

## CONTENTS

<b>INTRODUCTION.....</b>	<b>1</b>
<b>1. BRAZILIAN LEGISLATION ON THE CARRIAGE OF GOODS BY SEA .....</b>	<b>3</b>
1.1 The 1850 Commercial Code .....	3
1.2 Decree n. 19.473/1930 .....	4
1.3 Decree n. 116/1967 .....	5
1.4 Law n. 9.611/1998 .....	5
1.5 The Consumer Code.....	6
1.6 The 2002 Civil Code .....	7
1.7 Summary of Brazilian Legislation on the Carriage of Goods by Sea.....	9
<b>2. HOW TO MOVE FORWARD: HAMBURG RULES, ROTTERDAM RULES OR A DOMESTIC LAW?.....</b>	<b>11</b>
2.1 The Hamburg Rules .....	11
2.2 The Rotterdam Rules .....	14
2.3 A Domestic Law?.....	17
<b>3. THE IMPLEMENTATION OF THE HAMBURG RULES AND ITS IMPLICATIONS .....</b>	<b>22</b>
3.1 General Provisions .....	23
3.2 Liability of the Carrier.....	26
3.3 Liability of the Shipper .....	28
3.4 Transport Documents .....	29
3.5 Claims and Actions .....	30
3.6 Supplementary Provisions.....	32
3.7 Summary of the Impacts on the Brazilian Legal System .....	32
<b>4. LOOKING INTO THE FUTURE: KEEP ROTTERDAM RULES AT A CLOSE SIGHT.....</b>	<b>34</b>
<b>BIBLIOGRAPHY.....</b>	<b>35</b>
<b>DRAFT LEGISLATION.....</b>	<b>38</b>

## EXPLANATORY NOTE

### INTRODUCTION

The carriage of goods by sea is regulated, on the international plane, by different conventions currently in force. These conventions are the so-called Hague Rules,<sup>1</sup> amended by the Visby Protocol<sup>2</sup> (also known as “Hague-Visby Rules”) and by the SDR Protocol,<sup>3</sup> and the Hamburg Rules.<sup>4</sup> Each of these conventions is said to lean towards the interests of either the shipowners or the cargo-owners. The Hague Rules and their Protocols are reputed to represent the interests of the maritime countries, incorporating provisions highly favourable to the shipowners, while the Hamburg Rules are deemed to provide a response to the over-protective system of the Hague Rules, by trying to give effect to the interests of cargo-owners.<sup>5</sup>

The clear fragmentation of international law on the subject, caused by the division among countries as to the current implementation of the conventions,<sup>6</sup> was the reason for the United Nations to initiate works for the adoption of a new convention that would bring uniformity on the international plane and provide a response to the inconsistencies still present in the former regimes.<sup>7</sup> The works resulted in the adoption, in 2009, of the text of the “Rotterdam Rules”.<sup>8</sup>

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<sup>1</sup> International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924.

<sup>2</sup> Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968.

<sup>3</sup> Protocol (SDR Protocol) Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, as amended by the Protocol of 23 February 1968.

<sup>4</sup> United Nations Convention on the Carriage of Goods by Sea, 1978.

<sup>5</sup> Although adhered by over thirty countries, the Convention has not gained widespread acceptance so far, most likely due to the pressure of shipowners.

<sup>6</sup> Indeed, under the current scenario it is possible to identify at least six different regimes adopted by countries: (i) countries that are party only to the original Hague Rules; (ii) countries that are party to the Hague-Visby Rules; (iii) countries that are party to the Hague Rules and also adopted the SDR Protocol; (iv) countries that are party to the Hague-Visby Rules and also adopted the SDR Protocol, (v) countries that are party to the Hamburg Rules; and (vi) countries that have their own national legislation on this topic.

<sup>7</sup> Francis Reynolds, ‘Hague, Visby, Hamburg and Rotterdam: A maritime tour of northern Europe’, in Martínez Gutiérrez, Norman A. (ed.), *Serving the Rule of International Maritime Law: Essays in Honour of Professor David Joseph Attard*, Reutledge, London and New York, 2010, p. 246.

<sup>8</sup> United Nations Convention of Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009.

Brazil is not a party to any of these conventions, although it has taken part to the negotiations of the Hamburg Rules and signed the Convention, without later ratifying it. The Brazilian legal rules applicable to the carriage of goods by sea are found in different legal texts, such as the 1850 Commercial Code,<sup>9</sup> the 2002 Civil Code,<sup>10</sup> the Consumer Code<sup>11</sup> and other legislation.<sup>12</sup>

It is clear that the domestic regime is also highly fragmented, and thus calls for an immediate systematization. But such systematization should not be carried out without due regard to the international developments on the subject, leaving Brazil isolated from what may be considered as the worldwide practice. To the contrary, any Brazilian initiative to bring uniformity into its own legal regime should also focus in what is being developed by the international community.

The urge to do so, however, might lead to a hasty conclusion that Brazil should promptly adhere to the Rotterdam Rules. But some important reasons, as further elaborated hereinafter, lead to the conclusion that the best option for the country to move along with a systematization process should be, firstly, to implement the regime of the Hamburg Rules and, at the same time, maintain a very close eye to the developments of the Rotterdam Rules.<sup>13</sup> The reason for that recommendation will be presented in this Explanatory Note, together with the proposal of a drafted law to be passed by the Brazilian Legislative Body.

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<sup>9</sup> Law n. 556/1850.

<sup>10</sup> Law n. 10.406/2002.

<sup>11</sup> Law n. 8.078/1990.

<sup>12</sup> Such as Law n. 9.611/1998, which regulates the multimodal transport; and Decree n. 116/1967, which regulates the liability of the port operators when handling the cargo.

<sup>13</sup> As Brazil is traditionally a cargo-owner country, the option to adopt the Hague Rules seems not to be appropriate and will not be analyzed hereunder.

## 1. BRAZILIAN LEGISLATION ON THE CARRIAGE OF GOODS BY SEA

### 1.1 *The 1850 Commercial Code*

The 1850 Commercial Code was partially derogated by the 2002 Civil Code. In fact, most of its text is not in force anymore, and the only provisions that are still applicable are some specific rules of bankruptcy and other rules related to maritime matters, such as ownership and registration of ships, charterparty contracts, bills of lading, marine insurance, general average, general rules regarding crew members, duties and powers of masters of ships, and carriage of passengers.<sup>14</sup> Nevertheless, apart from the very old fashionable language used in the text, such provisions nowadays are not up to date and consonant with current commercial practices.

The parts of the 1850 Commercial Code that matter for the carriage of goods by sea are the chapters on bills of lading and charterparties. This Code, however, treats charterparties and bills of lading as representing the same species of contract,<sup>15</sup> what seems to be contradictory with the market practices currently in place and also with current Brazilian legislation as established in other laws. As the articles related to bills of lading are very few and deal mainly with formal requirements for the issuance of such documents,<sup>16</sup> and the provisions relating to obligations and rights under charterparties are more elaborated, confusion arises as to which of those provisions are actually applicable to bills of lading.

The provisions related to liability under the chapters on charterparties and bills of lading are mostly connected with delays (by the shipper, during the loading or unloading operations,<sup>17</sup> or by the carrier, during navigation<sup>18</sup>), and are generally based on fault or

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<sup>14</sup> Articles 457-796 are related to maritime matters.

<sup>15</sup> Article 566 seems to establish such rule. Its text is not clear and could also be interpreted as indicating two different categories of contracts, the charterparty and that represented by the bill of lading, under the general contract of affreightment. The problem is that the word used in Portuguese that would be understood as contract of affreightment is also the word used nowadays for charterparties.

<sup>16</sup> Articles 575-589.

<sup>17</sup> Articles 591-594.

<sup>18</sup> Article 608.

neglect. With respect to the liability of the carrier for damage to or loss of the goods, it seems that the 1850 Commercial Code approached the contract of carriage of goods as an obligation to perform a service rather than as an obligation of result. This implies that the liability regime would be based on fault or neglect of the carrier.<sup>19</sup> Such position, however, is no longer supported by the Brazilian jurisprudence and jurists, which tend to consider the contract of carriage of goods as entailing an obligation of result pursuant to the new rules brought about by the 2002 Civil Code.<sup>20</sup>

From these considerations, it seems clear that the remaining articles of the Commercial Code of 1850 dealing with charterparties and bills of lading are no longer representative of the customs and practices currently in place in the carriage of goods by sea.

## 1.2 *Decree n. 19.473/1930*

First and foremost, it has to be highlighted the fact that Decree n. 19.473/1930 is no longer in force, as it was entirely repealed by a Presidential Decree of April 25<sup>th</sup> 1991.<sup>21</sup>

The reason why some attention should be paid to it is that it regulated bills of lading issued for the carriage of good by roads, rails, air and sea. Its rules addressed, among others, the information that should be included in such documents, the ways by which they could be transferred, the effects of endorsements, the impacts of such transfers on the duties and rights of the relevant parties (carrier, shipper, consignee and transferee) and the rights of the pledgees.

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<sup>19</sup> O. A. Castro Junior and N. A. Martínez Gutiérrez; *Limitação da Responsabilidade Civil no Transporte Marítimo*, Rio de Janeiro, Renovar, 2016, p. 122-124. The conclusion that the liability regime under the Commercial Code of 1850 is based on negligence or fault is founded in Articles 494, 508 and 529, whose provisions are related to the duties of the master. Article 529 expressly determines that the master should be liable for damage to or loss of the goods in the event that such damage or loss resulted from his negligence or fault. This is not aligned with the new provisions found in the Civil Code of 2002 for the general liability of the carrier of goods. See item 1.6.

<sup>20</sup> See item 1.6.

<sup>21</sup> Curiously, such Decree has no title and is not numbered, as it should be the best practice under the Brazilian legal system. It repealed a huge number of old decrees that were still in force in Brazil, which had been passed from 1889 until 1990. The text of this Decree does not give any reason for this massive derogation, and just makes reference to six annexes containing the long list of decrees being repealed.

After the repeal of such Decree, no other rules were adopted to replace it, and especially to regulate bills of lading. Instead, sparse norms were included in other laws as incident matter to other specific regulations, as it will be explained later. This evidences, once again, how fragmented the Brazilian legal system is in respect to the carriage of goods by sea.

### *1.3 Decree n. 116/1967*

Decree n. 116/1967 deals specifically with the duties and liabilities of port operators when they act as a depot or warehouse for the goods and handle them for the loading on and unloading from ships. As this is an incidental matter to the carriage of goods by sea, although its importance should not be neglected, it does not touch upon the relation between the carrier and cargo-owners, nor it contains provisions in respect of the contract of carriage of goods by sea.<sup>22</sup>

### *1.4 Law n. 9.611/1998*

Law n. 9.611/98 is the Brazilian law that regulates the multimodal transport within Brazil. Its text reflects the provisions of the United Nations Convention on International Multimodal Transport of Goods, 1980.<sup>23</sup> Pursuant to this law, the multimodal transport concerns the type of carriage of goods that is performed by more than one means of transport, regulated by one single contract and under the responsibility of the multimodal transport operator, who remains liable to the cargo-owner for any damage or loss caused by any subcontracted carrier.

The provisions of this law will only be applicable to the carriage of goods by sea, when the carriage operation indeed includes a stage to be performed at sea and provided that, in such case, Brazilian legislation is applicable to the contract. Hence, its scope of

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<sup>22</sup> Indeed, this Decree only goes as far as the loading activity is completed by the port operators, stating, in its Article 3 that the responsibility of the ship starts once the goods are duly placed on board the ship.

<sup>23</sup> This Convention is not in force yet. Brazil is not a signatory State.

application is quite limited, and does not cover a massive number of operations carried out by seaway transport.

Regardless of the limited applicability of Law n. 9.611/98, it is important to highlight the fact that the liability of the multimodal transport operator is strict. Indeed, the multimodal transport operator will only be able to excuse himself from responsibility for damage to or loss of the goods in cases of acts of God or *force majeure*, defective packaging, inherent vice of the goods or exclusive fault of the shipper, the consignee or the transferee.<sup>24</sup> Furthermore, the multimodal transport operator will remain responsible for the goods from the moment they are received and placed under his custody until the moment of actual delivery to the holder of the bill of lading.<sup>25</sup> Finally, the liability of the multimodal transport operator is limited to the value of the goods as declared in the relevant bill of lading, added by the insurance and freight costs,<sup>26</sup> in as much as such liability does not arise from negligence or wilful misconduct of this operator.<sup>27</sup>

### 1.5 *The Consumer Code*

When Brazilian courts find that the relation represented by a contract of carriage of goods by sea is of a consumer nature, they will likely apply the rules of the Consumer Code to the contract.

Without delving into the fairly complex discussion of what is the concept of a consumer for the purposes of identifying a consumer contract, it is important to note that under such Code, a consumer is “every person or entity which buys or uses products or services as a final receiver”.<sup>28</sup> There is no uniformity in Brazilian Courts as to the application of this concept, but it is an unquestionable fact that in some situations the

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<sup>24</sup> Article 16.

<sup>25</sup> Article 13.

<sup>26</sup> Article 17.

<sup>27</sup> Article 20.

<sup>28</sup> Article 2. There are two main theories attempting to explain what is meant to be a final receiver, the *finalistic* and the *maximalist*. See C. L. Marques, in A. H. V. Benjamin, *Manual de direito do consumidor*. 2. ed., São Paulo, Revista dos Tribunais, 2009, p. 71.

Courts recognize the shippers of cargo under a contract of carriage of goods by sea as a consumer and apply the defences in favour of them under the Consumer Code.<sup>29</sup>

The outstanding provisions of the Consumer Code that will probably be enforced in such cases are related to (i) the strict liability of the provider of services with respect to any loss or damage caused during the rendering of the service; (ii) the unenforceability of any contractual clause that reduces or excludes the liability of the service provider, which are forthwith considered null and void; and (iii) the imposition of the burden of proof over the service provider once the allegations of the consumer are simply considered by the Court as credible.<sup>30</sup>

### 1.6 *The 2002 Civil Code*

The 2002 Civil Code has an entire chapter dedicated to the “contract of transport”, which is divided into transport of persons and of goods, without making any distinction as to which are the means of transport concerned. It provides, therefore, a general legal regime for all sorts of carriage of persons and goods.

Pursuant to Article 730, “by a contract of transport someone undertakes, upon remuneration, to transport persons or goods from one place to another”. This concept is considered to embody an obligation of result imposed on the carrier, which reflects directly the liability regime adopted by the Code. Indeed, Article 750, building on this principle, is deemed to place upon the carrier the risk of the goods from the moment he receives until the moment he delivers them to the consignee, and his duty of care during this period is considered as a strict obligation. The majority of Brazilian court’s decisions, in many different actions brought by shippers or consignees relating to losses of or damage to the goods, explicitly state that “in contracts of carriage of goods, the liability of the carrier is

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<sup>29</sup> See, as an example, ‘RE n. 286.441 – RS [2003]’, *Superior Tribunal de Justiça* [website], [www.stj.gov.br](http://www.stj.gov.br) (accessed April 24<sup>th</sup>, 2017). In this decision, the Court held that there was a consumer relation between the shipper and the carrier in order to apply the time limit for action as provided for under the Consumer Code (5 years, as per Article 27). It was an action brought by the shipper for damages sustained while the cargo was still under the care of the carrier.

<sup>30</sup> Articles 14, 51 (I), 6 (VIII) and 27.



strict”.<sup>31</sup> This was the position expressly adopted by the Brazilian Superior Court of Justice, in the following decision:

CIVIL LAW AND CIVIL PROCEDURE [...] TRANSPORT. CIVIL LIABILITY. FORCE MAJEURE. EXCLUSION. RIGHT OF RECOURSE OF THE INSURER AGAINST THE CARRIER. INVIABILITY. [...] DECISION MAINTAINED.

1. The liability of the carrier shall be strict, in accordance with Art. 750 of the CC / 2002, and can be excluded only by operation of acts of God or *force majeure*, when the risk is not comprised in the scope of the carrier’s activity.

[...]

3. In this case, the trial Court, on the basis of the evidence presented, concluded that the capsizing of the vessel and the loss of the goods carried resulted from *force majeure* that could not had been predicted by the master of the vessel. Changing such understanding is impracticable on special appeal.

4. Appeal dismissed.<sup>32</sup> [Author’s translation]

Because of the strict liability, the carrier may only exempt himself of the liability for any damage to or loss of the goods in case of the shipper’s fault, inherent vice or defective packaging of the goods and *force majeure*. Likewise, it will be for the carrier to bear the burden of proof when claiming any of these exemptions.<sup>33</sup>

Notwithstanding the strict obligation of the carrier to deliver the goods to the consignee, the same Article 750 provides a limitation of liability that is similar to that one included in Law n. 9.611/1998, based on the value of the goods as declared in the relevant bill of lading. If limitation of liability is possible, however, exemption of liability is not so,

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<sup>31</sup> See M. H. Diniz, *Código Civil Anotado – Contém Notas à LICC*, 14 ed., São Paulo, Saraiva, 2009, p. 530. According to her, the risk of the carriage is allocated to the carrier, who will only be exempted from it in case of *force majeure* or shipper’s fault. Some jurists do not agree with this understanding, defending that the language of Article 750 does not necessarily imply that the obligation of the carrier is strict. See Rui Stoco, *Tratado de Responsabilidade Civil*, 6 ed., São Paulo, RT, 2004, p. 287. This, however, is not the position of the great majority of the Court decisions. Brazilian jurisprudence largely supports the strict liability of the carrier of goods. See, in this respect, the following State Court decisions: AC 70066186677 RS, APL 1318199720098170001 PE, APC 20130111239029 DF, APL 00158681420118260008 SP.

<sup>32</sup> REsp 1.285.015/AM.

<sup>33</sup> Pedro Calmon Filho, ‘Contratos de Transporte Marítimo de Mercadorias’, *Direito Marítimo – Atualidades e Tendências*, Rio de Janeiro, Editora FGV, 2016, p. 11.

as the Brazilian Supreme Court does not accept any clause completely exempting the carrier from liability.<sup>34</sup>

The articles of the 2002 Civil Code do not expressly address the functions of a bill of lading and it is not clear if it considers it as an evidence of the contract of carriage of goods or the contract itself. Regardless of that, it is important to appreciate that, to the extent that standard forms are used between the parties, the contract will be subject to special rules put forward to protect the bona fide party that is not in a position to negotiate their terms.<sup>35</sup>

Apart from the rules on the responsibility of the carrier, the articles of the 2002 Civil Code regarding the carriage of goods are not exhaustive. They include basic rules on the information that should be provided by the shipper and inserted in the bill of lading, on delays on delivery and on the delivery itself. Particularly, with respect to the information to be included in the bill of lading, reference to subsidiary legislation is made. However, there is a lacuna in this topic, at least when the carriage is not performed under a multimodal transport contract; after the repeal of Decree n. 19.473/1930,<sup>36</sup> no other law was enacted to specifically address the legal regime of bills of lading.

### *1.7 Summary of Brazilian Legislation on the Carriage of Goods by Sea*

From the exposition above, it becomes evident that the current state of the Brazilian legislation with respect to the carriage of goods by sea is far from satisfactory. Just to recall a few reasons for that: there are rules in force that entirely contradict each other (i.e. the liability provisions under the 1850 Commercial Code and the 2002 Civil Code); there is a lacuna caused by the repeal of a regulation without due replacement by another; and there is a possible overlap of rules when the carriage of goods by sea is performed under a multimodal contract or a consumer contract.

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<sup>34</sup> *Súmula* n. 161, Brazilian Supreme Court.

<sup>35</sup> Article 423 establishes that ambiguous clauses in standard contracts will be interpreted in favor of the party to whom they were imposed and Article 424 deems null and void any clause by which a waiver of rights is imposed on the adherent party.

<sup>36</sup> See item 1.2 above.

Adding up to this evident inconsistency is the legal trend of the most recent laws which establish the strict liability of the carrier for any damage to or loss of the goods. This emerges from the very fact that the contract of carriage is deemed to entail an obligation of result under Brazilian law.<sup>37</sup>

Due to that construction, the obligations of the carrier and the shipper tend to reflect this allocation of risks between the parties, especially under the 2002 Civil Code and the Law n. 9.611/1998. Indeed, as the carrier will be responsible for the goods while they remain under his custody, rules are established to regulate the effects of delay, the manner of delivery, and the measures that should be taken by the carrier should the consignee fail to take delivery of the goods. On the other hand, the shipper is under the duty to provide sufficient information about the goods to the carrier and to properly pack the goods. The consignee, finally, is obliged to carry out the inspection of the goods upon delivery and promptly register any identified non-conformity (either by insertion of the information in the bill of lading or by notification to the carrier).

In addition to the considerable fragmentation of the legal system, it is equally important to note that the Brazilian regime also departs from the international conventions that are currently in force to regulate this subject.<sup>38</sup>

There is no doubt that the complexity of this “mazy” system, together with the high standards of care imposed on the carriers, are factors that are capable of having considerable economic impact for Brazil, increasing the freight and insurance rates and

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<sup>37</sup> See items 1.4, 1.5 and 1.6 above.

<sup>38</sup> In fact, the strict liability of the carrier is a unique feature, not found in the Hague or Hague Visby Rules, nor in the Hamburg Rules or the Rotterdam Rules. The Hague and Hague Visby Rules, protecting the carriers, impose on them a duty of due diligence on the care of the cargo, listing many excepted perils capable of excluding his liability, among which the nautical fault (negligence) is also included. The Hamburg Rules, as will be further explained (item 2.1), create a presumption of fault against the carrier, who will still have the opportunity to prove he was not negligent on the care of the cargo. Finally, the Rotterdam Rules attempt to combine both these mentioned regimes, by stipulating the presumption of fault of the carriers, at the same time allowing them to avail themselves of a list of excepted perils very similar to the list under the Hague and Hague Visby Rules (except by the nautical fault, which was excluded). Although the strict liability regime may protect the interests of cargo-owners, see a further analysis on why this could entail disadvantages for the country under item 2.1.

discouraging carriers to expand their operations in the country. The call for an immediate and effective answer is imperative.

## **2. HOW TO MOVE FORWARD: HAMBURG RULES, ROTTERDAM RULES OR A DOMESTIC LAW?**

### *2.1 The Hamburg Rules*

The Hamburg Rules entered into force in 1992. As aforementioned, they were adopted as a response to the excessive protections granted to shipowners under the Hague and Hague-Visby regimes. Although adhered by over thirty countries, the applicability of the Convention is still limited, most likely due to the opposition of shipowners and traditional maritime countries.

Brazil signed the Convention but has not yet ratified it. Nevertheless, the regime under this Convention can be considered as the closest to the Brazilian legal system currently in place, for its main features are similarly related with the high standard of care imposed on the carrier during the period in which the goods are under his custody.

The salient features of the Hamburg Rules that should be taken into account in this comparison are the following:<sup>39</sup> (i) the period of responsibility of the carrier; (ii) the basis of the carrier's liability; (iii) the liability in case of delays; (iv) the financial limits of liability; (v) the rights of the carrier's servants and agents to avail themselves of the defences under the convention; (vi) the loss of benefit of limits of liability; and (vii) the liability of the shipper.

With respect to items (i) and (iii), it can be reasonably concluded that the Hamburg Rules do not substantially depart from what is currently in force in the domestic legislation. The liability of the carrier under the Hamburg Rules also comprises the entire period during

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<sup>39</sup> These are some of the distinguished features of the Hamburg Rules highlighted by the United Nations in the document "Explanatory note by the UNCITRAL Secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)".

which the goods are in his custody and delays by the carrier may also give rise to a claim from the consignee.<sup>40</sup> The distinction with respect to the effects of delays between both regimes is attributed to the general liability system elected by each of them, as will now be explained.

While the Brazilian recent legislation seems to favour the strict liability of the carrier for any damage to or loss of the goods during the period in which they remain in his custody, the Hamburg Rules are slightly different, providing, instead, for a presumption of fault of the carrier. What this means in practice is that, in both cases, the burden of proof of any reason claimed to preclude the carrier's liability is placed upon the carrier. However, while under a strict liability regime the causes that lead to the exclusion of the carrier's liability are very limited and he is not able to claim that he did not act negligently, when there is a presumption of fault, the carrier may still be able to prove that the event that led to the damage or loss was not caused by his fault or neglect, in order to be exempted from liability.

Despite this difference, it is reasonable to conclude that the interests of the cargo-owner are still protected under the Hamburg Rules, while some balance is sought by giving the carrier the opportunity to prove his due diligence in the proper care of the cargo. As opposed to that, the Brazilian system places a very high and unbalanced burden over the carrier, which can turn out to be not economically wise.<sup>41</sup>

With respect to the financial limits to liability and the rights of carrier's servants and agents, the Hamburg Rules provisions seem not to depart from the Brazilian system, as both concepts are already familiar in the country.<sup>42</sup> The adoption of the rules of the Convention internally would only bring uniformity with international law as to their effects.

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<sup>40</sup> This possibility is not addressed, for example, under the Hague and Hague-Visby Rules.

<sup>41</sup> As freight rates and insurance costs tend to reflect the risks undertaken by the carrier; the greater the risk, the higher the costs.

<sup>42</sup> Articles 750 and 932 of 2002 Civil Code.

The loss by the carrier of the benefit of liability limits as provided for under the Convention is neither strange to the Brazilian legal regime, since it is similar to the rule included in Law n. 9.611/1998 (although not expressly reproduced in the 2002 Civil Code). Similarly, the liability of the shipper under the Hamburg Rules emerges from the particular obligations that are imposed upon him, which is also consistent with some of the Brazilian rules.

The Hamburg Rules also have provisions on jurisdiction and arbitration.<sup>43</sup> Overall, they are not inconsistent with the Brazilian legal system. Some of the rules on jurisdiction are not exactly similar to the ones in force in Brazil, but if they were to be adopted by the country, they would only amount to special rules applicable specifically to the international carriage of goods by sea.

In light of this brief comparison, it becomes clear that the main difference between the legal regime of carriage of goods by sea in Brazil and in the Hamburg Rules relates to the liability of the carrier. While the Hamburg Rules seem to promote a fairly balanced approach, by protecting the interests of the shipper and consignee and at the same time granting the carrier the right to prove his due diligence and proper care, the Brazilian system is characterized by an over-protection of the cargo-owners. Although this may seem to be an attractive approach for a traditional cargo country, the truth is that the entire market may suffer from the economic impacts that this protection may cause on freight and insurance rates, leading, ultimately, to an impact on the competitiveness of the Brazilian goods in the international market.

Except for the liability regime, the other main provisions of the Hamburg Rules do not look alien to the Brazilian legal system, a feature that would facilitate its internal implementation without further complications. The process to become a party to this Convention, however, should be carried out by way of a smooth transition in Brazilian legislation, as it will be further explained.<sup>44</sup>

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<sup>43</sup> Articles 21 and 22.

<sup>44</sup> See item 2.3.

## 2.2 *The Rotterdam Rules*

The Rotterdam Rules were a result of an initiative headed by the United Nations to overcome past problems of the conventions on the international carriage of goods currently in force. Similarly to the Hamburg Rules, they also sought to offer a more balanced system for both shipowners and cargo-owners, although granting again to the ship-owners some benefits originated in the Hague and Hague-Visby Rules, in an attempt to overcome their resistance to adhere to a new regime as it was the case with the Hamburg Rules.<sup>45</sup>

This Convention has not yet entered into force, and there is little certainty as to whether and when this might occur. The main criticism directed to the Rotterdam Rules concerns their wording: they are said to be of a style strange both to common and civil lawyers, with a rather long and complex text, especially when compared to the previous conventions.<sup>46</sup>

The main innovations of the Rotterdam Rules are the creation of a different regime for the carriage of goods in its very essence, called “maritime plus”, which includes under their regulations other means of transport, provided that at least one part of the international carriage is performed by sea;<sup>47</sup> the inclusion of rules regarding electronic transport documents; and the liability regime, which tried to combine the Hague and Hague-Visby Rules with the Hamburg Rules, creating a problematic and complex system of difficult apprehension.<sup>48</sup>

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<sup>45</sup> Reynolds (n.7) p. 246.

<sup>46</sup> This was also described as “verbosity”, William Tetley, ‘A summary of some general criticisms of the UNCITRAL Convention (the Rotterdam Rules)’, in Gutiérrez, Norman A. Martínez (ed.), *Serving the Rule of International Maritime Law: Essays in Honour of Professor David Joseph Attard*, Reutledge, London and New York, 2010, p. 252. The criticism is still complemented by the manifestations of concern on how this new wording could impact in the vast jurisprudence and case law that have been developed since the adoption of the Hague Rules. This specific issue was addressed by the ‘Declaración de Montevideo’, signed by jurists of many different countries against the adoption of the Convention. See in [http://www.nuestromar.org/noticias/transporte\\_maritimo\\_y\\_fluvial/05\\_12\\_2010/34272\\_declaracion\\_de\\_montevideo](http://www.nuestromar.org/noticias/transporte_maritimo_y_fluvial/05_12_2010/34272_declaracion_de_montevideo), (accessed April 18th, 2017).

<sup>47</sup> Article 5.

<sup>48</sup> Although other substantial provisions of the Convention are targeted by many critics, the analysis herein will be focused only on those that have immediate impact on the Brazilian legal system and differ from the Hamburg Rules. Many features of the Rotterdam Rules are similar to the ones of Hamburg Rules and were, therefore, assessed in item 2.1.

In the international plane, some voices against the adoption of the convention were raised. Particular emphasis should be given to Tetley,<sup>49</sup> who strongly opposed to the “maritime plus” regime, described by him as an *unfamiliar* approach to this type of convention, creating a *contracts* act, rather than a *carriage* act or a *multimodal* act. The regime is said to encompass a partial regulation of many different subjects, such as bills of lading, multimodal transport, carriage of goods, warehousemen and responsibility. Because of that, he clearly stated that the Rotterdam Rules should be opposed by all Maritime Law Associations and should be subject to revision. Also, he submitted that the United Nations Convention on International Multimodal Transport of Goods is superior to the Rotterdam Rules, and therefore should be adopted.

Turning attention to the Brazilian legal system, it is undeniable that the accession to this Convention could cause problems internally with respect to the “maritime plus” regime, due to the fact that Brazil has a domestic law on multimodal transport<sup>50</sup> that substantially reproduces the provisions of the United Nations Multimodal Transport Convention. Any overlap between the Rotterdam Rules and the Brazilian domestic law would not be covered by the carve-out brought in Article 26, which is only related to other international instruments.<sup>51</sup>

Insofar as the possibility and regulation of the use of electronic documents is concerned, the Rotterdam Rules indeed sought to reflect the developments in communications and technologies that impose new challenges in the traditional dynamics of the international carriage of goods. In fact, the replacement of paper document by electronic records is the modern trend to answer to the ever-increasing urge to conclude transactions in the shortest period of time possible.

In this respect, Brazil has already taken some steps to regulate the use of electronic documents in a number of different fields. Recently, the adoption of a system for the

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<sup>49</sup> Ibid, p. 254.

<sup>50</sup> Law n. 9.611/1998. See item 1.4.

<sup>51</sup> Article 26 states that the Rotterdam Rules should not prevail over other conventions regulating the particular means of transport engaged in a multimodal operation.



issuance of electronic bills of lading limited to tax purposes was launched and seems to have been showing good results.<sup>52</sup> Also, Brazil has recently passed a law establishing the admissibility and the overall requirements for the use of electronic documents.<sup>53</sup> Therefore, if it is true that Brazil would benefit from these provisions of the Rotterdam Rules, it is also true that Brazil is not left behind and is taking its own steps to keep track of the communication's and technologies' developments and regulate them accordingly.

Finally, the liability regime under the Rotterdam Rules, in an attempt to balance the interests between cargo-owners and shipowners, ended up creating a rather complex and quite inaccessible system. It sought to establish a general rule of liability that was close to the presumption of fault of the carrier contained in the Hamburg Rules,<sup>54</sup> but maintained the concept of excepted perils that may exclude his liability.<sup>55</sup> The long list of excepted perils included in the Hague and Hague-Visby Rules were substantially reproduced, except for the nautical fault and fire (which is not anymore dependent upon the fault of the carrier). Also, the overriding character of the seaworthiness duty seems to have been maintained.<sup>56</sup>

By seeking to bring together all the past formulations of liabilities under the former conventions, the Rotterdam Rules may create considerable confusion in practice, especially with regard to the allocation of the burden of proof. In fact, this is the main criticism directed to the liability regime envisaged under these Rules.

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<sup>52</sup> The "CTe" ("*Conhecimento de Transporte Eletrônico*"), which was implemented in order to facilitate the control of the state's revenue services over the collection of taxes levied on freight due in some types of transport.

<sup>53</sup> Law n. 12.682/2002, which has only 8 articles dealing with the conditions for the use of electronic documents. In general, it established that the mechanisms used for them must ensure the authenticity, integrity and, when applicable, the confidentiality of the documents. Electronic records must have its digital certificate issued pursuant to the Brazilian Public Key infrastructure.

<sup>54</sup> Pursuant to article 17 (1), the carrier will be liable for loss of or damages to the goods if the claimer proves that this occurred during the period in which the cargo was under the carrier's care.

<sup>55</sup> The carrier may argue, in turn, in accordance with Article 17 (2) and (3), that he did not act in fault or that the damages or losses were attributable to the excepted perils listed thereunder.

<sup>56</sup> Article 17 (5) (a).

The general criticism that has been directed towards the Rotterdam Rules has already echoed in Brazil and there have been manifestations against their ratification.<sup>57</sup> No consensus has yet been reached internally on how to proceed with this matter. Likewise, the uncertainty with relation to what will ultimately be the international community's attitude towards the Rotterdam Rules also brings uncertainty to Brazil and does not provide the country with the immediate solution that it currently needs. Indeed, in the event that Brazil simply opts to ratify the Rotterdam Rules and these Rules never gain sufficient adherence to come into force, the Brazilian legal system will remain as fragmented and contrary to the international practices as it is nowadays – no improvement whatsoever will be reached.

### 2.3 *A Domestic Law?*

Against the above considerations, it is reasonable to conclude that the domestic regime should be based on the Hamburg Rules rather than on the Rotterdam Rules, especially due to all the uncertainties of the Rotterdam Rules that are still subject to great debate. Also, since the text of the Hamburg Rules is not complex, as the Rotterdam Rules seems to be, this would facilitate its internal implementation without prejudice to its content.

In making the decision, however, regard should be had to the main trading partners of the country. This is because the five biggest importers of Brazilian goods, which represent almost 50% of Brazilian exports, are not party to the Hamburg Rules.<sup>58</sup> In the same sense, the five biggest exporters of goods to Brazil, which represent almost 50% of Brazilian imports, are neither party to this Convention.<sup>59</sup> To the contrary, one of the greatest partners of the country, the USA, is party to the Hague Rules and has also actively

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<sup>57</sup> This is the position and recommendation of the Brazilian Maritime Law Association. See 'Regras de Roterdã', *ABDM, Associação Brasileira de Direito Marítimo* [website], [www.abdm.org.br](http://www.abdm.org.br), (accessed April 18th, 2017).

<sup>58</sup> China (18%), United States of America ("USA") (12%), Argentina (6,3%), Netherlands (4,7%) and Germany (3,6%). See 'Brazil', *The Observatory of Economic Complexity*, [website], 2017, <http://atlas.media.mit.edu/pt/profile/country/bra/#Importação>, (accessed April 18th, 2017). From these 5, the USA, Argentina and the Netherlands are parties to one of the versions of the Hague Rules, while China and Germany have their own domestic law on the carriage of goods by sea.

<sup>59</sup> *Ibid.* China (16%), USA (15%), Argentina (6,1%), Germany (6,0%) and South Korea (3,8%). South Korea is not party to any Convention on the carriage of goods by sea.

participated in the negotiations of the Rotterdam Rules.<sup>60</sup> Moreover, the Hague Rules find great acceptance among European countries that, considered together, are very influential to the Brazilian balance of trade.<sup>61</sup>

In spite of that, there are clear reasons for opting for the Hamburg Rules, which can be summarized as twofold: (i) the legal regime of the Hamburg Rules does not substantially depart from the general rules in force under the domestic law; and (ii) the differences in the liability regime established in the Hamburg Rules would be capable of balancing the interests between cargo-owners and carriers, without causing significant alterations in judicial procedures (as the burden of proof remains unaltered).

It is worth noting the importance of sticking to the text of just one of the conventions, rather than creating a hybrid law to reflect both Hamburg Rules and anticipate the inclusion of the new features of the Rotterdam Rules. In fact, if one of the main objectives of the regulation of the carriage of goods by sea in Brazil is to seek uniformity with international law, creating a hybrid system will only reinforce inconsistency.

In respect to an important innovation brought by the Rotterdam Rules, related to the regulation of the use of electronic records in substitution of paper documents between the parties engaged in the carriage of goods by sea,<sup>62</sup> it must be highlighted that the Rotterdam Rules leave room for domestic law to regulate the matter. Although there is already a domestic law admitting the use of electronic documents within Brazil, its provisions are not as detailed as they should be under the Rotterdam Rules.

In fact, the Rotterdam Rules establish that the procedures for the use of the electronic transport record must comprise the mechanisms for issuance and transfer of an electronic document, the assurance that it retains integrity, the means for the holder to

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<sup>60</sup> Although it has not yet signed that it will indeed become a party to it.

<sup>61</sup> 26,5% of the Brazilian importations come from Europe and 21,49% of the Brazilian exportations have Europe as their destination. In 'Comex Vis: Continentes e Blocos', *Ministério da Indústria, Comércio Exterior e Serviços* [website], 2017, <http://www.mdic.gov.br/comercio-exterior/estatisticas-de-comercio-exterior/comex-vis/frame-bloco> (accessed April 18th, 2017).

<sup>62</sup> Articles 8-10.

prove that he is the holder and the methods to confirm delivery of the document to the holder. Parties, when making use of these mechanisms, must refer to them in the contract entered into.

This provision makes it clear that, even if the option were to either adhere to the Rotterdam Rules or reproduce its text through a domestic law, subsidiary legislation would still be needed to regulate, in further details, the precise requirements for the use of electronic documents for the carriage of goods by sea within Brazil. The silence of the Hamburg Rules in this respect, in turn, does not imply that the use of electronic documents is inconsistent with them. Therefore, the outcome would be exactly the same by either adopting Hamburg or Rotterdam Rules, that is, the need to enact another domestic law to address specific issues related to the use of electronic transport record in the carriage of goods by sea.

Brazil is not unaware of the developments of technology. Indeed, and further to the general law on electronic documents, specifically in relation to the carriage of goods, the use of electronic bills of lading for tax purposes has already been implemented internally.<sup>63</sup> But the country could also benefit from some other international initiatives in this field. One reasonable suggestion would be the adoption of a public policy, together with the regulation of the carriage of goods by sea, encouraging Brazilian companies to adopt, in the relevant contract of carriage, the CMI Rules on Electronic Bills of Lading, 1990, as it may be amended from time to time.<sup>64</sup> These Rules would not be in conflict with either the Hamburg Rules or the domestic law and would address some important concerns regarding electronic documents, especially those related to how to approach the formal requirements of the contract, such as the written form, the signature of the parties and the retention of the original form.

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<sup>63</sup> See note 51 above.

<sup>64</sup> In 'Rules for Electronic Bills of Lading', *Comité Maritime International* [website], 2017, <http://www.comitemaritime.org/Rules-for-Electronic-Bills-of-Lading/0,2728,12832,00.html> (accessed April 18th, 2017). These rules were created in addition to the United Nations Rules for Electronic Data Interchange (UN/EDIFACT). They define EDI as "Electronic Data Interchange, i.e. the interchange of trade data effected by teletransmission". See D. R. Thomas, *The Carriage of Goods by Sea Under Rotterdam Rules*, Lloyd's List, London, 2010, p. 283-284.

In order to move forward with the implementation of the Hamburg Rules, therefore, Brazil could choose from two available options: either (i) officially become a party to the Convention, concluding the internal process of approval of the Hamburg Rules through an act of the Parliament, followed by the deposit of the ratification instrument before the Secretary-General of the United Nations,<sup>65</sup> and the Presidential Decree publishing the Convention,<sup>66</sup> or (ii) enact a domestic law that substantially reflects its provisions.<sup>67</sup> For that decision to be made, some important matters should be taken into consideration.

Firstly, it should be noted that becoming a party to an international convention should always be the best choice for the country, since it not only promotes uniformity of law among States, bringing Brazil in line with international practices and facilitating its international commerce and relations, but also because it puts the country in a position to benefit from the rights granted by the Convention to the member States, which could be enforced, in the international plane, against other member States.

Another particular reason that should justify the adherence to the Convention is the fact that Brazil has signed the Hamburg Rules but has not completed the ratification process, nor has the domestic legislation been adapted to reflect the Hamburg Rules regime. This could create problems to the country related to public international law, since under the Vienna Convention on the Law of Treaties (1969), Brazil cannot go against the spirit of the international convention that it has signed, even though not ratified.<sup>68</sup> Completing the process of adherence, in this scenario, seems to be, rather than a practical measure, a real duty of the country towards the international community.

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<sup>65</sup> As per article 27 of the Hamburg Rules.

<sup>66</sup> As per the Brazilian system for the approval of international treaties, there is no need to pass a law implementing the convention. However, in the event that the Convention conflicts with any domestic law (which is the case hereunder), it is advisable to enact a new law repealing the conflicting provisions. Moreover, the Hamburg Rules leave some options to be chosen by the State member, such as the parameters to fix the units of account provided for in Article 26. Such options should also be formalized by means of a new domestic law.

<sup>67</sup> As further explained in item 3.7, this law would be referred to in the applicable chapter of the 2002 Civil Code.

<sup>68</sup> Article 18 (a).

It should be reinforced, however, that the Hamburg Rules have not really gained the desired acceptance by the international community. If Brazil decides to simply ratify them now, when there is already an international movement for the adoption of a new convention on the carriage of goods by sea (the Rotterdam Rules), it might send to the world a wrong message that Brazil is not really concerned with harmonizing its domestic law with the international practices that are being consolidated worldwide. Because of that, while doing so, Brazil would have to clearly justify its reasons for such action, in order to avoid any misunderstanding of its initiative.

The reasons that Brazil could invoke would relate to the need for the systematization of the domestic rules and the beginning of a smooth transition from a legal regime whereby the carriers are imposed an excessive burden of care to a regime more balanced which allows for the carriers to prove their due diligence. It could be submitted that the Convention would actually put the carriers in a better position than they are nowadays, under the domestic legislation in force. The focus, therefore, should be placed not on the other available international regimes on the carriage of goods by sea, to which Brazil could have adhered, but instead on the benefits of overcoming a domestic regime remarkably overprotective in relation to the cargo interests.

Since the process of becoming party to a Convention involves political discussions, a public debate could arise, concerning the ratification of an international instrument that was signed a very long time ago as opposed to the adherence to a new international regime that the international community is currently debating (the Rotterdam Rules). In the event that such a debate takes place, the above-mentioned reasons are sufficiently convincing and should provide evidence that the Brazilian legislator is aware of the developments of the international community and yet considers that in order to promote trade and protect the best interests of parties to a contract of carriage of goods by sea the adherence to the Hamburg Rules is preferable over the Rotterdam Rules.

Further support to this conclusion would rely on the fact that if the choice was to adhere to the Rotterdam Rules, domestic law would still be needed anyway, considering

that this Convention has not yet come into force. Should this be the option, the domestic legislation that Brazil would have to enact to implement such Rules would be inconsistent with the current practices of the international community.

Due to all these considerations, it seems to be adequate the enacting of a domestic law incorporating the Hamburg Rules, to function as a transitory regime capable of providing Brazil with the immediate answer to the fragmentation of its laws and its departure from the international practices. This initiative could be a stepping-stone in the preparation for the eventual adoption of the Rules. Indeed, becoming a party to the Hamburg Rules after putting forward and enforcing a domestic regime that is the reflection of it, would likely find no political resistance or debate, since it could be deemed as a measure to ensure that the country enjoys rights under the Convention, to which regime it will have already adhered to, by virtue of national legislation.<sup>69</sup>

In order to move forward with this plan, therefore, the draft of all the relevant documents is already prepared. It comprises the domestic law to be enacted, reflecting the provisions of the Hamburg Rules and, with regard the adhesion to the Convention, the following instruments: a Decree of the Legislative Body (“Legislative Decree”), approving the ratification of the Hamburg Rules; an instrument of ratification to be deposited before the Secretary-General of the United Nations; and a Presidential Decree publishing the translated text of the Convention, to which the text of the Convention will be attached. After the completion of this process of adherence to the Hamburg Rules, no further national law will be needed, since the implementation of its regime would have already been done by the enactment of the previous domestic law.

### **3. THE IMPLEMENTATION OF THE HAMBURG RULES AND ITS IMPLICATIONS**

Once it has been established that the regulation of the carriage of goods by sea in Brazil should follow the regime put forward by the Hamburg Rules, it is important to have an

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<sup>69</sup> An example of the second reason could be the cases of conflict of jurisdiction. The same rules for such disputes would be applicable to the parties of the Convention, while if Brazil simply replicates its text in a domestic law, the dispute would trigger, in similar events, the much more complicated rules of conflict of laws.

overview of the rules of this Convention and to specify which are the implications of its adoption to the domestic laws currently in force. The following items will address the relevant parts of the Convention, exposing which are the domestic laws affected, as the case may be.

### *3.1 General Provisions*

The general provisions of the Hamburg Rules include the definitions, the rules of interpretation and the scope of application of the Convention. For the domestic regime, particular emphasis should be given to the distinction between “contractual carrier” and “actual carrier”<sup>70</sup> under the definitions and the scope of application.

According to the definitions article, “contractual carrier” is the person in whose name the contract of carriage of goods is concluded with the shipper, while the “actual carrier” is the person to whom the contractual carrier entrusted the performance of the carriage of goods. It is a clear situation of subcontracting, which is created under the rules for the particular purpose to determine how the liability of the contractual carrier and actual carrier would operate, as stipulated in Articles 10 and 11.<sup>71</sup>

In this respect, it is established that (i) the contractual carrier remains responsible for the entire carriage as provided for in the relevant contract, and for the actions or omissions of the actual carrier and his agents and servants; (ii) the actual carrier is also subject to the provisions of the Convention; (iii) when both carriers are liable, the liability of the contractual carrier and of the actual carrier is joint and several; (iv) the aggregate amount of the liability of them should not exceed the limits of the Convention. In addition, there is an authorization for the contractual carrier to exclude his responsibility during a specified part of the voyage that will be covered by a different carrier (“through carriage”), provided that action can be brought against the actual carrier in the competent court.<sup>72</sup>

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<sup>70</sup> Article 1 (1) and (2).

<sup>71</sup> W. E. Astle, *The Hamburg Rules*, Fairplay Publications, London, 1981, p. 86.

<sup>72</sup> As per paragraphs 1 and 2 of Article 21.



These provisions are not inconsistent with Brazilian law. Indeed, the actual carrier would be deemed to be a subcontractor of the contractual carrier, who, in turn, would still be entirely responsible for the performance of the contract.<sup>73</sup> If the contractual carrier is to exclude his liability as per Article 11, however, the actual carrier will have to undertake to perform the carriage to the shipper.<sup>74</sup> With respect to joint and several liability, Brazilian law determines that such liability operates only by virtue of law or of the contract, in which case the domestic law on the carriage of goods by sea would serve to that purpose.<sup>75</sup>

In relation to the scope of application, the Hamburg Rules have a wider scope than the Hague Rules, by including both inward and outward shipments of the contracting States.<sup>76</sup> The Hamburg Rules will be applicable to all shipments where the port of loading or discharge is located in a contracting State, when the bill of lading or other document evidencing the contract of transport is issued in a contracting State or expressly elect the Hamburg Rules or the laws of a contracting State to govern the contract.

The implementation of this provision into the Brazilian system would imply that the Hamburg Rules would be applicable when the port of loading or discharge is located in Brazil, or when the bill of lading or document of transport is issued in Brazil or elects Brazilian legislation as applicable law. Adding to that, the Brazilian legislation could also extend the applicability of the same rules to the coastal navigation, for the sake of consistency of the rules applicable to all forms of carriage of goods by sea within Brazil.

Attention should be paid, however, to the circumstances in which the goods are shipped from a country that is not party to the Hamburg Rules, and, more particularly, that is party to the Hague Rules, such as the USA (an important trading partner of Brazil).<sup>77</sup> In

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<sup>73</sup> Article 439 of the 2002 Civil Code.

<sup>74</sup> Article 440 of the 2002 Civil Code.

<sup>75</sup> Article 265 of the 2002 Civil Code. Also, Article 756 stipulates the joint and several liability of carriers in similar situations (for all types of contracts of transport of goods).

<sup>76</sup> C. Luddeke and A. Johnson, *The Hamburg Rules*, 2 ed., Lloyd's of London Press Ltd., London, 1995, p. 6.

<sup>77</sup> The implementation of the Hague Rules in the USA is deemed to be made by the United States Carriage of Goods by Sea Act, 1936 ("COGSA"), notwithstanding the fact that the country became party to the treaty after the enactment of COGSA, in 1937, as decided by the United States Supreme Court in *Robert C. Herd & Co. v. Kramwill Mach. Corp.* 359 U.S. 297, 301 (1959). According to this decision, COGSA was considered as "modeled" on the Hague Rules. However, some provisions of the Act depart from the Hague Rules, such as

this case, as the Hague Rules provide that they are applicable to outbound shipments of the contracting States, a “forum shopping” situation would arise, whereby the involved parties would be able to chose to sue under the Hamburg Rules, in Brazil, or under the Hague Rules, in the USA, as deemed more convenient.<sup>78</sup>

This possibility, however, should not discourage Brazil to adopt the exact scope of application as provided for under the Hamburg Rules, since this sort of conflict of laws is an unfortunate reality still existent in the international plane.<sup>79</sup> The closer the States get to harmonize rules by virtue of the adoption of international treaties, the lesser this sort of problems are likely to arise. In relation to the carriage of goods by sea, this outcome remains to be seen, as the world is still waiting for the developments of the unification attempts made by the Rotterdam Rules.

The Hamburg Rules are applicable not only to bill of ladings, but also to other documents evidencing the contract of transport, what should include waybills, delivery orders and other documents.<sup>80</sup> Charterparties are not included in its scope of application, but when a bill of lading is issued under a charterparty, the Convention will be applicable to the holder of such a bill of lading who is not the charterer. These rules do not find echo in the current Brazilian legislation, but are not against any particular provision currently in force.

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the scope of application. Curiously, COGSA not only applies to outbound shipments, as provided for by the Hague Rules, but rather to “all contracts for carriage by sea to or from ports of the United States in foreign trade”, what means that inbound shipments will also be regulated by it. This is similar to the Hamburg Rules. See Sarah Anderson, ‘U.S. Implementation of the Rotterdam Rules’, Legislation Draft Project, IMO International Maritime Law Institute, 2010, p. 3-7.

<sup>78</sup> Luddeke and Johnson (n. 76) p. 6. It is noteworthy that most likely, when the port of discharge is in Brazil, the cargo owner will also be located in the country in order to take over the goods. Therefore, it is highly probable that any cargo claim he may have will be brought in Brazil, under the regime of the Hamburg Rules, which is more protective to him than the regime of the Hague Rules. The further implications of this type of conflict of laws are highly complex and will not be analyzed herein.

<sup>79</sup> A good example of this is still the USA, which applies the COGSA also for inbound shipments (see n. 77). As COGSA has some provisions that do not reflect the Hague Rules, the country faces this precise type of conflict of laws even in situations in which the country of the loading port is party to the Hague Rules. See Michael F. Sturley, *Bill of Lading for Cargo Carried in Foreign Trade*, 2A Benedict on Admiralty s. 41, at 5-3 n. 21.

<sup>80</sup> Article 1 (6).

Finally, the Hamburg Rules are not applicable to door-to-door shipments, but rather only to the part of the carriage that is effectively carried out by sea, excluding therefore, multimodal transport. This is convenient for Brazil, as it has already in force a specific law regulating multimodal transport.<sup>81</sup>

A final observation should be made with respect to the possible applicability, within Brazil, of the Consumer Code to the shipments of goods where there is an underlying consumer relation. Most likely, the new regime of carriage of goods by sea will not be able to prevent the application of the protections on behalf of the consumers under the Consumer Code, due to the fact that the protection of the consumer is a fundamental right safeguarded by the Brazilian Federal Constitution.<sup>82</sup> A law excluding the defences available for the consumers would very likely be repudiated as unconstitutional.

Since simply precluding the application of the Consumer Code through a special provision of law directed only to the carriage of goods by sea seems not to be the option,<sup>83</sup> what could alternatively be done is the creation of a definition of a consumer contract of carriage of goods by sea. This strategy could avoid the unstoppable extension, by the Brazilian courts, of the applicability of the Consumer Code to all sorts of contracts based on the great variety of theoretical formulations of the definition of consumer relation.

### *3.2 Liability of the Carrier*

The liability of the carrier has already been mentioned several times above, as one of the most important distinctions between the current Brazilian legal system and the Hamburg Rules. Apart from the difference between strict liability and presumption of fault, as already explained,<sup>84</sup> other important features are to be equally taken into consideration.

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<sup>81</sup> Law n. 9.611/1998. See item 1.4.

<sup>82</sup> Article 5 (XXXII). This is considered to create a positive obligation on the State to actively protect the consumers right. See C. M. Lima, A. H. V. Benjamin, and L. R. Bessa (ed), *Manual de direito do consumidor*, Revista dos Tribunais, São Paulo, 2008. p. 25.

<sup>83</sup> Where the Consumer Code is applicable to the contract of carriage of goods, the shipper, consignee or transferee will have a privileged position in relation to the carrier. The liability of the carrier will always be strict, and no reduction or exclusion of such liability will be admitted. Also, the burden of proof will be placed on the carrier, insofar as the allegations of the consumer are verisimilar.

<sup>84</sup> See item 2.1.

The Hamburg Rules have 8 articles on the liability of the carrier.<sup>85</sup> They deal with the period of responsibility, the basis of liability, the limits of liability, the application to non-contractual parties, the loss of the right to limit liability, deck cargo, the liability of the contractual and actual carrier and through carriage. Except for the deck cargo, which is not regulated by any Brazilian law,<sup>86</sup> the other subjects were already addressed hereinfore, but a special emphasis should be given now to the limits of liability.

The limits of liability existent under the Brazilian system are fixed based on the value of the goods as declared in the bill of lading. This provision might have limited applicability, as it is very common for the parties not to declare such amounts.<sup>87</sup> In these circumstances, the carrier is exposed, since no limit would, in principle, be applicable.

The Hamburg Rules, to the contrary, stipulate fixed amounts, which are based on the number of units of cargo or on its weight, and calculated with reference to the Special Drawing Right as defined by the International Monetary Fund.<sup>88</sup> Such limitation would be applicable whether the action is founded in tort or in contract. This approach prevents situations where no limit will be applicable due to the omission of the value of the cargo on the bill of lading, and at the same time guarantees that, in any case, being the action brought due to the violation of the contract or the violation of a general duty of care, the limits will still be applicable. These rules are not inconsistent with Brazilian law; rather, they would fill an existent lacuna that could lead to the unlimited liability of the carrier.

As the regulation of the carriage of goods by sea will be made by special provisions, the overall regime of transport contracts under the 2002 Civil Code will not need to be amended or repealed, since it will be still applicable to other means of transport, mainly the road transport. The same consideration is applicable to Law n. 9.611/1998 that regulates

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<sup>85</sup> Articles 4-11.

<sup>86</sup> The specific regime for deck cargo under the Hamburg Rules would address another domestic lacuna and, therefore, another benefit for Brazil would arise from the adoption of the regime of these Rules.

<sup>87</sup> Especially for purposes of freight costs.

<sup>88</sup> Article 26. Another option, based on the value of the gold, is given to countries that are not party to the International Monetary Fund or within which this parameter would not be permitted by the local law, which is not the case of Brazil.

multimodal transport. The 1850 Commercial Code, however, still has liability provisions for the carriage of goods by sea that are inconsistent with the new regime that is to be put forward.<sup>89</sup> Although the derogation of such rules by a new law might ensue from the simple incompatibility of them,<sup>90</sup> it is recommended to expressly mention in the new law which are the articles of the 1850 Commercial Code that are derogated.<sup>91</sup>

### 3.3 *Liability of the Shipper*

Under the Hamburg Rules, the liability of the shipper is based on fault or neglect,<sup>92</sup> and also encompasses the responsibility for acts or omissions of his servants or agents. There are, however, some special rules for shipment of dangerous goods, which impose on the shipper an absolute obligation<sup>93</sup> to disclose the information of the dangerous goods to the carrier and properly mark and label them. If he fails to do so, he will be strictly liable for any loss resulting from the shipment of such goods, and the carrier will have the right to unload, destroy or render them innocuous, without payment of any compensation.

The liability of the shipper based on fault or neglect is similar under Brazilian law. However, there is no similar provision with respect to dangerous goods. What does exist is the strict liability of the shipper to the carrier in case this latter sustains damages due to inaccurate or false information provided by the shipper about the goods.<sup>94</sup>

Part III of the Hamburg Rules, therefore, is compatible with Brazilian law and does not call for the derogation of any provision.

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<sup>89</sup> See item 1.1.

<sup>90</sup> Article 2, §1° of Law n. 4.657/1942 (“Introduction to the Rules of Brazilian Law”). This paragraph sets forth the rule *lex posterior derogate (legi) priori*.

<sup>91</sup> Article 494, 508, 519, 521, 529 and 608.

<sup>92</sup> Article 12.

<sup>93</sup> Luddeke and Johnson (n. 76) p. 26.

<sup>94</sup> Article 745 of the 2002 Civil Code.

### *3.4 Transport Documents*

The rules on the issuance, content, effects and guarantees by the shipper as provided for under Part IV of the Hamburg Rules will be of great importance for the Brazilian system. Indeed, they create a comprehensive regime on formalities and nature of bills of lading that is missing in the Brazilian legislation since the repeal of Decree n. 19.473/1930. Overall, they are substantially similar to the content of such Decree, except by the itemization of the types of information that should be included in the bill of lading, which is wider under the Hamburg Rules. This is closely related to the liability regime of this Convention, and can be said to be beneficial for carriers (the more information on the bill of lading, the less conflicts are likely to arise as to the conditions of the goods).<sup>95</sup>

For the sake of consistency, however, it is advisable to expressly repeal the articles of the 1850 Commercial Code that regulate bills of lading.<sup>96</sup> Although they are not expressly contrary to the rules set forth under the Hamburg Rules, they are not up to date. Their repeal would cause no prejudice to Brazilian law and at the same time would avoid any possible doubts in the interpretation of more than one set of rules in force to regulate the same matters.

In addition, another benefit that would come from these rules, once adopted internally, is related to their applicability to documents of transport other than bills of lading, including non-negotiable transport documents. This is important to keep the law up to date, as currently many contracts of carriage of goods in different trades are represented by waybills, delivery orders and other documents that do not fall within the concept of bill of lading. In this sense, the scope of application of the new Brazilian regime would be widened in order to meet the needs of modern commerce.

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<sup>95</sup> As explained by the “Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)”.

<sup>96</sup> Articles 575-589.

### 3.5 Claims and Actions

Pursuant to the Hamburg Rules, notices of loss or damage must be given to the carrier 1 (one) day after delivery or, if the loss or damage is not apparent, within 15 (fifteen) days of delivery. In addition, notice of delay must be tendered within 60 (sixty) days of the due delivery date. In respect to losses or damages sustained by the carrier, notice must be given to the shipper within 90 (ninety) days of the event that caused such loss or damage. Finally, any action for loss or damage, either in judicial or arbitral proceedings, must be brought within 2 (two) years as of the delivery of the goods or the date they should have been delivered, in case they are lost.<sup>97</sup>

Under Brazilian law, there is no clarity in respect to the period of limitation of actions. With respect to notices, the 2002 Civil Code only provides for that, upon delivery, immediate notice must be served to the carrier for any loss or damage and, in case they are not apparent, there is a 10-days period to do so.<sup>98</sup>

The time limit for bringing an action for loss of or damage to the goods can be considered by the courts based on three different rules: (i) a 1-year limitation set forth in Decree n. 116/1967;<sup>99</sup> (ii) a 3-years limitation based on a general rule of the 2002 Civil Code;<sup>100</sup> or (iii) a 5-years limitation where a consumer relation is considered.<sup>101</sup>

Since there is no clarity under Brazilian law as to which time limitations to apply and there is no prohibition for any new law to regulate such matters, the replication of the parameters set out in the Hamburg Rules will be of great help to Brazil, extinguishing the uncertainty over the subject.

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<sup>97</sup> Articles 19 and 20.

<sup>98</sup> Article 754 of the 2002 Civil Code.

<sup>99</sup> Although this Decree regulates the handling of cargo in ports, not the carriage of goods by sea itself, Article 8 establishes a general rule for a 1-year time limit for any action related to any claims for losses of or damages to the cargo, to be counted as of the completion of the unloading of the relevant ship. It seems that this should be directed only to port operators, but there is no clarity or consensus in this respect. See Calmon Filho (n. 33) p. 16.

<sup>100</sup> Article 206, §3º, V, which sets forth a general rule for any civil compensation.

<sup>101</sup> Article 27 of the Consumer Code.

As above mentioned, the rules over jurisdiction and arbitration are equally compatible with the Brazilian system.<sup>102</sup> For the former, the rules will only be considered as special norms in relation to the general rules of jurisdiction as provided for in other laws,<sup>103</sup> while for the latter, there is already a Brazilian law regulating arbitral procedures and their content is not inconsistent with the provisions of the Hamburg Rules.<sup>104</sup> There is no prohibition for arbitral procedures to be instituted in relation to the carriage of goods by sea, as it seems to be the case in some other jurisdictions.<sup>105</sup>

Just for the sake of clarity, a final remark should be made in relation to Article 21 (2) (a) of the Hamburg Rules, which allows claims under the Rules to be brought before courts of any contracting State where the carrying vessel has been arrested.<sup>106</sup> In such an event, the defendant may request the removal of the action to one of the jurisdictions considered competent by Article 21 (1) upon furnishing security to ensure the payment of any judgement that may be awarded to the plaintiff.

For the purposes of domestic law, there is no point in expressly recognizing the right of a plaintiff to bring an action in a foreign State, since this is not a matter of Brazilian legislation, but rather of the domestic law where the plaintiff intends to initiate the action. However, when it comes to the right granted to the defendant to request the removal of the action to one of the competent courts, this becomes relevant to the extent that such competent court is in Brazil.

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<sup>102</sup> Item 2.1.

<sup>103</sup> Such as Decree n. 4.657/1942 (“Introduction to the Rules of Brazilian Law”) and the Code of Civil Procedure.

<sup>104</sup> Law n. 9.307/1993.

<sup>105</sup> As explained by the “Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)”.

<sup>106</sup> Brazil is not party to any international convention on the arrest of ships. It is not the purpose of this Explanatory Note to entertain the complex discussions related to the arrest of ships within Brazilian territory, but it should be stressed that, generally, the arrest of ship in Brazil can be made by way of an action *in rem* only when the claim is secured by a maritime lien, which is not the case of general cargo claims or, as a precautionary measure through an injunction granted by the Courts in the course of actions *in personam*, what would probably be the case of cargo claims initiated in Brazil. Even in these situations, however, there is a lot of controversy as to which are the requirements to be fulfilled for the arrest to take place. A complete new set of rules in this matter was recently enacted, by the new Code of Civil Procedures (Law n. 13.105/2015), which entered into force in 2016. The interpretation of the Courts, therefore, remains to be seen.



In the event that a ship is arrested in a foreign country and the defendant requests the action to be removed to Brazil, it is important for the Brazilian law to recognize that the condition for that, as provided for under the Hamburg Rules, is the offering of a security that meets the requirements of the domestic law of the country where the vessel has been arrested.

### *3.6 Supplementary Provisions*

Under the title of “supplementary provisions”, the Hamburg Rules bring general provisions pertaining to few different topics. Overall, there is not much to be said with respect to this part. The most important consideration is Article 23, which considers as null and void any stipulation in a contract regulated by the Hamburg Rules that derogates from its provisions, leaving room, however, to the increase of the carriers’ responsibilities and obligations under the Convention.

The other Articles of this part are directed to avoid conflicts of laws, whether between the Convention and domestic law regulating general average, or between the Convention and other international conventions to which the State members are also party. In order to replicate these rules under a domestic law, regard must be had to the adherence or not to these conventions by Brazil.<sup>107</sup>

Finally, the rules related to the “unit of account”, for the purpose of fixing the liability limits under the Convention were already addressed under Part III.<sup>108</sup>

### *3.7 Summary of the Impacts on the Brazilian Legal System*

From the above considerations, it is possible to conclude that the implementation of the Hamburg Rules within the Brazilian legal system will not call for the derogation from

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<sup>107</sup> As per Article 25 (1), Brazil is party to the 1924 International Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Sea-going Vessels and Protocol of Signature. With respect to Article 25 (2), Brazil is party to some regional treaties relating to jurisdiction (i.e., the Mercosur Agreement on Jurisdiction Relating to Contracts for the International Transport of Cargo, approved by Legislative Decree n. 208/2004).

<sup>108</sup> Item 3.3.

or substantial modification of many Brazilian laws. The provisions on the contract of transport under the 2002 Civil Code will not be modified, since they will still regulate other means of transport, other than the seaborne transport of goods. Because of that, it is advisable to include a new article under the corresponding part of the 2002 Civil Code in order to clarify that a special law will regulate the carriage of goods by sea.

The Consumer Code, on the other hand, will not suffer any modification whatsoever. To address and restrict the applicability of the defences under the Consumer Code that shippers, consignees or transferees could avail themselves of, a special rule can be included in the new law restricting the concept of consumer relation for the purposes of the carriage of goods by sea.

Decree n. 116/1967 and Law n. 9.611/1998 do not need any modifications as well, due to the fact that they regulate specific matters not included in the scope of application of the Hamburg Rules, i.e., the port operations and the multimodal transport.

The only legislation that will have to be modified is the 1850 Commercial Code, which should have some of its rules repealed. These rules are related to the liability of the carrier and the bills of lading.<sup>109</sup> Considering that the status of the 1850 Commercial Code under the hierarchy of Brazilian norms is the same as the status of a new law, this derogation can be expressly made by the same law that will implement the Hamburg Rules.

As a final remark, it is important to note that, once the Brazilian Legislative Body moves towards the conclusion of the process to approve and deposit the ratification instrument of the Hamburg Rules, this approval will be formalized by a legislative decree (followed by the presidential decree that will publish the translated version of the Convention, after the deposit of the ratification instrument). No further legislation implementing the Convention will be needed, since this will have already been done by virtue of the previous domestic law on this matter.

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<sup>109</sup> Refer to fn. 91 and 96.

#### **4. LOOKING INTO THE FUTURE: KEEP ROTTERDAM RULES AT A CLOSE SIGHT**

Since the international community seems to be moving towards the adoption of a new international convention on the carriage of goods by sea as a way to overcome the difficulties that the former regimes faced, Brazil should not remain impassive to that. It is a fact that the Rotterdam Rules have received some vociferous criticisms, the main ones related to the very complex and extensive wording of its text, which indeed sought to cover a very broad spectrum of situations. Particular rules are generally criticised either due to impreciseness of their language or the situations that were left out of their reach.

If the Rotterdam Rules led to the creation of partial legal regimes for different legal institutions, as fairly pointed out by Tetley,<sup>110</sup> it is worthy to highlight that the criticisms so far raised are mainly related to the formal aspects of the text. The substantiality of the rules, although also attacked, might only be tested once they enter into force and their provisions effectively come into practice and challenged in courts. Therefore, whether or not the Rules are able to provide the desirable solutions for the market is something that will remain a question and subject to all sorts of different opinions until reality can bring evidence pointing to one or the other side. Each of the new problems that they may bring should and will be addressed as and when they arise.

What should be noted, however, is that the Rotterdam Rules made a genuine attempt to resolve many of the problems of the former conventions. Even though their wording may contain inconsistencies, this is something that unfortunately is embodied in almost all legislations and must be faced and dealt with by every legal system. Therefore, if countries worldwide opt to adhere to this new convention, for the sake of uniformity, Brazil should also take the necessary steps to follow this trend. Being part of an international community also brings responsibilities, which cannot be fulfilled by simply ignoring the existence of international law. Inaction, in this sense, does not imply in the absence of consequences, rather, it can leave the country behind, with great harm to its international commerce and economy.

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<sup>110</sup> See 1.3.2 above.

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## DRAFT LEGISLATION

DRAFT LAW N. [ ], 2017

(By [name])

This Law provides for certain rules for the Carriage of Goods by Sea.

The NATIONAL CONGRESS decrees:

### Chapter I

#### Definitions and Applicability

Art. 1. For the purposes of this law:

I – Carrier: means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper;

II - 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.

III - 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 carrier in relation to the contract of carriage by sea.

IV - Consignee: means the person entitled to take delivery of the goods;

V - Goods: includes live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if supplied by the shipper;

VI - 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; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Law only in so far as it relates to the carriage by sea;

VII - Bill of lading: means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking;

VIII - Consumer relation: means a contractual relation between a carrier and a natural person that hires the carrier's services for the carriage of goods by sea as a final receiver of such services. When a natural person transfers the transport document to a third party, no consumer relation is deemed to exist between this third party and the carrier.

IX - Writing: includes, inter alia, telegram and telex.

Art. 2. The provisions of this Law are applicable to all contracts of carriage by sea which are to be carried out in a coastal trade within Brazilian jurisdictional waters and in any situation of international carriage by sea, if:

I - the port of loading as provided for in the contract of carriage by sea is located in Brazil,  
or

II - the port of discharge as provided for in the contract of carriage by sea is located in Brazil, or

III - 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 Brazil, or



IV - the bill of lading or other document evidencing the contract of carriage by sea is issued in Brazil, or

V - the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Law are to govern the contract.

§ 1° The provisions of this Law are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.

§ 2° The provisions of this Law are not applicable to charterparties. However, where a bill of lading is issued pursuant to a charterparty, the provisions of this Law apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.

§ 3° If a contract provides for future carriage of goods in a series of shipments during an agreed period, the provisions of this Law apply to each shipment. However, where a shipment is made under a charterparty, the provisions of paragraph 2 of this article apply.

## Chapter II

### Liability of the Carrier

Art. 3. The responsibility of the carrier for the goods under this Law covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.

§ 1° For the purpose of this article, the carrier is deemed to be in charge of the goods from the time he has taken over the goods from:

I - the shipper, or a person acting on his behalf; or

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;

§ 2° For the purpose of this article, the carrier will be deemed to remain in charge of the goods until the time he has delivered the goods:

I - by handing over the goods to the consignee; or

II - 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; or

III - by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.

§ 3° For the purposes of this article, reference to the carrier or to the consignee means, in addition to the carrier or the consignee, the servants or agents, respectively of the carrier or the consignee.

Art. 4. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 3, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

§ 1° Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.

§ 2° The person entitled to make a claim for the loss of goods may treat the goods as lost if

they have not been delivered as required by article 3 within 60 (sixty) consecutive days following the expiry of the time for delivery according to paragraph 1 of this article.

§ 3° The carrier is liable:

I - for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;

II - for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents, in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.

§ 4° In case of fire on board the ship affecting the goods, if the claimant or the carrier so desires, a survey in accordance with shipping practices must be held into the cause and circumstances of the fire, and a copy of the surveyor's report shall be made available on demand to the carrier and the claimant.

§ 5° With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.

§ 6° The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.

§ 7° Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.

Art. 5. The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 4 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

§ 1° The liability of the carrier for delay in delivery according to the provisions of article 4 is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea.

§ 2° In no case shall the aggregate liability of the carrier, under the *caput* and paragraph 1 of this article, exceed the limitation which would be established under paragraph 1 of this article for total loss of the goods with respect to which such liability was incurred.

§ 3° For the purpose of calculating which amount is the higher in accordance with paragraph 1 of this article, the following rules apply:

I - 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.

II - 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.

§ 4° Unit of account means the unit of account mentioned in article 25.

§ 5° By agreement between the carrier and the shipper, limits of liability exceeding those provided for in this article may be fixed.

Art. 6. The defences and limits of liability provided for in this Law apply in any action against the carrier in respect of loss of or damage to the goods covered by the contract of carriage by sea, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise.

§ 1° If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Law.

§ 2° Except as provided in article 7, the aggregate of the amounts recoverable from the carrier and from any persons referred to in paragraph 1 of this article shall not exceed the limits of liability provided for in this Law.

Art. 7. The carrier is not entitled to the benefit of the limitation of liability provided for in article 5 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

§ 1° Notwithstanding the provisions of paragraph 1 of article 6, a servant or agent of the carrier is not entitled to the benefit of the limitation of liability provided for in article 5 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

Art. 8. The carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations.

§ 1° If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier must insert in the bill of lading or other document evidencing the contract of carriage by sea a statement to that effect. In the absence of such a statement the carrier has the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier is not entitled to invoke such an agreement against a third party, including a consignee, who has acquired the bill of lading in good faith.

§ 2° Where the goods have been carried on deck contrary to the provisions of this article or where the carrier may not under paragraph 1 of this article invoke an agreement for carriage on deck, the carrier, notwithstanding the provisions of article 4, *caput*, is liable for loss of or damage to the goods, as well as for delay in delivery, resulting solely from the carriage on deck, and the extent of his liability is to be determined in accordance with the provisions of article 5 or article 7 of this Law, as the case may be.

§ 3° Carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of article 7.

Art. 9. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Law. The carrier is 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.

§ 1° All the provisions of this Law governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of

paragraphs 1 and 2 of article 6 and of paragraph 1 of article 7 apply if an action is brought against a servant or agent of the actual carrier.

§ 2° Any special agreement under which the carrier assumes obligations not imposed by this Law or waives rights conferred by this Law affects the actual carrier only if agreed to by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement.

§ 3° Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.

§ 4° The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability provided for in this Law.

§ 5° Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier.

Art. 10. Notwithstanding the provisions of article 9, *caput*, where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named person other than the carrier, the contract may also provide that the carrier is not liable for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage. The burden of proving that any loss, damage or delay in delivery has been caused by such an occurrence rests upon the carrier.

§ 1° The actual carrier is responsible in accordance with the provisions of paragraph 1 of article 9 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge.

### Chapter III Liability of the Shipper

Art. 11. The shipper is not liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor is any servant or agent of the shipper liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part.

Art. 12. The shipper must mark or label in suitable manner dangerous goods as dangerous.

§ 1° Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper must inform him of the dangerous character of the goods and, if necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character:

I - the shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and

II - the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

§ 2° The provisions of paragraph 1 of this article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character.

§ 3° If, in cases where the provisions of paragraph 1 (II) of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 4.



Chapter IV  
Transport Documents

Art. 13. When the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading.

§ 1° The bill of lading may be signed by a person having authority from the carrier. A bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.

§ 2° 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.

Art. 14. The bill of lading must include, *inter alia*, the following particulars:

I - the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

II - the apparent condition of the goods;

III - the name and principal place of business of the carrier;

IV - the name of the shipper;

V - the consignee if named by the shipper;

VI - the port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading;

VII - the port of discharge under the contract of carriage by sea;

VIII - the number of originals of the bill of lading, if more than one;

IX - the place of issuance of the bill of lading;

X - the signature of the carrier or a person acting on his behalf;

XI - the freight to the extent payable by the consignee or other indication that freight is payable by him;

XII - the statement referred to in paragraph 2 of article 22;

XIII - the statement, if applicable, that the goods shall or may be carried on deck;

XIV - the date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties; and

XV - any increased limit or limits of liability where agreed in accordance with paragraph 5 of article 5.

§ 1° After the goods have been loaded on board, if the shipper so demands, the carrier must issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under the *caput* of this article, must state that the goods are on board a named ship or ships, and the date or dates of loading.

§ 2° In case of paragraph 1, if the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier, the shipper must surrender such document in exchange for a "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand

for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading.

§ 3° The absence in the bill of lading of one or more particulars referred to in this article does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in article 1 (VII).

Art. 15. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person must insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.

§ 1° If the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition.

§ 2° Except for particulars in respect of which and to the extent to which a reservation permitted under the *caput* of this article has been entered:

I - the bill of lading is *prima facie* evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and

II - proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein.

§ 3° A bill of lading which does not, as provided in article 14 (XI), set forth the freight or otherwise indicate that freight is payable by the consignee or does not set forth demurrage

incurred at the port of loading payable by the consignee, is *prima facie* evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier is not admissible when the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

Art. 16. The shipper is deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper must indemnify the carrier against the loss resulting from inaccuracies in such particulars. The shipper remains liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity in no way limits his liability under the contract of carriage by sea to any person other than the shipper.

§ 1° Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss resulting from the issuance of the bill of lading by the carrier, or by a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, is void and of no effect as against any third party, including a consignee, to whom the bill of lading has been transferred.

§ 2° Such letter of guarantee or agreement is valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 1 of this article, intends to defraud a third party, including a consignee, who acts in reliance on the description of the goods in the bill of lading. In the latter case, if the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier has no right of indemnity from the shipper pursuant to the *caput* of this article.

§ 3° In the case of intended fraud referred to in paragraph 2 of this article the carrier is liable, without the benefit of the limitation of liability provided for in this Law, for the loss incurred by a third party, including a consignee, because he has acted in reliance on the

description of the goods in the bill of lading.

Art. 17. Where a carrier issues a document other than a bill of lading to evidence the receipt of the goods to be carried, such a document is *prima facie* evidence of the conclusion of the contract of carriage by sea and the taking over by the carrier of the goods as therein described.

## Chapter V Claims and Actions

Art. 18. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the carrier not later than the working day after the day when the goods were handed over to the consignee, such handing over is *prima facie* evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition.

§ 1° Where the loss or damage is not apparent, the provisions of the *caput* of this article apply correspondingly if notice in writing is not given within 15 (fifteen) consecutive days after the day when the goods were handed over to the consignee.

§ 2° If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

§ 3° In the case of any actual or apprehended loss or damage the carrier and the consignee must give all reasonable facilities to each other for inspecting and tallying the goods.

§ 4° No compensation shall be payable for loss resulting from delay in delivery unless a notice has been given in writing to the carrier within 60 (sixty) consecutive days after the day when the goods were handed over to the consignee.

§ 5° If the goods have been delivered by an actual carrier, any notice given under this article to him shall have the same effect as if it had been given to the carrier, and any notice given to the carrier shall have effect as if given to such actual carrier.

§ 6° Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the carrier or actual carrier to the shipper not later than 90 (ninety) consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2 of article 3, whichever is later, the failure to give such notice is prima facie evidence that the carrier or the actual carrier has sustained no loss or damage due to the fault or neglect of the shipper, his servants or agents.

§ 7° For the purpose of this article, notice given to a person acting on the carrier's or the actual carrier's behalf, including the master or the officer in charge of the ship, or to a person acting on the shipper's behalf is deemed to have been given to the carrier, to the actual carrier or to the shipper, respectively.

Art. 19. Any action relating to carriage of goods under this Law is time-barred if judicial or arbitral proceedings have not been instituted within a period of 2 (two) years.

§ 1° The limitation period commences on the day on which the carrier has delivered the goods or part thereof or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered.

§ 2° The day on which the limitation period commences is not included in the period.

§ 3° The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

§ 4° An action for indemnity by a person held liable may be instituted within 90 (ninety) days after the expiration of the limitation period provided for in this article. This period will

commence from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.

Art. 20. In judicial proceedings relating to carriage of goods under this Law, the plaintiff, at his option, may institute an action in a court situated in one of the following places:

I - the principal place of business or, in the absence thereof, the habitual residence of the defendant; or

II - 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

III - the port of loading or the port of discharge; or

IV - any additional place designated for that purpose in the contract of carriage by sea.

§ 1º If an action is instituted in a court of a foreign State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law, the defendant may request that the plaintiff removes the action to one of the Brazilian courts that meets the requirements of (I) to (IV) of this article, upon furnishing security sufficient to ensure payment of any judgment that may subsequently be awarded to the claimant in the action. The sufficiency of the deposit is to be assessed by the court of the port or place of the arrest.

§ 2º Where an action has been instituted in a foreign court which is competent under this article or where judgement has been delivered by such a court, no new action may be started before the Brazilian courts between the same parties on the same grounds unless the judgement of the court before which the first action was instituted is not enforceable in Brazil.

I - For the purpose of this article the institution of measures with a view to obtaining

enforcement of a judgement is not to be considered as the starting of a new action;

II - For the purpose of this article, the removal of an action to a different court within the same country, or to a court in another country, is not to be considered as the starting of a new action.

§ 3° Notwithstanding the provisions of this article, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an action, is effective.

Art. 21. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Law shall be referred to arbitration, as provided for in the applicable law.

§ 1° Where a charterparty contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charterparty does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.

§ 2° The arbitration proceedings shall, at the option of the claimant, be instituted at any place designated for that purpose in the arbitration clause or agreement, or at a place in a State within whose territory is situated:

I - the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

II - 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

III - the port of loading or the port of discharge.



§ 3° The arbitrator or arbitration tribunal shall apply the rules of this Law.

§ 4° The provisions of paragraphs 2 and 3 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.

§ 5° Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.

## Chapter VI Supplementary Provisions

Art. 22. Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Law. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, is null and void.

§ 1° Notwithstanding the provisions of this article, a carrier may increase his responsibilities and obligations under this Law.

§ 2° Where a bill of lading or any other document evidencing the contract of carriage by sea is issued, it must contain a statement that the carriage is subject to the provisions of this Law which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.

§ 3° Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 2 of this article, the carrier must pay compensation to the

extent required in order to give the claimant compensation in accordance with the provisions of this Law for any loss of or damage to the goods as well as for delay in delivery. The carrier must, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right.

Art. 23. Nothing in this Law shall prevent the application of provisions in the contract of carriage by sea regarding the adjustment of general average.

§ 1º With the exception of article 19, the provisions of this Law relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.

Art. 24. This Law does not modify the rights or duties of the carrier, the actual carrier and their servants and agents, provided for in international conventions to which Brazil is a party or national law relating to the limitation of liability of owners of seagoing ships. Any other applicable rights and duties provided for under other international conventions to which Brazil is a party shall not be affected by this Law.

Art. 25. The unit of account referred to in article 5 of this Law is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 6 are to be converted into the Brazilian currency according to the value of such currency at the date of judgment or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right 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.

§ 1º The calculation mentioned in this article is to be made in such a manner as to express in the Brazilian currency as far as possible the same real value for the amounts in article 5 as is expressed there in units of account.

Chapter VII  
Final Provisions

Art. 26. This Law enters into force within 90 (ninety) days of its publication.

Art. 27. The following “Article 743-A” shall be added to Law n. 10.406/2002:

“Art. 743-A. Notwithstanding the provisions of this Chapter, the carriage of goods by sea shall be regulated by the provisions of Law n. [ ]”.

Art. 28. This Law is not applicable where the carriage of goods by sea is performed under a consumer relation.

Art. 29. Articles 494, 508, 519, 521, 529, 575 to 589 and 608 of the 1850 Commercial Code are hereby derogated.

Brasília, [date].

LEGISLATIVE DECREE

This Decree approves the text of the United Nations Convention on the Carriage of Goods by Sea (1978)

Let it be know that the NATIONAL CONGRESS approved, pursuant to Art. 44, I, of the Federal Constitution, and that [name], PRESIDENT OF THE BRAZILIAN SENATE, promulgates the following

LEGISLATIVE DECREE n. [ ] of [date].

Art. 1. The text of the United Nations Convention on the Carriage of Goods by Sea, 1978, concluded between Brazil and other countries in Hamburg, Federal Republic of Germany, on 31<sup>st</sup> March 1978, is hereby approved.

Art. 2. This Legislative Decree shall come into force as of the date of its publication.

FEDERAL SENATE, [date].

SENATOR [name]

PRESIDENT OF THE SENATE

RATIFICATION INSTRUMENT TO THE UNITED NATIONS CONVENTION ON THE  
CARRIAGE OF GOODS BY SEA (1978)

PRESIDENCY OF THE FEDERATIVE REPUBLIC OF BRAZIL

*Whereas* the United Nations Convention on the Carriage of Goods by Sea (1978), concluded in Hamburg, Federal Republic of Germany, on 31<sup>st</sup> March 1978, was signed by Brazil on 31<sup>st</sup> March 1978,

NOW, THEREFORE, [name], President of the Republic, declares that the Government of the Federative Republic of Brazil ratifies the United Nations Convention on the Carriage of Goods by Sea (1978) and undertakes faithfully to perform and comply with all the provisions contained therein.

IN WITNESS WHEREOF, I have signed this instrument of ratification at Brasilia (DF), Brazil, on [date].

[name]

PRESIDENT OF THE REPUBLIC

EXECUTIVE DECREE  
Presidency of the Republic

Decree n. [ ], [date]

This Decree promulgates the United Nations Convention on the Carriage of Goods by Sea (1978), known as Hamburg Rules.

The PRESIDENT OF THE REPUBLIC, in the exercise of the powers conferred upon him by Art. 84, IV, of the Federal Constitution, and

*Whereas* the United Nations Convention on the Carriage of Goods by Sea (1978), concluded in Hamburg, Federal Republic of Germany, on 31<sup>st</sup> March 1978, and signed by Brazil on the same date, was approved by the National Congress by means of the Legislative Decree n.. [ ], of [date],

DECREES:

Art. 1. The United Nations Convention on the Carriage of Goods by Sea (1978) concluded in Hamburg, Federal Republic of Germany on 31<sup>st</sup> March 1978, of which the translated version is attached to this Decree, should be fulfilled and complied with by Brazil, without any condition.

Art. 2. This Decree enters into force as of the date of its publication.

Brasilia, [date]; [ ]th year of the Independence and [ ]th of the Republic.

PRESIDENT OF THE REPUBLIC

*[Attachment omitted: to be completed with the official Portuguese translation of the UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA, 1978]*