**Joint Session of the CMI Rotterdam Rules IWG and the MLA Carriage of Goods by Sea Committee**

**“*A comparative analysis of how courts in different countries deal with Jurisdiction and Arbitration Clauses in Bills of Lading and Other Sea Carriage Documents*”**

**Overview of the Hamburg Rules**

**Enforcement in Chile**

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**1. Introduction**

In 1982, Chile ratified the United Nations Convention on the Carriage of Goods by Sea 1978 (the “Hamburg Rules”), which were in force internationally as of November 1, 1992. Additionally, the Chilean legislature included them in the Chilean Code of Commerce in 1988 (Paragraph 3rd of Title V of Book III), with minimal changes. This paper will deal with some of the most interesting issues related to the enforcement of the Chilean adoption of the Hamburg Rules (the “Rules”).

**2. Definitions**

1. Contractual and Actual Carrier:

Chilean law recognizes a basic distinction between the "carrier" (also known as the "contractual carrier") and the "actual carrier". The former 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”* [[1]](#footnote-1) and the latter as “*any person to whom the performance of the carriage of the goods, or part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted”.[[2]](#footnote-2)*

The above distinction has simplified very much the identity of the carrier problem as anyone who issues a bill of lading as a principal may be treated as a Contractual Carrier. This applies even to freight forwarders in case they issue their own "House" bill of lading and actually many cargo claims are just normally based on these documents.

It is also worthy to note that where the performance of the carriage or part thereof has been entrusted to an actual carrier the carrier nevertheless remains responsible for the entire carriage. In this respect the carrier is joint and severally responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment. Additionally, all the provisions governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him.[[3]](#footnote-3)

1. Shipper

As per Chilean law “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, and 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*.”

Under Chilean practice the scope of this definition comprises both the person concluding the contract of carriage of goods by sea and that actually delivering the cargo, provided they are not the same person.

1. Consignee

By “consignee” it is meant “*the person entitled by a document of title to take delivery of the goods*”,[[4]](#footnote-4) which comprises his servants or agents. Accordingly, his identification will normally be evidenced by the information contained in the bill of lading or other document evidencing the contract of carriage by sea.

1. Goods

Article 976 of the Chilean Code of Commerce defines “goods” as “*any sort of chattel, including live animals*”. Where the goods are consolidated in a container, pallet or similar article of transport or where they are packet, “goods” includes such article of transport or packaging if supplied by the shipper.[[5]](#footnote-5)

1. Contract of Carriage by sea

Under Chilean law a “contract of carriage by sea” means “*any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another.* In this respect, a contract which involves carriage by sea and also carriage by some other means is subject to the Rules only in so far as it relates to the carriage by sea.[[6]](#footnote-6)

1. Bill of lading

Article 977 of the Chilean Code of Commerce provided that the bill of lading "*is a document which establishes the existence of a contract of maritime transport and verifies that the carrier has taken charge or has loaded the goods and has undertaken to deliver them against presentation of that document to a determined person to his order or to the bearer.*" [[7]](#footnote-7)

1. **Scope of Application.**

In Chile any party may be subject to the provisions of the Rules, which are applicable if: [[8]](#footnote-8)

1. the port of loading or discharge as provided for in the contract of carriage by sea is located in Chile; or
2. the bill of lading or other document evidencing the contract of carriage by sea (such as the sea waybill; through bill of lading; short formbill of lading; etc.) stipulates that the contract will be governed by Chilean law (such as through a “Paramount” Clause); or
3. one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in Chile.

The Rules are compulsory applicableregardless of the nationality of the ship, carrier, actual carrier, shipper, consignee or any other interested person. Therefore, cargo owners are provided with an alternative for suing in Chile as far as they wish to do so.

In this respect, it is worthy to note that Jurisdiction & Applicable Law clauses have been held as unwritten by our Supreme Court as they would be contrary to public order rules of law.

In the case *A.J. Broom vs. Exportadora*, the defendant raised an objection of lack of jurisdiction alleging that, due to the application of the Jurisdiction & Applicable Law clause contained in the Bill of Lading, the competent courts where located in Spain.

Both the first instance court and Court of Appeal of Santiago accepted this argument. However, the Chilean Supreme Court held that the jurisdiction rules contained in our Code of Commerce in connection to judicial proceedings relating to Carriage of Goods by Sea are not subject to freedom of contract. These rules allow the plaintiff, at his option, to institute an action before the competent court of several but specific locations, including:[[9]](#footnote-9) (i) the principal place of business; (ii) the location where the contract of carriage by sea was made; (iii) [and] the port or place of loading or discharge; (iv) In actions against the carrier, any other place designated for such purpose in the contract of carriage by sea; and (v) any Chilean port or place at which the carrying vessel or any other vessel of the same ownership may have been arrested.[[10]](#footnote-10)

Chilean regulations expressly prohibit commencing judicial proceedings in a different place[[11]](#footnote-11) and thus, according to the Chilean Supreme Court, Jurisdiction & Applicable Law clauses that provides jurisdiction for other courts are contrary to our public order rules of law. According to our provisions, in such a case the sanction is to treat the clause as “unwritten”.[[12]](#footnote-12)

1. **Contracts Covered.**

The Rules are applicable to all contracts of carriage by sea and it is not a condition that they are necessarily evidenced in a bill of lading or other documents of title such as a sea way bills or short-sea notes. In respect to combined transport bills or through bills of Lading the aforementioned Rules are applicable only to the corresponding sea leg carriage.[[13]](#footnote-13)

The Rules do not apply to charter parties. Nonetheless, a bill of lading issued in compliance with a charter party is under the Rules if it governs the relation between the carrier and the holder of the bill of lading other than the charterer.[[14]](#footnote-14)

1. **Period of Responsibility.**

According to Article 4.1 of the Hamburg Rules the responsibility of the carrier is from "port to port". This encompasses the period during which the goods are in custody of the carrier "at the port of loading, during the carriage and at the port of discharge."

The Chilean system goes one step further and Article 982 of our Code of Commerce provides that the carrier is responsible for the goods while they are in his custody, *"be this ashore or during their actual transport"*. Therefore, the Chilean system is rather closer to a "door to door" period of responsibility. Accordingly, the test for establishing when the carrier's period of responsibility is triggered does not depend on whether or not the goods reached the port of loading but actually on the exact time and place where the goods are handed over to the carrier.

For the purpose of Article 982 the carrier is deemed to be in charge of the goods from the time he has taken over the goods from:[[15]](#footnote-15)

1. the shipper, or a person acting on his behalf;

(ii) an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment.

The carrier's custody period ends when he delivers the goods:

1. by handing over the goods to the consignee; or
2. in cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge;
3. or by handing over the goods to an authority or other third party to who, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.
4. **Basis of Liability**

**6.1. Presumed Fault or Neglect and Duty of Diligence.**

The main principle is that the liability of the carrier is based on presumed fault or neglect [ni’ gleckt]. Accordingly, the carrier is liable for loss resulting from loss or damage to the goods, as well as from delay in delivery, if the occurrence that caused the loss, damage or delay took place while the goods were in the carrier's charge[[16]](#footnote-16).

However, the carrier may avoid liability if he discharges the burden of proving that that he, his servants or agents adopted all measures that could reasonably be required to avoid the cause of loss or damage, and consequences thereof.

As to delay in delivery under Chilean law it is understood to occur when the goods have not been delivered at the port of discharge stipulated in the contract of carriage by sea (i) in the period expressly agreed or, in absence of such agreement, (ii) when they have not been delivered in the period that would be reasonable to require of a diligent carrier given the pertinent circumstances. Additionally, losses of goods will be deemed to exist if they have not been delivered to its destination within 60 days following expiration of the term for delivery.[[17]](#footnote-17)

1. **Limits of Liability.**

**7.1. Limitation Rules.**

Chilean law draws a distinction between lost or damaged goods and delayed goods. In the former case the carrier's liability is limited to an amount equal to 835 Special drawing Right (“SDR”) [[18]](#footnote-18) per package or other shipping unit or 2.5 SDR per kg of gross weight, if the latter is higher.[[19]](#footnote-19) In case of delayed goods the carrier's liability is limited to an amount equivalent to 2.5 times the freight payable for the goods delayed, but not exceeding the total sum of the freight payable under the respective contract of carriage by sea.[[20]](#footnote-20)

It is worthy to note that the above rules do not comprise neither the interests arisen from the value of the goods damage nor judicial costs.

1. **Limitation of Actions.**

Under Chilean law the general principle is that any action relating to maritime disputes is time-barred in two years.[[21]](#footnote-21) In case of cargo claims this period commences on the day on which the carrier has delivered the goods or part thereof. If there is no delivery, the period is counted from the end of the last day on which the goods should have been delivered.[[22]](#footnote-22)

Is interesting to note that actions for indemnity by a person held liable may be instituted even after the expiration of the limitation period if instituted within 6 months. The time allowed is counted as of the person instituting such an action has settled the claim or has been served with process in the action against himself. [[23]](#footnote-23) Under Chilean practice cargo claimants normally sue anyone that may fall within the Carrier and Actual Carrier definitions. Therefore, carriers must be aware of this provision particularly in the actions for indemnity they may have against other carriers, stevedores, ship agents, freight forwarders, or any other party that may have responsibility thereof.

1. **Arbitration.**

Under the Hamburg Rules arbitration is an option for the parties.[[24]](#footnote-24) However, under Chilean law the general principle is that the hearing of any dispute derived from acts, events or contracts creating maritime commerce or navigation, including maritime insurance of any type, are subject to mandatory arbitration.[[25]](#footnote-25)

Unless the parties have chosen ordinary jurisdiction,[[26]](#footnote-26) the arbitration procedure can be instituted, at the choice of the plaintiff, in one of the following places:

1. the principal places of business of the defendant or, in absence thereof, the habitual residence of the defendant; or
2. the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
3. the port or place of loading or discharge;
4. in any other place designated for such purpose in the arbitration clause or agreement.

As to the procedural rules to be followed the main principle is that the applicable rules are the ones agreed to by the parties in writing. If the parties reach no agreement this matter is subject to the rules under the Chilean Code of Tribunals and the Chilean Code of Civil Procedure. In this connection, Title IX of the Chilean Code of Tribunals[[27]](#footnote-27) establishes the general rules for arbitration under Chilean law. Such rules are complemented by the procedural rules contained under Title VIII of Book III of the Chilean Code of Civil Procedure. Furthermore, article 222 of the Chilean Code of Tribunals establishes, that “*arbitrators, are the judges appointed by the parties or subsidiarily by a judicial authority, for the resolution of a litigious matter*”. In turn, article 223 of the Chilean Code of Tribunals provides that the arbitrators may be of three types, namely:

1. “arbitrators at law”;
2. “arbitrators *ex aequo et bono*” (also called “friendly mediators”), and
3. the so-called “mixed arbitrators”.

Arbitrators at law are arbitrators who must render a judgment in accordance to positive law. The judgment must fulfil all of the formal requirements established for judgments rendered by the ordinary judges and, in addition, the procedure in which the matter must be resolved has to be in accordance with the law which would be applicable to the claim had it been brought in court.[[28]](#footnote-28) Under Chilean maritime practice the parties normally will choose these sort of arbitrators.

The second, that is “arbitrators *aequo et bono* are arbitrators who are authorized to resolve a conflict in accordance with what is deemed prudent and equitable by them. With respect to the formalities of the judgment and the formalities relative to the procedure, they must submit themselves to the procedures agreed to by the parties that appointed them.[[29]](#footnote-29)

Finally, “Mixed Arbitrators” are those who must render a judgment according to positive law but with respect to the procedure, they may abide by the rules that the parties have agreed upon.

To act as an arbitrator it is not necessary to fulfil any special requirements. In this connection, it is important to point out that only “arbitrator at law” and “mixed arbitrator” need be lawyers.[[30]](#footnote-30)

With respect to maritime claims where the parties have not reached any agreement as to the arbitrator's name and his capacity,[[31]](#footnote-31) the formalities for the arbitrator's appointment may last between 45 and 60 days. These formalities commence with “a petition to appoint an arbitrator” before the competent ordinary civil court and end with a “resolution” issued by the same court appointing the arbitrator as an arbitrator at law. The procedural rules to be applied during the arbitration are settled in a subsequent hearing before the appointed arbitrator.

**10. Effect of Contractual Stipulation that may Conflict with the Conventions.**

Under Chilean law any stipulation in the contract of carriage by sea, in the bill of lading or in any other document evidencing the contract of carriage by sea that deviates directly or indirectly from the Chilean provisions is deemed unwritten.[[32]](#footnote-32) This sanction does not affect the validity of other stipulations in the contract or document of which it forms part.

When the holder of goods experiences damage as a consequence of a stipulation that must be deemed unwritten the carrier must pay an indemnity in the amount necessary to redress the holder of the goods for any loss or damage thereto or for delay in delivery thereof.[[33]](#footnote-33)

Last but least, as to a completely different matter and since we are in the USA, I recall that the so-called *Copa America Centenario* or referred to in English as the 2016 Centennial Copa America is due to be held here next month. In this respect, I just would like to recall that the current champion is my country and we are looking forward to play against all American teams in June!

1. Article 975 No. 1 of the Chilean Code of Commerce (based on Article 1.1 of the Hamburg Rules). [↑](#footnote-ref-1)
2. Article 975 No. 2 of the Chilean Code of Commerce (based on Article 1.2 of the Hamburg Rules). [↑](#footnote-ref-2)
3. Articles 1006 to 1008 of the Chilean Code of Commerce (based on Articles 10.1 and 10.2 of the Hamburg Rules). [↑](#footnote-ref-3)
4. Article 975 No. 4 of the Chilean Code of Commerce (based on Article 1.1 of the Hamburg Rules). [↑](#footnote-ref-4)
5. Article 976 of the Chilean Code of Commerce (based on Article 1.5 of the Hamburg Rules). [↑](#footnote-ref-5)
6. Article 974 of the Chilean Code of Commerce (based on Article 1.6 of the Hamburg Rules). [↑](#footnote-ref-6)
7. Based on Article 1.7 of the Hamburg Rules. [↑](#footnote-ref-7)
8. Article 979 of the Chilean Code of Commerce (based on Article 2 of the Hamburg Rules). [↑](#footnote-ref-8)
9. Articles 1032 and 1033 of the Chilean Code of Commerce (based on Article 21.1 and 21.2 of the Hamburg Rules). [↑](#footnote-ref-9)
10. In such case, if the defendant so petitions in the period of service of process, the judge may authorize a change in venue to any of the courts competent according to numerals (i) to (iv) above. [↑](#footnote-ref-10)
11. Article 1034. [↑](#footnote-ref-11)
12. Article 824. [↑](#footnote-ref-12)
13. Second paragraph of Article 974 of the Chilean Code of Commerce (based on Article 1.6 of the Hamburg Rules). [↑](#footnote-ref-13)
14. First paragraph of Article 980 of the Chilean Code of Commerce (based on Article 2.3 of the Hamburg Rules). [↑](#footnote-ref-14)
15. Article 983 of the Chilean Code of Commerce (based on Article 4.2 of the Hamburg Rules). [↑](#footnote-ref-15)
16. Article 984 of the Chilean Code of Commerce (based on Article 5.1 of the Hamburg Rules). [↑](#footnote-ref-16)
17. Articles 985 and 986 of the Chilean Code of Commerce (based on Articles 5. 2 and 5.3 of the Hamburg Rules). [↑](#footnote-ref-17)
18. The Special Drawing Right as defined by the International Monetary Fund. [↑](#footnote-ref-18)
19. Article 992 of the Chilean Code of Commerce (based on Article 6.1(a) of the Hamburg Rules). For the purpose of calculating which amount is the higher the following rules apply:

Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit (Article 996 No. 1 of the Chilean Code of Commerce (based on Article 6.2(a) of the Hamburg Rules).

(b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit. (Article 996 No. 2 of the Chilean Code of Commerce (based on Article 6.2(b) of the Hamburg Rules). [↑](#footnote-ref-19)
20. Article 993 of the Chilean Code of Commerce (based on Article 6.1(b) of the Hamburg Rules). [↑](#footnote-ref-20)
21. Article 1249 of the Chilean Code of Commerce. In this respect it is worthy to note that actions relating to passage contracts, freight, general average and contributions are time-barred within six months (Articles 1246 and 1247 of the Chilean Code of Commerce). [↑](#footnote-ref-21)
22. First Paragraph of Article 1249 No. 2 of the Chilean Code of Commerce (based on Article 20.2 of the Hamburg Rules). [↑](#footnote-ref-22)
23. Second Paragraph of Article 1249 No. 2 of the Chilean Code of Commerce. [↑](#footnote-ref-23)
24. Article 22 of the Hamburg Rules. [↑](#footnote-ref-24)
25. Article 1203 of the Chilean Commerce Code. [↑](#footnote-ref-25)
26. Under Chilean law ordinary justice may hear maritime disputes exceptionally in the following cases:

	1. When the parties or interested parties so agree (either in the same act or contract in which the dispute originates or by agreement set down in writing prior to commencement of the lawsuit);
	2. When criminal liabilities are sought that could originate in the same acts (a civil action may be filed before a court hearing the respective criminal process or before the arbitration tribunal according to general rules);
	3. In the case of the lawsuits mentioned in paragraph 4 of Title IX of the Navigation Law (which discusses the spill of hydrocarbons and other harmful substances) for which there is a special procedure that must be followed before an ordinary court according to general maritime regulations;
	4. In the case of the government or of disputes for liabilities that are enforced before government, customs or port services or agencies or obligations controlled by such entities; and
	5. When the amount of the lawsuit does not exceed 5,000 SDR and the plaintiff chooses to file action with the ordinary courts. [↑](#footnote-ref-26)
27. Articles 222 through 243 of the Chilean Code of Tribunals. [↑](#footnote-ref-27)
28. Article 223 paragraph 1 of the Chilean Code of Tribunals. [↑](#footnote-ref-28)
29. Article 223 paragraph 2 of the Chilean Code of Tribunals. [↑](#footnote-ref-29)
30. Article 225 of the COT. [↑](#footnote-ref-30)
31. i.e. whether an arbitrator in law or an arbitrator in equity or a mixed arbitrator. [↑](#footnote-ref-31)
32. Article 1039 of the Chilean Code of commerce (based on Article 23.1 of the Hamburg Rules, which instead of using “unwritten” states “null and void”). [↑](#footnote-ref-32)
33. Article 1040 of the Chilean Code of commerce (based on Article 23.4 of the Hamburg Rules). [↑](#footnote-ref-33)