*.
[1047] S. 5(2) of COGSA 1992; *Glyn, Mills & Co v East and West India Dock Co* (1882) 7 App Cas 591, 610; *Motis Exports Ltd v Dampskibsselskabet AF 1912 A/S* [1999] 1 Lloyd's Rep 837 (QBD). See also Aikens and others (n 154) para 5.42 *et seq*.; Todd, *Bills of Lading* (n 321) para 7.5.
[1048] Pejović, 'Article 47(2) of the Rotterdam Rules' (n 359) 349; Van der Ziel, 'Delivery of the Goods, Rights of the Controlling Party' (n 175) 600, 604; Van der Ziel, 'Delivery of the Goods' (n 34) 205; Reynolds (n 310) para 13.3; Sturley and others (n 26) para 13.34.

goods against a letter of indemnity,[1049] it might still be liable against the rightful consignee for misdelivery.[1050] Therefore, to prevent such undesirable outcomes, the Convention introduces Article 47(2), which gives the carrier a right to deliver the goods without surrender of the negotiable transport document.[1051]

Pursuant to Article 47(2), if the negotiable transport document expressly states so, the goods may be delivered without presentation of the transport document. In the *travaux préparatoires*, it was pointed out that if the statement allowing delivery of the goods without surrender of the transport document is incorporated in the transport document, by reference to terms of a charterparty, this incorporation will not be sufficient to meet the requirement of "expressly states"; therefore Article 47(2) will not apply.[1052] Determination of whether the transport document "expressly states" that there is no need for surrender of the negotiable transport document will depend on the applicable law. Under English law, there is some judicial support which shows that the general rule to deliver the goods only against an original bill of lading can be excluded with appropriately worded clauses. For instance, in a recent case, *The MSC Amsterdam,*[1053] it was pointed out that for the exclusion of the general rule, "very clear words" are required.[1054]

[1049] In current practice, where the transport document is not available and the person claiming delivery of the goods cannot surrender the document, the carrier traditionally delivers the goods to that person against a letter of indemnity. By a letter of indemnity, the issuers obtain delivery of the goods without surrendering the transport document, but promise to surrender the document when it arrives, and the carriers gain security against possible future claims based on misdelivery. See F Arizon, D Semark, *Maritime Letters of Indemnity* (Informa 2013) para 2.13 *et seq.*; Sturley and others (n 26) para 8.075 *et seq.*; *Carver* (n 54) para 6-009; Mollmann (n 229) 57.

[1050] Diamond (n 81) 515.

[1051] Art 47(2) of the Rotterdam Rules; UN Doc., A/CN.9/526 paras 86-87; UN Doc., A/CN.9/591 para 232; UN Doc., A/CN.9/594 para 80; UN Doc., A/CN.9/642 para 52.

[1052] UN Doc., A/63/17 paras 160-161, 165. See also Chapter 3.4.2.

[1053] *Trafigura Beheer BV v Mediterranean Shipping Co SA* (*The MSC Amsterdam)* [2007] 2 Lloyd's Rep 622.

[1054] Ibid paras 29, 39. Also, in *The Houda* [1994] 2 Lloyd's Rep 541, 543 there was a clause which stated "The Master … shall be under the orders and directors of charterers as regards employment of the vessel … and shall sign bills of lading as charterers or their agents may direct… charterers hereby indemnify owners against all consequences or liability that may arise from the master … otherwise complying with charterers' as their agents' orders (including delivery of cargo without presentation of bills of lading …" It was held that the clause did not impose an express obligation on the carrier to delivery the goods without presentation of the bill. See also *Motis Exports Ltd. v Dampskibsselskabet AF 1912 A/S* [2000] 1 Lloyd's Rep 211 (CA), 217. It was held that the clause was not appropriately worded and sufficiently clear to affect the carrier's duty to delivery only against the presentation of the original bill of lading.

It is plain that where the transport document expressly states that it does not need to be surrendered, then there may be no surrendered transport document which tells the carrier whether the person claiming delivery of the goods is the consignee or not. Although in respect of the persons listed in Article 1(10)(a)(i), namely the shipper, named consignee and final endorsee, it is stated that the carrier refuses delivery where the person claiming delivery of the goods does not properly identify itself, it is unclear how it can identify itself without surrendering the document, and even if it shows its identity, how can the carrier know that it is the consignee, if the document is not surrendered?[1055] The Convention provides that where the holder of a negotiable transport document does not claim delivery of the goods, the person listed in Article 1(10)(a)(i) does not properly identify itself, or the carrier cannot locate the consignee, it may request the shipper or documentary shipper to give it instructions.[1056] Pursuant to Article 47(2)(b), the carrier will be discharged from its delivery obligation when it delivers the goods upon the instructions of the shipper or documentary shipper, given in accordance with Article 47(2)(a).[1057] For instance, assuming there is a negotiable transport document that does not require surrender, and at the port of discharge, A claims delivery of the goods by stating that it is the consignee, without surrendering the transport document. This claim may not be accepted as an adequate identification; as the document is not surrendered, the carrier cannot be sure whether A is the consignee or not. In order to properly perform its delivery obligation, the carrier may request instruction from the shipper or documentary shipper as per in Article 47(2)(a), and where it delivers the goods to A in accordance with the instructions of the shipper or documentary shipper, then according to Article 47(2)(b), the carrier will be discharged from its delivery obligation.

It must be said that the wording of provision might create problems on the issue of identification of the consignee. Firstly, the legitimate function, i.e. the presentation and surrender of the transport document, is at the core of the negotiable transport document, and it seems that Article 47(2) is inconsistent with the legitimate function of the negotiable transport document.[1058] Because of the effect of legitimate function,

[1055] Art 47(2)(a)(ii) of the Rotterdam Rules; Debattista, 'Delivery of the Goods' (n 34) para 47-20.
[1056] Art 47(2)(a) of the Rotterdam Rules.
[1057] Art 47(2)(b) of the Rotterdam Rules.
[1058] For legitimate function, see above part 8.2.3. See also Sturley and others (n 26) paras 8.082-0.83, 13.33; Reynolds (n 310) para 13.3.

the negotiable transport document indicates the person entitled to receive delivery of the goods, and therefore where the transport document is surrendered, the carrier could know who the consignee is. On the other hand, if the negotiable transport document is not surrendered, one of the essential elements of the legitimate function will not be satisfied; thus the negotiable transport document will not have the legitimate function and cannot tell the carrier who the consignee is.[1059] With regard to bearer or blank endorsed order documents, in addition to not having to surrender the negotiable transport document, the holder is not even obliged to properly identify itself and this will clearly make identification of the consignee through the transport document impossible. Furthermore, in respect of persons listed in Article 47(2)(a)(ii), it is ambiguous how those persons are to identify themselves and how the carrier is to be sure such person is the rightful consignee, without surrender of the transport document.

Secondly, it is not clear from Article 47(2) whether the person claiming delivery of the goods has to have possession of the negotiable transport document. When all relevant Articles are interpreted together, bearing in mind the aim of the draftsmen, the result becomes very odd. Debattista states that to apply Article 47(2), the holder must still have possession of the negotiable transport document but it does not need to surrender the document to the carrier to receive delivery of the goods.[1060] This seems a plausible argument, for the following reasons: the word "holder" is used throughout Article 47(2), and as previously mentioned,[1061] pursuant to Article 1(10) the person with possession of the negotiable transport document qualifies as the holder. More importantly, as the transport document addressed in Article 47(2) is a negotiable transport document, the right of control can only be transferred in accordance with the rules regulated in Article 51(3).[1062] Therefore, as explained in detail above,[1063] to transfer the right of control, which is linked with the right to receive delivery of the goods as stated in Article 50(1)(b), the negotiable transport document needs to be

[1059] UN Doc., A/CN.9/526 para 85; Pejović, 'Article 47(2) of the Rotterdam Rules' (n 359) See also *The Houda* [1994] 2 Lloyd's Rep 541, 558. In this case, it was pointed out that the carrier cannot be sure of the identity of the consignee, unless the bill of lading is produced.
[1060] Debattista, 'Delivery of the Goods' (n 34) para 47-17. For the same view see Diamond (n 81) 519; *Benjamin* (n 136) para 18.090 n 704.
[1061] Above part 8.2.3.
[1062] Art 51(3) of the Rotterdam Rules.
[1063] Above part 8.2.3.

transferred according to the method in Article 57.[1064] In order to exercise the right of control, Article 51(3)(c) states that the holder shall produce the negotiable transport document to the carrier, which means without production of the negotiable transport document, it is not possible to exercise the right of control and thus the right to claim delivery of the goods.[1065] Besides, in respect of the persons referred in Article 1(10)(a)(i), namely the shipper, consignee and endorsee, both Article 47(2) and Article 51(3)(c) require the holder to properly identify itself.[1066] It does not seem possible to expect the holder to properly identify itself only by showing its identity, without producing the negotiable transport document. Having regard to these provisions, it could be submitted that although the holder does not need to surrender the negotiable transport document to receive delivery of the goods, it must have possession of the document and must produce it.[1067]

On the other hand, considering the aim of the draftsmen, the foregoing interpretation makes no sense, as Article 47(2) was introduced to prevent undesirable outcomes where the goods arrive but the transport document does not.[1068] If the person claiming delivery of the goods has possession of the transport document, then what would be the logic in not surrendering it and letting the shipper or documentary shipper instruct the carrier? Additionally, although under Article 1(10), the holder is required to have possession of the transport document, depending on the interpretation of the word "possession" by national courts, even if the person claiming delivery of the goods does not have actual possession of the document, it can still apply Article 47(2).

Thirdly, Article 47(2)(a) states that the carrier may request instructions from the shipper or documentary shipper; however, pursuant to paragraph (c), the carrier does not have to follow the instructions given by the shipper or documentary shipper, if

[1064] Arts 50(1)(b), 57 of the Rotterdam Rules.
[1065] Art 51(3)(c) of the Rotterdam Rules.
[1066] Arts 1(10)(i), 47(2), and 51(3)(c) of the Rotterdam Rules.
[1067] *Benjamin* (n 136) para 18.041. The authors pointed out that while Article 47(2) uses the word "surrender" Article 51(3)(c) uses the word "produce", thus the Convention makes a distinction between surrender of the transport document and production of the transport document.
[1068] UN Doc., A/CN.9/526 paras 86-87; UN Doc., A/CN.9/591 para 232; UN Doc., A/CN.9/594 para 80; UN Doc., A/CN.9/642 para 52; Sturley and others (n 26) para 8.083; Pejović, 'Article 47(2) of the Rotterdam Rules' (n 359) 356; Berlingieri, 'Revisiting the Rotterdam Rules' (n 81) 632; Van der Ziel, 'Delivery of the Goods, Rights of the Controlling Party' (n 175) 604.

they do not provide adequate security on the carrier's request.[1069] Requesting instructions from the shipper is nothing new, but the question is that after the shipper has been paid and the transport document has been transferred, why would the shipper want to instruct the carrier and provide it with a statutory indemnity? Berlingieri states that the shipper or documentary shipper may have an interest in instructing the carrier.[1070] From this point of view, it could be argued that if the shipper or documentary shipper does not have such interest, for instance if they have already been paid and have transferred the transport document, they would be unwilling to instruct the carrier. Furthermore, giving instructions to the carrier is a right exercised by the controlling party, and where the shipper, as the controlling party, transfers the transport document to the transferee, the transferee acquires the right of control over the goods, including giving instructions to the carrier. Besides, under Article 57, by transfer of the negotiable transport document, the transferee obtains the rights incorporated in the document, but the Convention leaves the destiny of rights of the transferor to the applicable law.[1071] Under English law, section 2(5) of COGSA 1992 clearly indicates that the transferor's rights are extinguished when the bill of lading is transferred, therefore the right of control can only be exercised through a single source.[1072] Therefore, if the shipper gives instructions to the carrier after transfer of the negotiable transport document, because of the effect of section 2(5) of COGSA 1992, such instructions would be treated as ineffective.

So how does the shipper instruct the carrier? It is argued by some authors that Article 28, which imposes an obligation on the shipper against the carrier, to provide information and instructions for proper handling and carriage of the goods as long as it has the possession of the information, would be helpful.[1073] This argument makes the situation even more baffling. As Pejović highlights, the wording of Article 28 does not seem broad enough to cover instructions related to delivery of the goods, however, if it is interpreted widely the outcomes would be odd; as on one hand, the transferee can instruct the carrier by acquiring the right of control, but on the other

[1069] Arts 47(2)(a), 47(2)(c) of the Rotterdam Rules.
[1070] Berlingieri, 'Revisiting the Rotterdam Rules' (n 81) 633.
[1071] Art 57 of the Rotterdam Rules; Thomas, 'A Comparative Analysis of the Transfer of Contractual Rights' (n 124) 448.
[1072] S. 2(5) of COGSA 1992; Thomas, 'A Comparative Analysis of the Transfer of Contractual Rights' (n 124) 442, 447; *Carver* (n 54) para 5-065 *et seq*.
[1073] Art 28 of the Rotterdam Rules; Sturley and others (n 26) para 8.102.

hand, the shipper can instruct the carrier, and if the shipper addresses another person as the person entitled to receive delivery of the goods, then the rightful consignee would lose its right to claim delivery of the goods from the carrier.[1074] It should be added that related to matters in Article 50, which cover the rights to give instructions, obtain delivery of the goods and replace the consignee, Article 52 states that the carrier is only obliged to follow instructions given by the controlling party; therefore if the shipper or documentary shipper is not the controlling party, the instructions given by them are non-binding on the carrier.[1075]

It seems that Article 47(2) will make identification of the consignee significantly vague; determination of the shipper or documentary shipper might not be so easy,[1076] and even if they are determined, they might not be willing to instruct the carrier, due to the requirement of providing security, or they might not have adequate knowledge about the consignee, particularly, if the goods have been sold several times.[1077] Consequently, issuing a negotiable transport document that does not require surrender is risky for both the carrier and the consignee. Even though the carrier follows the instructions given by the shipper or documentary shipper, and delivers the goods to a person not entitled to obtain delivery of the goods, it will still be liable towards the rightful consignee where the preconditions in Article 47(2)(d)-(e) are met.[1078] This is because the transport document does not cease to be valid, and because of the negotiable feature of the document, it would still be in circulation even after delivery of the goods and therefore, subject to the right to claim delivery, the holder of the transport document acquires rights against the carrier.[1079] Therefore, in order to avoid

[1074] Pejović, 'Article 47(2) of the Rotterdam Rules' (n 359) 353, 358; Baughen, 'Misdelivery Claims' (n 34) para 9.52.
[1075] Arts 50, 52 of the Rotterdam Rules. Paragraphs 2 and 3 of Article 52 show the exceptions where the carrier does not have to follow instructions given by the controlling party. See Van der Ziel, 'Delivery of the Goods, Rights of the Controlling Party' (n 175) 603; Pejović, 'Article 47(2) of the Rotterdam Rules' (n 359) 353.
[1076] Chapter 7.
[1077] Diamond (n 81) 519; Van der Ziel, 'Delivery of the Goods, Rights of the Controlling Party' (n 175) 605; Pejović, 'Article 47(2) of the Rotterdam Rules' (n 359) 356. See also Sturley and others (n 26) para 8.098 *et seq.* The authors state that in some commodity trades, shippers usually keep track of the sale of goods and therefore generally have knowledge of the final buyer, or sometimes the shipper might be in a better position than the carrier to discover the final buyer, but sometimes the shipper might not have any knowledge of the consignee.
[1078] Art 47(2)(d)-(e) of the Rotterdam Rules; Sturley and others (n 26) para 8.092 *et seq*.; Pejović, 'Article 47(2) of the Rotterdam Rules' (n 359) 354; Røsæg (n 995) 184.
[1079] Sturley and others (n 26) para 8.083; Diamond (n 81) 520; Røsæg (n 995) 185; Reynolds (n 310) para 13.37.

liability towards the rightful consignee under Article 47(2)(d)-(e), the carrier needs to deliver the goods to the consignee; however, without surrender of the negotiable transport document, it would be difficult for the carrier to determine and be sure that the person claiming delivery is the rightful consignee.[1080]

Lastly, it should be noted that under English law, the general principle is that only the holder of the bill of lading is entitled to delivery of the goods; therefore the carrier must deliver the goods to the holder of the bill of lading upon surrender of the bill, otherwise it would be liable for misdelivery against the rightful cargo interest.[1081] Therefore, even where the carrier follows the instructions of the shipper or delivers the goods against a letter of indemnity, it could still be liable for misdelivery against the rightful cargo interest. English courts state that even if the carrier delivers the goods to the person entitled to obtain delivery of the goods and no damage or loss occurs, the carrier would still be in a breach if the delivers the goods without production of the bill of lading.[1082] But of course, there would be no damages suffered by the cargo interest that it can claim for. Furthermore, even where goods are delivered against a forged bill of lading, although the carrier is not aware of it or it is not reasonably apparent to the carrier that the bill was forged, the carrier will still be liable against the holder of the genuine bill of lading.[1083] However, in *The Sormovskiy 3068*[1084] it was stated that there are some exceptions to the general rule: if it is required by law or the custom of the port of discharge; or if the carrier proves its reasonable satisfaction that "the person seeking the goods is entitled to possession of them and there is some reasonable explanation of what has become of the bill of lading", then the carrier can deliver the goods without production of the bill of lading.[1085] In subsequent cases, the last exception was questioned and has not been

[1080] *The Houda* [1994] 2 Lloyd's Rep 541, 558.
[1081] *London Joint Stock Bank v British Maritime Agency* (1910) 16 Com. Cas. 103; *The Jag Shakti* [1986] AC 337, 345; *Sze Hai Tong Bank Ltd. v Rambler Cycle Co. Ltd*., [1959] 2 Lloyd's Rep 114, [1959] AC 576; *Barclays Bank Ltd. v Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep 81; *The Antwerpen* [1994] 1 Lloyd's Rep 213, 247; *The Houda* [1994] 2 Lloyd's Rep 541; *The Sormovskiy 3068* [1994] 2 Lloyd's Rep 266; *The Ines* [1995] 2 Lloyd's Rep 144; *East West Corp v DKBS 1912 A/S* [2003] QB 1509; *Strathlorne Steamship Co Ltd v Andrew Weir & Co* (1934) 40 Com Cas 168. See also Arizon and Semark (n 1049) para 10.32 *et seq*.; Diamond (n 81) 517.
[1082] *The Ines* [1995] 2 Lloyd's Rep 144, 146; *The Houda* [1994] 2 Lloyd's Rep 541, 553; *The Future Express* [1992] 2 Lloyd's Rep 79, 102.
[1083] *Motis Exports Ltd. v Dampskibsselskabet AF 1912 A/S* [2000] 1 Lloyd's Rep 211 (CA), 217; *The MSC Amsterdam* [2007] 2 Lloyd's Rep 622.
[1084] *The Sormovskiy 3068* [1994] 2 Lloyd's Rep 266.
[1085] Ibid 272.

applied in any cases as an exception to the general rule.[1086] It can be argued that even if the Rotterdam Rules are not adopted by the United Kingdom, if they apply at the place of discharge, the exception indicated in *The Sormovskiy 3068*[1087] could arise. Therefore the carrier would be able to deliver the goods without production of the transport document by the instructions of the shipper or documentary shipper, if it is aware of the identity of those parties.

[1086] *The Houda* [1994] 2 Lloyd's Rep 541; *East West Corp v DKBS 1912 A/S* [2003] 1 Lloyd's Rep 239; *Motis Exports Ltd v Dampskibsselskabet AF 1912 A/S* [1999] 1 Lloyd's Rep 837 (QBD), 841; *The Erin Schulte* [2013] 2 Lloyd's Rep 338 para 77.
[1087] [1994] 2 Lloyd's Rep 266, 275.

CHAPTER 9: CONCLUSION

As explained in detail in Chapter 2, the issue of identification has crucial importance on the following matters: bringing an action within the time limit; raising a defence on the basis of lack of title to sue; properly performing some of the obligations imposed by the Convention; and determining the place of jurisdiction. Under the Rotterdam Rules, as well as the original parties to the contract of carriage, i.e. the carriers and the shippers, the maritime performing parties, documentary shippers and consignees also have obligations, liabilities and rights, and/or defences available. Therefore, if the Convention enters into force the identification issue would arise in relation to all those parties. As pointed out,[1088] the existence and type of transport document have crucial importance on the identification issue; the parties can be identified and/or traced through contract particulars included in the transport document. Therefore, the thesis analyses the term transport document, types of transport documents and contract particulars related to identification of the parties, analyses the definitions and provisions related to identification of the parties, and reaches the outcomes outlined below.

9.1- Identification of the Carrier

The Convention defines the carrier as a person who enters into a contract of carriage with a shipper.[1089] The definition expressly refers to the contractual carrier, however as explained, it is not always straightforward identifying who the contractual carrier is in practice. Cargo interests usually encounter difficulties in identifying carriers where bills of lading contain inconsistent information, or do not contain any information about the carrier. Therefore, to provide a solution to the issue of identification of the carrier, the Convention introduces a specific provision, Article 37. Compared with previous Conventions, the inclusion of Article 37 is a novelty, however, after analysing Article 37 in detail, the thesis has reached the conclusion that Article 37 is poorly drafted, and owing to the following reasons, identification of the carrier can still be problematic:

[1088] Chapter 3.1; Chapter 4.
[1089] Art 1(5) of the Rotterdam Rules; Chapter 5.

Article 37(1): This paragraph aims to provide a solution to the issue of identification of the carrier where the transport document contains inconsistent information on to the identity of the carrier. For application of Article 37(1), a person must be identified by name as the carrier in the transport document, and there must be any other information that is inconsistent with that identification. Therefore, where, for instance, a person is identified by name as the carrier in the transport document and the document contains an identity or demise clause, which refers to the shipowner as the carrier, without indicating its name, that clause will have no effect. However, due to the following reasons it appears the provision will provide a limited solution to the issue of identification of the carrier:

Firstly, the provision does not give special effect to typed/written/stamped words over pre-printed standard words, nor gives priority to terms located in the signature box. Therefore, the provision does not answer the question of how the carrier is to be identified where, for instance, a person is identified by name in the signature box with typed terms, and another person is identified by name within the pre-printed logo. In this regard, if the Convention had adopted the rationale from *The Starsin,*[1090] which gives priority to typed/written/stamped terms located in the signature box, it would have provided a better solution for the issue of identification of the carrier.

Secondly, Article 37(1) does not seem to provide a solution for identifying the carrier where the claimant is the shipper, and there are inconsistencies between information in the transport document and contract of carriage. Although in the hands of the shipper, a transport document is mere receipt of the goods, the information related to the carrier may still be used for the identification of the carrier. In such cases, it is not clear which information will be used to identify the carrier.

Thirdly, the Convention does not provide an answer to the question of how the carrier will be identified, where the transport document is signed by an unauthorised person. Whether or not a person named as carrier on the transport document through an unauthorised signature will become subject to Article 37(1) and is thus treated as the carrier, will depend on the applicable law.

[1090] *The Starsin* [2000] 1 Lloyd's Rep 85 (QB (Com Ct)); [2001] 1 Lloyd's Rep 437 (CA); [2003] 1 Lloyd's Rep 571 (HL).

Lastly, determination of whether the transport document contains inconsistent information will depend on how national courts will interpret the information in the transport document. Therefore, it is submitted that application of Article 37(1) will depend entirely on interpretation of national courts. Under English law, owing to the effect of *The Starsin*, it appears that application of Article 37(1) would not arise. Pursuant to *The Starsin*, the business/face side of the bill of lading prevails over the contractual/back side of the bill; amongst the information on the business side, typed/written/stamped words, particularly the terms in the signature box, are given priority over pre-printed standard terms. Accordingly, where a person is identified by name as the carrier within the signature box through typed/written/stamped words, due to the effect of *The Starsin*, any other information related to identification of the carrier will have no effect. Therefore, there will be no inconsistency among the contract particulars as required in Article 37(1). In conclusion, even if the Rotterdam Rules enter into force and apply with the force of law in the UK, it seems the carrier will still be identified in accordance with the rationale from *The Starsin,* rather than Article 37(1).

Article 37(2): This paragraph aims to provide a solution to the issue of identification of the carrier where the carrier is not identified by name on the transport document. For Article 37(2) to apply, there must be a transport document that does not identify anyone as the carrier, but shows that the goods are shipped on board a named ship. Where the requirements in Article 37(2) are met, the registered owner of the named ship is deemed to be the carrier and can be sued under the Convention. Imposing a rebuttable presumption on the registered owner of the named ship would certainly be useful in resolving the issue of identification of carrier where the transport document does not indicate the carrier's name. However, due to the following reasons, it seems the provision will provide only a limited solution, thus identification of the carrier would still remain problematic:

Application of Article 37(2) arises only where the transport document indicates that the goods have been put on board a named ship. However, there might be cases where no transport document is issued, as indicated in Article 35. If there is no transport document issued, application of Article 37(2) will not arise, even if the name of the ship is indicated in the contract of carriage. Although a transport document is issued,

if it does not include the name of the ship, or indicates the name of the ship but the transport document is a received for shipment rather than shipped on board transport document, Article 37(2) will not apply. Furthermore, where the transport document is in the hands of the shipper or the document is in the form of a non-negotiable transport document, even if the name of the ship is indicated, application of Article 37(2) might be prevented. In such cases, owing to the evidentiary effect of the contract particulars, if the particulars related to the name of the ship are rebutted, the requirement in Article 37(2) will not be met; therefore the carrier cannot be identified in accordance with that provision.

Also, Article 37(2) contains some procedural difficulties. It is not clear how the registered owner and bareboat charter can identify another person as the carrier to rebut the presumption. The following questions are unanswered: what kind of evidence do they have to provide? How can it be guaranteed that the identified person is the true carrier? Will the identified person be treated as the carrier automatically, or is the burden of proof on the cargo interest? What will happen if the registered owner or the bareboat charterer identifies a person as the carrier, but in fact the identified person is not the true carrier?

In conclusion, by introducing Article 37(2), the Rotterdam Rules take a further step to resolve the issue of identification where the carrier is not identified by name. However, the abovementioned issues remain unresolved, therefore in such cases the carrier will have to be identified in accordance with the applicable law. Under English law, where no person is clearly and unambiguously identified as the carrier, in order to identify the carrier, the bill of lading is interpreted as a whole. Namely, the written/typed/stamped and pre-printed standard terms located on the front and reverse of the bill of lading are interpreted together. If the Rotterdam Rules enter into force and apply with the force of law in the UK, only where a shipped on board transport document which shows the name of the ship is issued the carrier will be identified according to Article 37(2), and the registered owner of the named ship treated as the carrier. In all other cases, such as the abovementioned situations, the current rule, i.e. interpreting the document as a whole, will continue to apply to identify the carrier.

Article 37(3): This paragraph does not provide any specific rule for the identification issue; it aims to ensure that even if the requirements in Articles 37(1) or 37(2) are met, the cargo interest does not have to apply those provisions. If the cargo interest believes that someone else is the carrier, it can sue that person rather than applying Article 37(1)-(2). Without the inclusion of such a provision, cargo interests would have been forced to apply either Articles 37(1) or 37(2) even if they were aware of the identity of the carrier. Therefore, this paragraph gives liberty to the cargo interest to apply either Article 37(1)-(2) where the requirements are satisfied, or identify the carrier in accordance with its own knowledge.

To summarise, as Fujita pointed out,[1091] by introducing Article 37, the Convention provides a solution for the issue of identification of the carrier, but not a perfect one. This thesis shows that Article 37 would provide only a limited solution for the identification of the carrier; in most cases, the applicable law will still have crucial role. Therefore, it is submitted that instead of such a defectively worded provision, providing a simple interpretation rule to guide the applicable law would have better served.

9.2- Identification of the Maritime Performing Party

The Convention introduces the term "maritime performing party", and states that a maritime performing party is a performing party who performs or undertakes to perform any of obligations of the carrier during the port-to-port period.[1092] The maritime performing party is a new concept for the shipping industry. Owing to their relationship with carriers, third parties involved in the carriage process can be sued by cargo interests under the Convention where they fall within the definition of maritime performing party. Such persons are not parties to the contract of carriage concluded between the shipper and the carrier; they do not even have any relationship with the cargo interests. Particularly where there are long and complicated sub-contract chains, it would be difficult for the cargo interests to trace all actors involved in the carriage. Even if they trace or already know that a person has been involved in the carriage process, it would not be an easy process to determine whether or not such person falls

[1091] Fujita, 'Transport Documents and Electronic Transport Records' (n 172) 172.
[1092] Art 1(7) of the Rotterdam Rules; Chapter 6.

within the definition of maritime performing party. The Convention does not contain any specific provision to show how maritime performing parties will be identified. Therefore, identification of such parties will depend on how the definition will be interpreted by national courts. However, the definition in Article 1(7) is quite complex and contains ambiguities, therefore regarding identification of the maritime performing party, the following problems may arise:

Firstly, the main and foremost problem is that the definition does not provide a clear answer for question of which obligations of the carrier are performed or undertaken to be performed by the third party. While the definition of performing party in Article 1(6) refers to the carrier's core obligations in Article 13(1), the definition of maritime performing party in Article 1(7) first refers to the notion of performing party, and then uses the phrase "any the carrier's obligations". As the maritime performing party is a sub-category of the performing party, it is not clear whether the phrase "any of the carrier's obligations" refers to any obligations of the carrier listed within Article 1(6), or any obligations of the carrier indicated under the Convention. Regrettably, the drafting history is not assistive enough in understanding the intention of the draftsmen. This ambiguity would create uncertainty, particularly relating to the position of classification societies and shipyards. For instance, where the carrier is bankrupt or does not have enough assets, cargo interests would lean towards suing persons whom they are more likely to recover their damages from. Owing to their financial conditions, classification societies and shipyards would be attractive to cargo interests, but whether they fall within the definition of maritime performing party and thus could be sued under the Convention, will depend on how the defective definition will be interpreted by the courts. Consequently, if the Rotterdam Rules enter into force, it would not be an easy task to identify whether the third party performs or undertakes to perform the right obligations of the carrier, to become a maritime performing party according to Article 1(7).

In order to prevent ambiguities related to persons who perform or undertake to perform the carrier's obligations not listed in Article 1(6), it is suggested that a correction procedure should be undertaken, as applied already for Articles 1(6) and

19(1)(b).[1093] If the draftsmen's aim is to provide a narrow concept and embrace only persons who perform or undertake to perform the obligations listed in Article 1(6), the ambiguity in the definition could be removed by deleting the phrase "any of the carrier's obligations". However, if the draftsmen's aim is to embrace any of the carrier's obligations under the Convention, the obligations listed in the definition of performing party should be extended to all obligations of the carrier, thus harmony between Articles 1(6) and 1(7) will be ensured. Then again, if the draftsmen's aim is to ensure that to become a maritime performing party, the person who becomes the performing party by performing or undertaking to perform the carrier's obligations listed in Article 1(6), is free to perform any other further obligations of the carrier indicated in the Convention, then the wording of Article 1(7) should be clarified based on such intention.

Secondly, although the port-to-port period has determinative effect in identifying whether or not a person is a maritime performing party who can be sued under the Convention, or simply a performing party who cannot be sued under the Convention, the term port is not defined under the Convention. As rightfully pointed out by the draftsmen,[1094] as the extent of the term "port" drastically varies according to geographical conditions of places, it would be impossible to provide a uniform definition for it. However, it would have been useful if the Convention, or at least the working reports, had provided some guidance on how the geographical limits of a port should be determined, and which boundaries should be taken into account to satisfy the requirement in Article (7). As explained earlier under English law,[1095] the meaning and boundaries of a port vary depending on the purpose for which the port is defined. Therefore, depending on the purposes, the court will consider the limits of the port; a person, for instance, who acts within a consolidation area, may or may not fall within the definition of maritime performing party.

It is suggested that as maritime performing parties act for commercial purposes, the courts should determine the geographical limits of a port in accordance with the commercial limits. Namely, courts should consider what a port is understood to mean

[1093] For details on corrections see n 722.
[1094] UN Doc., A/CN.9/544 paras 30-31; UN Doc., A/CN.9/621 para 148; UN Doc., A/63/17 para 80.
[1095] Chapter 6.1.3.

by commercial and mercantile persons. As indicated before,[1096] under current English case law, the commercial limits of a port usually refer to places for loading and unloading; however depending on the facts, the court may apply to broadened commercial limits in which the port authority exercises its jurisdiction.

Lastly, the notion of performing party and as the sub-category of it the maritime performing party, only embrace persons involved in the carriage process at the carrier's request, control or supervision. According to Article 1(6)(b), persons retained by cargo interests are expressly excluded from the definition of performing party. However, the problem may arise where the person is retained by the cargo interest but acts under the carrier's supervision. For instance, what would be the position of a stevedore, who is retained by the consignee but unloads the goods under the supervision of the carrier? Literal reading of Article 1(6)(a) appears to imply that irrespective of who retains the third party, whenever the third party acts under the request, control or supervision of the carrier, it becomes a performing party if all the other requirements are also met. The drafting history does not provide any information related to this issue, therefore depending on the interpretation of national courts, such persons may or may not become maritime performing parties under the Convention. Again, a correction procedure should be undertaken, and the wording of definition should be clarified.

9.3- Identification of the Shipper and Documentary Shipper

The Convention defines the shipper as the person that enters into a contract of carriage with a carrier.[1097] The definition expressly refers to the contractual shipper, therefore if there is no contractual nexus between the person and the carrier, the person will not be a shipper within the meaning of the Convention. Furthermore, to clarify the position of f.o.b. sellers, the Convention introduces the notion of "documentary shipper", and defines it as a person who is not the contractual counterpart of the carrier under the contract of carriage, but accepts to be named as the shipper on the transport document.[1098] The definition of documentary shipper

[1096] Ibid.
[1097] Art 1(8) of the Rotterdam Rules; Chapter 7.1.1
[1098] Art 1(9) of the Rotterdam Rules; Chapter 7.1.2.

contains some ambiguities; the use of the word “accepts” particularly makes the meaning slightly baffling. With regard to the following issues, the definition is vague: whether the acceptance needs to be express or implied; to whom does the acceptance need to be directed at: the contractual shipper or the carrier?; how the existence of acceptance is to be guaranteed, if an unauthorised person provides the name of someone else as the shipper to be named on the transport document; whether the consent of the contractual shipper is necessary or not.

For the existence of a documentary shipper, the existence of a transport document is mandatory. If there is no transport document issued, as indicated in Article 35, the issue of identification of the documentary shipper will not arise. In such cases, the contractual shipper could be identified in accordance with the terms in the contract of carriage itself. However, where there is a transport document issued, the question will be whether the person named as the shipper in the transport document is the contractual shipper or documentary shipper. The Convention does not provide any specific provision for identification of the shipper and documentary shipper, therefore they will have to be identified in accordance with how national courts will interpret the definitions, as well as determine the contractual nexus with the carrier.

The thesis asserts that currently situation under English law, identification of the contractual shipper depends on the facts, type of the contracts of sale, existence of an initial contract of carriage, information on the bill of lading, and intention of the parties. Depending on the type of contract of sale, either the seller or buyer is under a duty to conclude a contract of carriage with a carrier, therefore the contract of carriage and the contract of sale have at least one party in common. The thesis examines the situation with c.i.f. and f.o.b. contracts, which are more commonly used in practice. In c.i.f. sales, the seller concludes the contract of carriage, and its name is indicated as the shipper on the bill of lading, unless the seller and the buyer have agreed otherwise. Therefore, in c.i.f. sales, the contractual shipper and the documentary shipper are usually the same person, i.e. the c.i.f. seller.

However, identification of the contractual shipper is not crystal clear in f.o.b. sales, as such contracts have many variations, and depending on the agreement between the parties, either seller or buyer concludes the contract of carriage. The relationships of

f.o.b. buyer and seller with the carrier are examined in the well-known case *Pyrene Co. Ltd. v Scindia Navigation Co. Ltd*.[1099] In this case, Devlin J. describes three different categories: in the first category, there is no advance booking; the ship is nominated by the buyer, while the goods are put on board by the seller, and the name of the seller is indicated as the shipper on the bill of lading, therefore it will qualify as the shipper. In the second category, the f.o.b. seller is asked to make shipping arrangements by the f.o.b. buyer, and if the seller acts on its own behalf, makes the shipping arrangements with a carrier and takes the bill of lading in its name, as with c.i.f. contracts, it will be regarded as the original party to the contract of carriage. However, if the seller acts as an agent of the buyer, instead of the seller, the buyer will be a party of the contract of carriage. In the third category, the buyer or its agent makes shipping arrangements while the seller puts the goods on board, obtains the mate's receipt and tenders it to the buyer or its agent. In such cases a contractual nexus arises between buyer and carrier, therefore the buyer will qualify as the shipper.

If the Rotterdam Rules enter into force and apply in the UK, where no transport document is issued, the issue of identification of the documentary shipper will not arise, and notwithstanding the type of contract of sale, the contractual shipper will be identified in accordance with the contract of carriage, as is currently done. Where a transport document is issued, depending on the type of contract of sale, the issue of identification of the documentary shipper would arise. In c.i.f. sales, the seller usually becomes the contractual shipper, thus there will be no documentary shipper. In f.o.b. sales, in the first two categories indicated in *Pyrene,* there will be no documentary shipper, as the contractual link arises between seller and carrier on the basis of the transport document, and the seller becomes the contractual shipper, not the documentary shipper. Furthermore, in the third category indicated in *Pyrene,* the name of the seller is not indicated in the transport document, therefore the requirement for being a documentary shipper is not satisfied, and there will be no documentary shipper. In all these cases, the current position related to identification of the contractual shipper under English law will remain the same. However, there might be cases where the f.o.b. buyer concludes an initial contract of carriage with a carrier, but the name of the seller is indicated as the shipper on the transport document, as in

[1099] [1954] 2 QB 402.

The Athanasia Comninos.[1100] In such cases, the f.o.b. seller would become the documentary shipper, while the f.o.b. buyer would become the contractual shipper. The courts must be careful when determining the existing of acceptance by the named person, as if there is no acceptance, there will be no documentary shipper. Consequently, except for cases as this, it appears that the introduction of the concept of "documentary shipper" does not create any fatal changes to the issue of identification of the shipper under current English law.

9.4- Identification of the Consignee

The Convention defines the consignee as the person entitled to delivery of the goods under the carriage contract or a transport document.[1101] The Convention does not contain any provision devoted to identification of the consignee, but contains specific provisions related to delivery of the goods, right of control and transfer of rights. Those provisions are closely connected with the identification of the consignee, therefore the thesis analyses identification of the consignee on the basis of these provisions, according to the type of transport document, reaching the outcomes below.

Non-Negotiable Transport Document that does not Require Surrender: In such cases, the consignee can be identified as follows:

Firstly, where the transport document shows the name of the consignee, the person who properly identifies itself as consignee will be the consignee (Article 45(a)). However, where the controlling party applies its right of control and replaces the named consignee, the carrier must act in accordance with the notification given to it by the controlling party.

Secondly, where there is no transport document issued or the transport document does not show the consignee's name, the consignee can be identified through the controlling party (Article 45(b)). The provision states that the controlling party shall

[1100] [1990] 1 Lloyd's Rep 277, 280. As indicated above (in pages 196-197), in this case, C.E.G.B was the f.o.b. buyer, who concluded a contract of affreightment with the time charterer and was named as consignee on the bill of lading, whereas Devco was the f.o.b. seller, who delivered the goods to the carrier and was named as the shipper on the bill of lading. Mustill J. stated that without any room for doubt, Devco was the shipper and it was named as such in the bill of lading.
[1101] Art 1(11) of the Rotterdam Rules; Chapter 8.1.

advise the carrier; but who is the controlling party? Pursuant to Article 51(1)(a), the shipper is the controlling party, unless it designates the consignee as the controlling party or transfers the right of control to someone else. Under the Convention, the controlling party exercises the right of control, which embraces the right to obtain delivery of the goods (Article 50), therefore it is submitted that the consignee is the shipper or any other person to whom the right of control is transferred.

Thirdly, where the carrier cannot locate the consignee after a reasonable effort to do so, it may request instruction from the controlling party, shipper or documentary shipper, and thus can reach the consignee through any of these parties (Article 45(c)(iii)). It should be noted that the provision uses the word "may"; therefore asking for instructions from these persons depends on the carrier's desire.

Lastly, it can be concluded that the Convention appears to resolve some problems related to identification of the consignee in this type of transport document. Currently under English law, where there is a seaway bill, the named consignee obtains the rights under the contract of carriage as if it had been party to that contract, but the rights of the original shipper are not extinguished.[1102] Therefore, the carrier may face a situation where it is instructed by both the shipper and the named consignee, and thus may face difficulties in identifying the consignee. Through the introduction of the concept of right of control, it seems the Rotterdam Rules will resolve such problems and the carrier will be able to identify the consignee by the instructions given from only a single source. Therefore, under the Convention, as long as carriers identify the controlling party, who could possibly be the shipper, they should be able to identify the consignee without any difficulties.

Non-Negotiable Transport Document that Requires Surrender: With this type of transport document, the consignee may be identified as follows:

Firstly, where the transport document shows the name of the consignee, the consignee will be the person who identifies itself and surrenders the document (Article 46(a)). The problem may arise where there is more than one original document; pursuant to

[1102] S. 2(1), 2(5) of COGSA 1992.

Article 46(a), surrendering only one original is sufficient to obtain delivery of the goods. However according to Article 51(2)(a), to transfer right of control, which covers the right to obtain delivery of the goods, all original documents need to be transferred. It seems these provisions are inconsistent, therefore it is not clear how a person who holds only one original document and thus cannot obtain the right of control, can obtain delivery of the goods.

Secondly, where for instance, the document does not indicate the name of the consignee, or the named consignee fails to identify itself, or the named consignee and the person who surrenders the document are not the same, identification of the consignee might be problematic. In such cases, as stated in Article 46(b)(iii), the carrier, may request instructions from the shipper or documentary shipper in order to identify the consignee. This provision directly refers to the shipper or documentary shipper, rather than the controlling party. Therefore, a problem may arise where the shipper has already transferred the right of control by transferring the transport document. It is not clear how the shipper or documentary shipper can instruct the carrier, if it has already transferred the right of control.

Lastly, under English law, as in the case of a non-negotiable transport document that does not require surrender, with this type of transport document, both the shipper and named consignee may instruct the carrier, therefore the carrier may face difficulties related to identification.[1103] As Article 46(b)(iii) refers to the shipper or documentary shipper rather than the controlling party, it appears that where such type of transport document is issued, the carrier may be instructed by more than a single source, i.e. the shipper/documentary shipper or the controlling party. Therefore, the carrier would face difficulties in identifying the consignee, as is the current situation under English law.

Negotiable Transport Document that Requires Surrender: In such cases, the consignee can be identified as follows:

[1103] For the purposes of COGSA 1992, straight bills of lading are treated as sea waybills, therefore s. 2(1), 2(5) of COGSA 1992 will also apply to such types of documents. See Chapter 8.2.2.

Firstly, according to Article 47(1), the holder of the transport document is entitled to obtain delivery of the goods; namely, the consignee is the holder of the document who surrenders the document to the carrier. If there is an order transport document, in addition to surrender of the document, the holder must properly identify itself. Accordingly, to identify the consignee, the carrier needs to identify who the holder is. The Convention defines "holder", but the ingredients of the definition, such as the meaning of the word "possession" and whether or not the holder needs to be the lawful holder will be determined in accordance with how national courts will interpret that definition. Therefore, identification of the holder and thus consignee will depend on the applicable law.

Secondly, the provisions for transfer of rights (Article 57(1)) and right of control (Article 51(3)) are closely related to identification of the consignee. Where the transport document is transferred, the rights incorporated in the document and the right of control are transferred to the transferee. That means by the transfer of the transport document, the transferee acquires the right to obtain delivery of the goods. In general, Articles 57(1) and 51(3) are in harmony with Article 47(1), and they all state that the holder of the transport document is entitled to obtain delivery of the goods; i.e. the holder is the consignee.

However, identification of the consignee would be problematic where there is more than one original transport document. Pursuant to Article 47(1)(c), surrender of only one original is sufficient to obtain delivery of the goods; however according to Article 51(3)(b), for the transfer of the right of control, all original documents need to be transferred. Therefore, as with Article 46(a), it is not clear how a person who holds only one original document and thus cannot obtain the right of control, can obtain delivery of the goods. Namely, Article 47(1)(c) which addresses the holder of one original transport document as the consignee, and Article 51(3)(b) which requires the transfer of all original transport documents for the transfer of the right of control, and thus the right to obtain delivery of the goods, are inconsistent.

Currently under English law, where a negotiable transport document that requires surrender is issued, the lawful holder of the document is entitled to obtain delivery of

the goods. Therefore, it can be concluded that in this regard, the Convention does not seem to alter the current position under English law.

Negotiable Transport Document that does not Require Surrender: With this type of transport document, the consignee can be identified as follows:

Firstly, according to Article 47(2)(a), where an order transport document expressly states that it does not require surrender, the consignee will be the person who properly identifies itself. In order to properly identify the consignee, carriers need to carefully examine whether the document needs to be surrendered or not. Under English law, the inclusion of very clear words in the transport document are required, to entitle the person to obtain delivery of the goods without surrender of the document. The thesis criticises Article 47(2) on the basis that without surrender of the transport document, the person cannot properly identify itself and thus the carrier cannot be assured whether it is the rightful consignee or not.

Secondly, the wording of Article 47(2) is baffling; it is not clear whether the person still needs to have possession of the document but does not need to surrender it, or whether the person does not need to have possession of the document at all. Where the issue of transfer of the right of control is considered, the first situation seems more plausible. According to Article 51(3), the right of control and the right to obtain delivery of the goods are transferred by transfer of the transport document, and to exercise the right of control, the transferee shall produce the document. But such an approach would not be in accord with the aim of creating this provision.

Furthermore, according to Article 47(2)(a), where the person does not properly identify itself or the carrier cannot locate the consignee, it may request instruction from the shipper or documentary shipper. However under the Convention, giving instruction to the carrier is done by the controlling party, and it is ambiguous how the shipper is able to instruct the carrier where it has already transferred the document. Besides, where the document is transferred, as stated in Article 57(1), the rights incorporated in it are transferred to the transferee. The fate of the transferor's rights is left to the applicable law, and under English law, where the document is transferred, the transferor's rights are extinguished. In conclusion, the regulations requiring

instructions from the shipper or the documentary shipper, who is not the controlling party, are clearly inconsistent with the concept of right of control, and it seems that identification of the consignee in such type of transport document would be highly problematic.

As explained before,[1104] currently under English law, the general principle is that only the holder of the bill of lading is entitled to delivery of the goods; therefore the carrier must deliver the goods to the holder of the bill of lading upon surrender of the bill, otherwise it would be liable for misdelivery against the rightful cargo interest. However, there is some judicial support which indicates that if the bill of lading is appropriately worded, the goods can be delivered without surrender of the bill. In this regard, it could be submitted that Article 47(2) is compatible with the position under the current English law. However, the problem would arise if the carrier requests instructions in respect of delivery of the goods from the shipper and delivers the goods in accordance with such instructions. Under English law, pursuant to section 2(5) of COGSA 1992, when the bill of lading is transferred the shipper's rights under the contract shall be extinguished therefore the shipper cannot instruct the carrier in respect of delivery of the goods. As a result, it could be argued that delivering the goods according to instructions given by the shipper in Article 47(2) would contradict section 2(5) of COGSA 1992.

To sum up, under the Convention, to identify the consignee, the provisions on delivery of the goods, right of control and transfer of the rights would be useful. However, these provisions are comprehensive, complex, contain some inconsistencies and are not easily understood, even by legal experts. Therefore, expecting carriers to properly identify consignees based on these provisions would be unreasonable. It is submitted that it would have been more appropriate for the Convention to contain a provision specifically devoted to the issue of identification of the consignee.

In the light of the aforesaid explanations, as an overall conclusion, it can be submitted that the issue of identification of the parties under the Rotterdam Rules would not be an easy task for both the carriers and cargo interests.

[1104] Chapter 8.2.4.

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APPENDIX 1: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA (THE ROTTERDAM RULES)

The Rotterdam Rules –Corrected Text[1]
Resolution adopted by the General Assembly
[*on the report of the Sixth Committee (A/63/438)*]

63/122.United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Concerned that the current legal regime governing the international carriage of goods by sea lacks uniformity and fails to adequately take into account modern transport practices, including containerization, door-to-door transport contracts and the use of electronic transport documents,

Noting that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Convinced that the adoption of uniform rules to modernize and harmonize the rules that govern the international carriage of goods involving a sea leg would enhance legal certainty, improve efficiency and commercial predictability in the international carriage of goods and reduce legal obstacles to the flow of international trade among all States,

Believing that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

Noting that shippers and carriers do not have the benefit of a binding and balanced universal regime to support the operation of contracts of carriage involving various modes of transport,

[1] This text is based on UN Document A/RES/63/122 and Circular letters from the Secretary-General of the UN 11 October 2012 and 25 January 2013

Recalling that, at its thirty-fourth and thirty-fifth sessions, in 2001 and 2002, the Commission decided to prepare an international legislative instrument governing door-to-door transport operations that involve a sea leg,[2]

Recognizing that all States and interested international organizations were invited to participate in the preparation of the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea and in the forty-first session of the Commission, either as members or as observers, with a full opportunity to speak and make proposals,

Noting with satisfaction that the text of the draft Convention was circulated for comment to all States Members of the United Nations and intergovernmental organizations invited to attend the meetings of the Commission as observers, and that the comments received were before the Commission at its forty-first session,[3]

Taking note with satisfaction of the decision of the Commission at its forty-first session to submit the draft Convention to the General Assembly for its consideration,[4]

Taking note of the draft Convention approved by the Commission,[5]

Expressing its appreciation to the Government of the Netherlands for its offer to host a signing ceremony for the Convention in Rotterdam,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea;

2. *Adopts* the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, contained in the annex to the present resolution;

3. *Authorizes* a ceremony for the opening for signature to be held on 23 September 2009 in Rotterdam, the Netherlands, and recommends that the rules embodied in the Convention be known as the «Rotterdam Rules»;

4. *Calls upon* all Governments to consider becoming party to the Convention.

67th plenary meeting
11 December 2008

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[2] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), paras. 319–345; and ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 210–224 [original footnote].

[3] A/CN.9/658 and Add.1–14 and Add.14/Corr.1 [original footnote].

[4] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 298 [original footnote].

[5] Ibid., annex I [original footnote].

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

The States Parties to this Convention,

Reaffirming their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Convinced that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contributes to universal economic cooperation among all States on a basis of equality, equity and common interest, and to the well-being of all peoples,

Recognizing the significant contribution of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels on 25 August 1924, and its Protocols, and of the United Nations Convention on the Carriage of Goods by Sea, signed in Hamburg on 31 March 1978, to the harmonization of the law governing the carriage of goods by sea,

Mindful of the technological and commercial developments that have taken place since the adoption of those conventions and of the need to consolidate and modernize them,

Noting that shippers and carriers do not have the benefit of a binding universal regime to support the operation of contracts of maritime carriage involving other modes of transport,

Believing that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

Have agreed as follows:

Chapter 1 General provisions

Art 1. Definitions

For the purposes of this Convention:

1. «Contract of carriage» means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.

2. «Volume contract» means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.

3. «Liner transportation» means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.

4. «Non-liner transportation» means any transportation that is not liner transportation.

5. «Carrier» means a person that enters into a contract of carriage with a shipper.

6.

(a) «Performing party» means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, keeping, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

(b) «Performing party» does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.

7. «Maritime performing party» means a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

8. «Shipper» means a person that enters into a contract of carriage with a carrier.

9. «Documentary shipper» means a person, other than the shipper, that accepts to be named as «shipper» in the transport document or electronic transport record.

10. «Holder» means:

(*a*) A person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(*b*) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.

11. «Consignee» means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.

12. «Right of control» of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.

13. «Controlling party» means the person that pursuant to article 51 is entitled to exercise the right of control.

14. «Transport document» means a document issued under a contract of carriage by the carrier that:

(*a*) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and

(*b*) Evidences or contains a contract of carriage.

15. «Negotiable transport document» means a transport document that indicates, by wording such as «to order» or «negotiable» or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being «non-negotiable» or «not negotiable».

16. «Non-negotiable transport document» means a transport document that is not a negotiable transport document.

17. «Electronic communication» means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.

18. «Electronic transport record» means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that:

(*a*) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and

(*b*) Evidences or contains a contract of carriage.

19. «Negotiable electronic transport record» means an electronic transport record:

(*a*) That indicates, by wording such as «to order», or «negotiable», or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being «non-negotiable» or «not negotiable»; and

(*b*) The use of which meets the requirements of article 9, paragraph 1.

20. «Non-negotiable electronic transport record» means an electronic transport record that is not a negotiable electronic transport record.

21. The «issuance» of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.

22. The «transfer» of a negotiable electronic transport record means the transfer of exclusive control over the record.

23. «Contract particulars» means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.

24. «Goods» means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.

25. «Ship» means any vessel used to carry goods by sea.

26. «Container» means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.

27. «Vehicle» means a road or railroad cargo vehicle.

28. «Freight» means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.

29. «Domicile» means (*a*) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation or central registered office, whichever is applicable, (ii) central administration or (iii) principal place of business, and (*b*) the habitual residence of a natural person.

30. «Competent court» means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.

Art 2. Interpretation of this Convention

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Art 3. Form requirements

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 19, paragraph 2; 23, paragraphs 1 to 4; 36, subparagraphs 1 (b), (c) and (d); 40, subparagraph 4 (b); 44; 48, paragraph 3; 51, subparagraph 1 (b); 59, paragraph 1; 63; 66; 67, paragraph 2; 75, paragraph 4; and 80, paragraphs 2 and 5, shall be in writing. Electronic communications may be used for these purposes, provided that the use of such means is with the consent of the person by which it is communicated and of the person to which it is communicated.

Art 4. Applicability of defences and limits of liability

1. Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:

   (*a*) The carrier or a maritime performing party;

   (*b*) The master, crew or any other person that performs services on board the ship; or

   (*c*) Employees of the carrier or a maritime performing party.

2. Any provision of this Convention that may provide a defence for the shipper or the documentary shipper applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their subcontractors, agents or employees.

Chapter 2 Scope of application

Art 5. General scope of application

1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:

   (*a*) The place of receipt;

   (*b*) The port of loading;

   (*c*) The place of delivery; or

   (*d*) The port of discharge.

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

Art 6. Specific exclusions

1. This Convention does not apply to the following contracts in liner transportation:

(*a*) Charter parties; and

(*b*) Other contracts for the use of a ship or of any space thereon.

2. This Convention does not apply to contracts of carriage in non-liner transportation except when:

(*a*) There is no charter party or other contract between the parties for the use of a ship or of any space thereon; and

(*b*) A transport document or an electronic transport record is issued.

Art 7. Application to certain parties

Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charter party or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.

Chapter 3 Electronic transport records

Art 8. Use and effect of electronic transport records

Subject to the requirements set out in this Convention:

(*a*) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and

(*b*) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

Art 9. Procedures for use of negotiable electronic transport records

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:

(a) The method for the issuance and the transfer of that record to an intended holder;

(b) An assurance that the negotiable electronic transport record retains its integrity;

(c) The manner in which the holder is able to demonstrate that it is the holder; and

(d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1 (a) (ii) and (c), the electronic transport record has ceased to have any effect or validity.

2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.

Art 10. Replacement of negotiable transport document or negotiable electronic transport record

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:

(a) The holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;

(b) The carrier shall issue to the holder a negotiable electronic transport record that includes a statement that it replaces the negotiable transport document; and

(c) The negotiable transport document ceases thereafter to have any effect or validity.

2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:

(a) The carrier shall issue to the holder, in place of the electronic transport record, a negotiable transport document that includes a statement that it replaces the negotiable electronic transport record; and

(b) The electronic transport record ceases thereafter to have any effect or validity.

Chapter 4 Obligations of the carrier

Art 11. Carriage and delivery of the goods

The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.

Art 12. Period of responsibility of the carrier

1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.

2.

(*a*) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.

(*b*) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.

3. For the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:

(*a*) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or

(*b*) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage.

Art 13. Specific obligations

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.

2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

Art 14. Specific obligations applicable to the voyage by sea

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

(*a*) Make and keep the ship seaworthy;

(*b*) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and

(*c*) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

Art 15. Goods that may become a danger

Notwithstanding articles 11 and 13, the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment.

Art 16. Sacrifice of the goods during the voyage by sea

Notwithstanding articles 11, 13, and 14, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure.

Chapter 5 Liability of the carrier for loss, damage or delay

Art 17. Basis of liability

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.

2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.

3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

   (*a*) Act of God;

   (*b*) Perils, dangers, and accidents of the sea or other navigable waters;

   (*c*) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;

   (*d*) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;

(*e*) Strikes, lockouts, stoppages, or restraints of labour;

(*f*) Fire on the ship;

(*g*) Latent defects not discoverable by due diligence;

(*h*) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34;

(*i*) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;

(*j*) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(*k*) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;

(*l*) Saving or attempting to save life at sea;

(*m*) Reasonable measures to save or attempt to save property at sea;

(*n*) Reasonable measures to avoid or attempt to avoid damage to the environment; or

(*o*) Acts of the carrier in pursuance of the powers conferred by articles 15 and 16.

4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:

(*a*) If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies; or

(*b*) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 18.

5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:

(*a*) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship;

or (iii) the fact that 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; and

(*b*) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (*a*) of this article caused the loss, damage, or delay; or (ii) it complied with its obligation to exercise due diligence pursuant to article 14.

6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.

Art 18. Liability of the carrier for other persons

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

(*a*) Any performing party;

(*b*) The master or crew of the ship;

(*c*) Employees of the carrier or a performing party; or

(*d*) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

Art 19. Liability of maritime performing parties

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

(*a*) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

(*b*) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; and either (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

Art 20. Joint and several liability

1. If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this Convention.

2. Without prejudice to article 61, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Convention.

Art 21. Delay

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed.

Art 22. Calculation of compensation

1. Subject to article 59, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 43.

2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 of this article except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 16.

Art 23. Notice in case of loss, damage or delay

1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of loss of or damage to the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party that delivered

the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days at the place of delivery after the delivery of the goods.

2. Failure to provide the notice referred to in this article to the carrier or the performing party shall not affect the right to claim compensation for loss of or damage to the goods under this Convention, nor shall it affect the allocation of the burden of proof set out in article 17.

3. The notice referred to in this article is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the person to which they have been delivered and the carrier or the maritime performing party against which liability is being asserted.

4. No compensation in respect of delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.

5. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.

6. In the case of any actual or apprehended loss or damage, the parties to the dispute shall give all reasonable facilities to each other for inspecting and tallying the goods and shall provide access to records and documents relevant to the carriage of the goods.

Chapter 6 Additional provisions relating to particular stages of carriage

Art 24. Deviation

When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 61.

Art 25. Deck cargo on ships

1. Goods may be carried on the deck of a ship only if:

   (*a*) Such carriage is required by law;

   (*b*) They are carried in or on containers or vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or vehicles; or

   (*c*) The carriage on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.

2. The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article, but the carrier is not liable for loss of or damage to such goods, or delay in their delivery, caused by the special risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs 1 (*a*) or (*c*) of this article.

3. If the goods have been carried on deck in cases other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and is not entitled to the defences provided for in article 17.

4. The carrier is not entitled to invoke subparagraph 1 (*c*) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic transport record in good faith, unless the contract particulars state that the goods may be carried on deck.

5. If the carrier and shipper expressly agreed that the goods would be carried under deck, the carrier is not entitled to the benefit of the limitation of liability for any loss of, damage to or delay in the delivery of the goods to the extent that such loss, damage, or delay resulted from their carriage on deck.

Art 26. Carriage preceding or subsequent to sea carriage

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

Chapter 7 Obligations of the shipper to the carrier

Art 27. Delivery for carriage

1. Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods

in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.

2. The shipper shall properly and carefully perform any obligation assumed under an agreement made pursuant to article 13, paragraph 2.

3. When a container is packed or a vehicle is loaded by the shipper, the shipper shall 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.

Art 28. Cooperation of the shipper and the carrier in providing information and instructions

The carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party.

Art 29. Shipper's obligation to provide information, instructions and documents

1. The shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary:

   (a) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and

   (b) For the carrier to comply with law, regulations or other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.

2. Nothing in this article affects any specific obligation to provide certain information, instructions and documents related to the goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.

Art 30. Basis of shipper's liability to the carrier

1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.

2. Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 31, paragraph 2, and 32, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or

damage is not attributable to its fault or to the fault of any person referred to in article 34.

3. When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 34.

Art 31. Information for compilation of contract particulars

1. The shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 36, paragraph 1; the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any.

2. The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this article. The shipper shall indemnify the carrier against loss or damage resulting from the inaccuracy of such information.

Art 32. Special rules on dangerous goods

When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:

(a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and

(b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.

Art 33. Assumption of shipper's rights and obligations by the documentary shipper

1. A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 55, and is entitled to the shipper's rights and defences provided by this chapter and by chapter 13.

2. Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.

Art 34. Liability of the shipper for other persons

The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.

Chapter 8 Transport documents and electronic transport records

Art 35. Issuance of the transport document or the electronic transport record

Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option:

(a) A non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record; or

(b) An appropriate negotiable transport document or, subject to article 8, subparagraph (a), a negotiable electronic transport record, unless the shipper and the carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage or practice of the trade not to use one.

Art 36. Contract particulars

1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper:

    (a) A description of the goods as appropriate for the transport;

    (b) The leading marks necessary for identification of the goods;

    (c) The number of packages or pieces, or the quantity of goods; and

    (d) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include:

    (a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;

    (b) The name and address of the carrier;

(c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and

(d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.

3. The contract particulars in the transport document or electronic transport record referred to in article 35 shall further include:

(a) The name and address of the consignee, if named by the shipper;

(b) The name of a ship, if specified in the contract of carriage;

(c) The place of receipt and, if known to the carrier, the place of delivery; and

(d) The port of loading and the port of discharge, if specified in the contract of carriage.

4. For the purposes of this article, the phrase «apparent order and condition of the goods» in subparagraph 2 (a) of this article refers to the order and condition of the goods based on:

(a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and

(b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or electronic transport record.

Art 37. Identity of the carrier

1. If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification.

2. If no person is identified in the contract particulars as the carrier as required pursuant to article 36, subparagraph 2 (b), but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner.

3. Nothing in this article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier.

Art 38. Signature

1. A transport document shall be signed by the carrier or a person acting on its behalf.

2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic transport record.

Art 39. Deficiencies in the contract particulars

1. The absence or inaccuracy of one or more of the contract particulars referred to in article 36, paragraphs 1, 2 or 3, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.

2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be:

   (a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or

   (b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship.

3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them, the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the carrier or a performing party received them.

Art 40. Qualifying the information relating to the goods in the contract particulars

1. The carrier shall qualify the information referred to in article 36, paragraph 1, to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper if:

   (a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is false or misleading; or

(b) The carrier has reasonable grounds to believe that a material statement in the transport document or electronic transport record is false or misleading.

2. Without prejudice to paragraph 1 of this article, the carrier may qualify the information referred to in article 36, paragraph 1, in the circumstances and in the manner set out in paragraphs 3 and 4 of this article to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper.

3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container or vehicle, or when they are delivered in a closed container or vehicle and the carrier or a performing party actually inspects them, the carrier may qualify the information referred to in article 36, paragraph 1, if:

(a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or

(b) The carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information.

4. When the goods are delivered for carriage to the carrier or a performing party in a closed container or vehicle, the carrier may qualify the information referred to in:

(a) Article 36, subparagraphs 1 (a), (b), or (c), if:

(i) The goods inside the container or vehicle have not actually been inspected by the carrier or a performing party; and

(ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and

(b) Article 36, subparagraph 1 (d), if:

(i) Neither the carrier nor a performing party weighed the container or vehicle, and the shipper and the carrier had not agreed prior to the shipment that the container or vehicle would be weighed and the weight would be included in the contract particulars; or

(ii) There was no physically practicable or commercially reasonable means of checking the weight of the container or vehicle.

Art 41. Evidentiary effect of the contract particulars

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 40:

(a) A transport document or an electronic transport record is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars;

(b) Proof to the contrary by the carrier in respect of any contract particulars shall not be admissible, when such contract particulars are included in:

(i) A negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith; or

(ii) A non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith;

(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any of the following contract particulars included in a non-negotiable transport document or a non-negotiable electronic transport record:

(i) The contract particulars referred to in article 36, paragraph 1, when such contract particulars are furnished by the carrier;

(ii) The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and

(iii) The contract particulars referred to in article 36, paragraph 2.

Art 42. «Freight prepaid»

If the contract particulars contain the statement «freight prepaid» or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.

Chapter 9 Delivery of the goods

Art 43. Obligation to accept delivery

When the goods have arrived at their destination, the consignee that demands delivery of the goods under the contract of carriage shall accept delivery of the goods at the time or within the time period and at the location agreed in the contract of carriage or, failing such agreement, at the time and location at which, having regard to the terms of the contract, the customs, usages or practices of the trade and the circumstances of the carriage, delivery could reasonably be expected.

Art 44. Obligation to acknowledge receipt

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

Art 45. Delivery when no negotiable transport document or negotiable electronic transport record is issued

When neither a negotiable transport document nor a negotiable electronic transport record has been issued:

(a) The carrier shall deliver the goods to the consignee at the time and location referred to in article 43. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier;

(b) If the name and address of the consignee are not referred to in the contract particulars, the controlling party shall prior to or upon the arrival of the goods at the place of destination advise the carrier of such name and address;

(c) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(d) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary shipper pursuant to subparagraph (c) of this article is discharged from its obligations to deliver the goods under the contract of carriage.

Art 46. Delivery when a non-negotiable transport document that requires surrender is issued

When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The carrier shall deliver the goods at the time and location referred to in article 43 to the consignee upon the consignee properly identifying itself on the request of the carrier and surrender of the non-negotiable document. The carrier may refuse delivery if the person claiming to be the consignee fails to

properly identify itself on the request of the carrier, and shall refuse delivery if the non-negotiable document is not surrendered. If more than one original of the non-negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity;

(b) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

Art 47. Delivery when a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 43 to the holder:

(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), upon the holder properly identifying itself; or

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;

(b) The carrier shall refuse delivery if the requirements of subparagraph (a) (i) or (a) (ii) of this paragraph are not met;

(c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the

surrender of one original will suffice and the other originals cease to have any effect or validity. When a negotiable electronic transport record has been used, such electronic transport record ceases to have any effect or validity upon delivery to the holder in accordance with the procedures required by article 9, paragraph 1.

2. Without prejudice to article 48, paragraph 1, if the negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rules apply:

(*a*) If the goods are not deliverable because (i) the holder, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, subparagraph 10 (*a*) (i), or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(*b*) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph 2 (*a*) of this article is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;

(*c*) The person giving instructions under subparagraph 2 (*a*) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph 2 (*e*) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;

(*d*) A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods pursuant to subparagraph 2 (*b*) of this article, but pursuant to contractual or other arrangements made before such delivery acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods;

(*e*) Notwithstanding subparagraphs 2 (*b*) and 2 (*d*) of this article, a holder that becomes a holder after such delivery, and that did not have and could not reasonably have had knowledge of such delivery at the time it became a holder, acquires the rights incorporated in the negotiable

transport document or negotiable electronic transport record. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

Art 48. Goods remaining undelivered

1. For the purposes of this article, goods shall be deemed to have remained undelivered only if, after their arrival at the place of destination:

   (a) The consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in article 43;

   (b) The controlling party, the holder, the shipper or the documentary shipper cannot be found or does not give the carrier adequate instructions pursuant to articles 45, 46 and 47;

   (c) The carrier is entitled or required to refuse delivery pursuant to articles 44, 45, 46 and 47;

   (d) The carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested; or

   (e) The goods are otherwise undeliverable by the carrier.

2. Without prejudice to any other rights that the carrier may have against the shipper, controlling party or consignee, if the goods have remained undelivered, the carrier may, at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require, including:

   (a) To store the goods at any suitable place;

   (b) To unpack the goods if they are packed in containers or vehicles, or to act otherwise in respect of the goods, including by moving them; and

   (c) To cause the goods to be sold or destroyed in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.

3. The carrier may exercise the rights under paragraph 2 of this article only after it has given reasonable notice of the intended action under paragraph 2 of this article to the person stated in the contract particulars as the person, if any, to be notified of the arrival of the goods at the place of destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper.

4. If the goods are sold pursuant to subparagraph 2 (c) of this article, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred by the carrier and any other amounts that are due to the carrier in connection with the carriage of those goods.

5. The carrier shall not be liable for loss of or damage to goods that occurs during the time that they remain undelivered pursuant to this article unless the claimant proves that such loss or damage resulted from the failure by the carrier to take steps that would have been reasonable in the circumstances to preserve the goods and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps.

Art 49. Retention of goods

Nothing in this Convention affects a right of the carrier or a performing party that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due.

Chapter 10 Rights of the controlling party

Art 50. Exercise and extent of right of control

1. The right of control may be exercised only by the controlling party and is limited to:

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;

(b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and

(c) The right to replace the consignee by any other person including the controlling party.

2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.

Art 51. Identity of the controlling party and transfer of the right of control

1. Except in the cases referred to in paragraphs 2, 3 and 4 of this article:

(a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party;

(b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party; and

(c) The controlling party shall properly identify itself when it exercises the right of control.

2. When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document by transferring the document to that person without endorsement. If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control; and

(b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

3. When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and

(c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

4. When a negotiable electronic transport record is issued:

(a) The holder is the controlling party;

(b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1; and

(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

Art 52. Carrier's execution of instructions

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 50 if:

   (a) The person giving such instructions is entitled to exercise the right of control;

   (b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and

   (c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.

2. In any event, the controlling party shall reimburse the carrier for any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.

3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.

4. The carrier's liability for loss of or damage to the goods or for delay in delivery resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 17 to 23, and the amount of the compensation payable by the carrier shall be subject to articles 59 to 61.

Art 53. Deemed delivery

Goods that are delivered pursuant to an instruction in accordance with article 52, paragraph 1, are deemed to be delivered at the place of destination, and the provisions of chapter 9 relating to such delivery apply to such goods.

Art 54. Variations to the contract of carriage

1. The controlling party is the only person that may agree with the carrier to variations to the contract of carriage other than those referred to in article 50, subparagraphs 1 (b) and (c).

2. Variations to the contract of carriage, including those referred to in article 50, subparagraphs 1 (b) and (c), shall be stated in a negotiable transport document or in a non-negotiable transport document that requires surrender, or incorporated in a negotiable electronic transport record, or, upon the request of the controlling party, shall be stated in a non-negotiable transport document or incorporated in a non-negotiable electronic transport record. If so stated or incorporated, such variations shall be signed in accordance with article 38.

Art 55. Providing additional information, instructions or documents to carrier

1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to the goods not yet provided by the shipper and not otherwise reasonably available to the carrier that the carrier may reasonably need to perform its obligations under the contract of carriage.

2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions or documents to the carrier, the shipper shall provide them. If the carrier, after reasonable effort, is unable to locate the shipper, the documentary shipper shall provide such information, instructions or documents.

Art 56. Variation by agreement

The parties to the contract of carriage may vary the effect of articles 50, subparagraphs 1 (*b*) and (*c*), 50, paragraph 2, and 52. The parties may also restrict or exclude the transferability of the right of control referred to in article 51, subparagraph 1 (*b*).

Chapter 11 Transfer of rights

Art 57. When a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:

   (*a*) Duly endorsed either to such other person or in blank, if an order document; or

   (*b*) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.

2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

Art 58. Liability of holder

1. Without prejudice to article 55, a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.

2. A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage

to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.

3. For the purposes of paragraphs 1 and 2 of this article, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:

(*a*) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or

(*b*) It transfers its rights pursuant to article 57.

Chapter 12 Limits of liability

Art 59. Limits of liability

1. Subject to articles 60 and 61, paragraph 1, the carrier's liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

2. When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.

3. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

Art 60. Limits of liability for loss caused by delay

Subject to article 61, paragraph 2, compensation for loss of or damage to the goods due to delay shall be calculated in accordance with article 22 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable pursuant to this article and article 59, paragraph 1, may not exceed the limit that would be established pursuant to article 59, paragraph 1, in respect of the total loss of the goods concerned.

Art 61. Loss of the benefit of limitation of liability

1. Neither the carrier nor any of the persons referred to in article 18 is entitled to the benefit of the limitation of liability as provided in article 59, or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier's obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

2. Neither the carrier nor any of the persons mentioned in article 18 is entitled to the benefit of the limitation of liability as provided in article 60 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.

Chapter 13 Time for suit

Art 62. Period of time for suit

1. No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under this Convention may be instituted after the expiration of a period of two years.

2. The period referred to in paragraph 1 of this article commences on the day on which the carrier has delivered the goods or, in cases in which no goods have been delivered or only part of the goods have been delivered, on the last day on which the goods should have been delivered. The day on which the period commences is not included in the period.

3. Notwithstanding the expiration of the period set out in paragraph 1 of this article, one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party.

Art 63. Extension of time for suit

The period provided in article 62 shall not be subject to suspension or interruption, but the person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

Art 64. Action for indemnity

An action for indemnity by a person held liable may be instituted after the expiration of the period provided in article 62 if the indemnity action is instituted within the later of:

(*a*) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(*b*) Ninety days commencing from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.

Art 65. Actions against the person identified as the carrier

An action against the bareboat charterer or the person identified as the carrier pursuant to article 37, paragraph 2, may be instituted after the expiration of the period provided in article 62 if the action is instituted within the later of:

(*a*) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(*b*) Ninety days commencing from the day when the carrier has been identified, or the registered owner or bareboat charterer has rebutted the presumption that it is the carrier, pursuant to article 37, paragraph 2.

Chapter 14 Jurisdiction

Art 66. Actions against the carrier

Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 67 or 72, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:

(*a*) In a competent court within the jurisdiction of which is situated one of the following places:

(i) The domicile of the carrier;

(ii) The place of receipt agreed in the contract of carriage;

(iii) The place of delivery agreed in the contract of carriage; or

(iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or

(*b*) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.

Art 67. Choice of court agreements

1. The jurisdiction of a court chosen in accordance with article 66, subparagraph *b*), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:

   (*a*) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated or (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and

   (*b*) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.

2. A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if:

   (*a*) The court is in one of the places designated in article 66, subparagraph (*a*);

   (*b*) That agreement is contained in the transport document or electronic transport record;

   (*c*) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and

   (*d*) The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement.

Art 68. Actions against the maritime performing party

The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:

(*a*) The domicile of the maritime performing party; or

(*b*) The port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performs its activities with respect to the goods.

Art 69. No additional bases of jurisdiction

Subject to articles 71 and 72, no judicial proceedings under this Convention against the carrier or a maritime performing party may be instituted in a court not designated pursuant to article 66 or 68.

Art 70. Arrest and provisional or protective measures

Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless:

(*a*) The requirements of this chapter are fulfilled; or

(*b*) An international convention that applies in that State so provides.

Art 71. Consolidation and removal of actions

1. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, the action may be instituted only in a court designated pursuant to both article 66 and article 68. If there is no such court, such action may be instituted in a court designated pursuant to article 68, subparagraph (*b*), if there is such a court.

2. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, a carrier or a maritime performing party that institutes an action seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum pursuant to article 66 or 68 shall, at the request of the defendant, withdraw that action once the defendant has chosen a court designated pursuant to article 66 or 68, whichever is applicable, where the action may be recommenced.

Art 72. Agreement after a dispute has arisen and jurisdiction when the defendant has entered an appearance

1. After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.

2. A competent court before which a defendant appears, without contesting jurisdiction in accordance with the rules of that court, has jurisdiction.

Art 73. Recognition and enforcement

1. A decision made in one Contracting State by a court having jurisdiction under this Convention shall be recognized and enforced in another Contracting State in accordance with the law of such latter Contracting State when both States have made a declaration in accordance with article 74.

2. A court may refuse recognition and enforcement based on the grounds for the refusal of recognition and enforcement available pursuant to its law.

3. This chapter shall not affect the application of the rules of a regional economic integration organization that is a party to this Convention, as concerns the recognition or enforcement of judgements as between member States of the

regional economic integration organization, whether adopted before or after this Convention.

Art 74. Application of chapter 14

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

Chapter 15 Arbitration

Art 75. Arbitration agreements

1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at:

(*a*) Any place designated for that purpose in the arbitration agreement; or

(*b*) Any other place situated in a State where any of the following places is located:

(i) The domicile of the carrier;

(ii) The place of receipt agreed in the contract of carriage;

(iii) The place of delivery agreed in the contract of carriage; or

(iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.

3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if the agreement is contained in a volume contract that clearly states the names and addresses of the parties and either:

(*a*) Is individually negotiated; or

(*b*) Contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement.

4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:

(*a*) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (*b*) of this article;

(*b*) The agreement is contained in the transport document or electronic transport record;

(*c*) The person to be bound is given timely and adequate notice of the place of arbitration; and

(*d*) Applicable law permits that person to be bound by the arbitration agreement.

5. The provisions of paragraphs 1, 2, 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is void.

Art 76. Arbitration agreement in non-liner transportation

1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the provisions of this Convention apply by reason of:

(*a*) The application of article 7; or

(*b*) The parties' voluntary incorporation of this Convention in a contract of carriage that would not otherwise be subject to this Convention.

2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:

(*a*) Identifies the parties to and the date of the charter party or other contract excluded from the application of this Convention by reason of the application of article 6; and

(*b*) Incorporates by specific reference the clause in the charter party or other contract that contains the terms of the arbitration agreement.

Art 77. Agreement to arbitrate after a dispute has arisen

Notwithstanding the provisions of this chapter and chapter 14, after a dispute has arisen the parties to the dispute may agree to resolve it by arbitration in any place.

Art 78. Application of chapter 15

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

Chapter 16 Validity of contractual terms

Art 79. General provisions

1. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(*a*) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;

(*b*) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or

(*c*) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 18.

2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(*a*) Directly or indirectly excludes, limits or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or

(*b*) Directly or indirectly excludes, limits or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.

Art 80. Special rules for volume contracts

1. Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.

2. A derogation pursuant to paragraph 1 of this article is binding only when:

(a) The volume contract contains a prominent statement that it derogates from this Convention;

(b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;

(c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and

(d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.

3. A carrier's public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.

4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 14, subparagraphs (*a*) and (*b*), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in article 61.

5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:

   (*a*) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and

   (*b*) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.

6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

Art 81. Special rules for live animals and certain other goods

Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:

(*a*) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier or of a person referred to in article 18, done with the intent to cause such loss of or damage to the goods or such loss due to delay or done recklessly and with knowledge that such loss or damage or such loss due to delay would probably result; or

(*b*) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and that no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

Chapter 17 Matters not governed by this convention

Art 82. International conventions governing the carriage of goods by other modes of transport

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

(*a*) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;

(*b*) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;

(*c*) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or

(*d*) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

Art 83. Global limitation of liability

Nothing in this Convention affects the application of any international convention or national law regulating the global limitation of liability of vessel owners.

Art 84. General average

Nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average.

Art 85. Passengers and luggage

This Convention does not apply to a contract of carriage for passengers and their luggage.

Art 86. Damage caused by nuclear incident

No liability arises under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the Additional Protocol of 28 January 1964 and by the Protocols of 16 November 1982 and 12 February 2004, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988 and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, including any amendment to these conventions and any future convention in respect of the liability of the operator of a nuclear installation for damage caused by a nuclear incident; or

(b) Under national law applicable to the liability for such damage, provided that such law is in all respects as favourable to persons that may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.

Chapter 18 Final clauses

Art 87. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Art 88. Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States at Rotterdam, the Netherlands, on 23 September 2009, and thereafter at the Headquarters of the United Nations in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Art 89. Denunciation of other conventions

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the International Convention for the Unification of certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924, to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading, signed at Brussels on 23 February 1968, or to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979, shall at the same time denounce that Convention and the protocol or protocols thereto to which it is a party by notifying the Government of Belgium to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

2. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978 shall at the same time denounce that Convention by notifying the Secretary-General of the United Nations to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

3. For the purposes of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraphs 1 and 2 of this article that are notified to the depositary after this Convention has entered into force are not effective until such denunciations as may be required on the part of those States in respect of these instruments have become effective. The depositary of this Convention shall consult with the Government of Belgium, as the depositary of the instruments referred to in paragraph 1 of this article, so as to ensure necessary coordination in this respect.

Art 90. Reservations

No reservation is permitted to this Convention.

Art 91. Procedure and effect of declarations

1. The declarations permitted by articles 74 and 78 may be made at any time. The initial declarations permitted by article 92, paragraph 1, and article 93, paragraph 2, shall be made at the time of signature, ratification, acceptance, approval or accession. No other declaration is permitted under this Convention.

2. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

3. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

4. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

5. Any State that makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. The withdrawal of a declaration, or its modification where permitted by this Convention, takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Art 92. Effect in domestic territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. When a Contracting State has declared pursuant to this article that this Convention extends to one or more but not all of its territorial units, a place located in a territorial unit to which this Convention does not extend is not considered to be in a Contracting State for the purposes of this Convention.

4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Art 93. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. When the number of Contracting States is relevant in this Convention, the regional economic integration organization does not count as a Contracting State in addition to its member States which are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration pursuant to this paragraph.

3. Any reference to a «Contracting State» or «Contracting States» in this Convention applies equally to a regional economic integration organization when the context so requires.

Art 94. Entry into force

1. This Convention 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.

2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State.

Art 95. Revision and amendment

1. At the request of not less than one third of the Contracting States to this Convention, the Secretary-General of the United Nations shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

Art 96. Denunciation of this Convention

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at New York, this eleventh day of December two thousand and eight, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

APPENDIX 2: CARRIAGE OF GOODS BY SEA ACT 1992

1992 CHAPTER 50

An Act to replace the Bills of Lading Act 1855 with new provision with respect to bills of lading and certain other shipping documents [16th July 1992]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:–

1 Shipping documents etc to which Act applies

(1) This Act applies to the following documents, that is to say—

(a) any bill of lading;

(b) any sea waybill; and

(c) any ship's delivery order.

(2) References in this Act to a bill of lading—

(a) do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement; but

(b) subject to that, do include references to a received for shipment bill of lading.

(3) References in this Act to a sea waybill are references to any document which is not a bill of lading but—

(a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and

(b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract.

(4) References in this Act to a ship's delivery order are references to any document which is neither a bill of lading nor a sea waybill but contains an undertaking which—

(a) is given under or for the purposes of a contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods; and

(b) is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person.

(5) The Secretary of State may by regulations make provision for the application of this Act to cases where [an electronic communications network] or any other information technology is used for effecting transactions corresponding to—

(a) the issue of a document to which this Act applies;

(b) the indorsement, delivery or other transfer of such a document; or

(c) the doing of anything else in relation to such a document.

(6) Regulations under subsection (5) above may—

(a) make such modifications of the following provisions of this Act as the Secretary of State considers appropriate in connection with the application of this Act to any case mentioned in that subsection; and

(b) contain supplemental, incidental, consequential and transitional provision;

and the power to make regulations under that subsection shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

2 Rights under shipping documents

(1) Subject to the following provisions of this section, a person who becomes—

(a) the lawful holder of a bill of lading;

(b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract; or

(c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order,

shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.

(2) Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill—

(a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or

(b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.

(3) The rights vested in any person by virtue of the operation of subsection (1) above in relation to a ship's delivery order—

(a) shall be so vested subject to the terms of the order; and

(b) where the goods to which the order relates form a part only of the goods to which the contract of carriage relates, shall be confined to rights in respect of the goods to which the order relates.

(4) Where, in the case of any document to which this Act applies—

(a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but

(b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person,

the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised.

(5) Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives—

(a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage; or

(b) in the case of any document to which this Act applies, from the previous operation of that subsection in relation to that document;

but the operation of that subsection shall be without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill and, in relation to a ship's delivery order, shall be without prejudice to any rights deriving otherwise than from the previous operation of that subsection in relation to that order.

3 Liabilities under shipping documents

(1) Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection—

(a) takes or demands delivery from the carrier of any of the goods to which the document relates;

(b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or

(c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods,

that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract.

(2) Where the goods to which a ship's delivery order relates form a part only of the goods to which the contract of carriage relates, the liabilities to which any person is subject by virtue of the operation of this section in relation to that order shall exclude liabilities in respect of any goods to which the order does not relate.

(3) This section, so far as it imposes liabilities under any contract on any person, shall be without prejudice to the liabilities under the contract of any person as an original party to the contract.

4 Representations in bills of lading

A bill of lading which—

> (a) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel; and
>
> (b) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading,

shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment.

5 Interpretation etc

(1) In this Act—

> "bill of lading", "sea waybill" and "ship's delivery order" shall be construed in accordance with section l above;
>
> "the contract of carriage"—
>
> > (a) in relation to a bill of lading or sea waybill, means the contract contained in or evidenced by that bill or waybill; and
> >
> > (b) in relation to a ship's delivery order, means the contract under or for the purposes of which the undertaking contained in the order is given;
>
> "holder", in relation to a bill of lading, shall be construed in accordance with subsection (2) below;

"information technology" includes any computer or other technology by means of which information or other matter may be recorded or communicated without being reduced to documentary form; . . .

. . ..

(2) References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say—

(a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;

(b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or , in the case of a bearer bill, of any other transfer of the bill;

(c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates;

and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith.

(3) References in this Act to a person's being identified in a document include references to his being identified by a description which allows for the identity of the person in question to be varied, in accordance with the terms of the document, after its issue; and the reference in section l(3)(b) of this Act to a document's identifying a person shall be construed accordingly.

(4) Without prejudice to sections 2(2) and 4 above, nothing in this Act shall preclude its operation in relation to a case where the goods to which a document relates—

(a) cease to exist after the issue of the document; or
(b) cannot be identified (whether because they are mixed with other goods or for any other reason);

and references in this Act to the goods to which a document relates shall be construed accordingly.

(5) The preceding provisions of this Act shall have effect without prejudice to the application, in relation to any case, of the rules (the Hague-Visby Rules) which for the time being have the force of law by virtue of section l of the Carriage of Goods by Sea Act 1992

6 Short title, repeal, commencement and extent

(1) This Act may be cited as the Carriage of Goods by Sea Act 1992.

(2) . . .

(3) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed; but nothing in this Act shall have effect in relation to any document issued before the coming into force of this Act.

(4) This Act extends to Northern Ireland.