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on the

Carriage of Goods by Sea Bill 1997

EXPLANATORY NOTE

INTRODUCTION

Western Samoa's Sea Carriage of Goods Ordinance 1960 needs to be repealed in order to conform with the Hamburg Rules ("Rules"). These Rules are supposedly an improvement on their predecessors (the Hague and Hague/Visby Rules plus subsequent amendments). Before explaining the need for the implementation of the Rules, it is necessary to explain very briefly the general background of the Rules.

The Hamburg Rules of 1978, being the United Nations Convention on the Carriage of Goods by Sea adopted on March 31, 1978, at a conference convened by the UN General Assembly after preparation of a preliminary text by the UNCITRAL, is according to some writers an extraordinary document. It is extraordinary because the Rules show the influence of shipowners and shippers, the revendications of P & I and cargo underwriters, the complaints of carrier and shipper nations and the aspirations of wealthy and emerging nations. None of these influences is consistent, none runs unbroken through the text and none is predominant. Therefore such an amalgam as reflected in the Rules has inconsistency because of the obvious diversity of interests involved, and for this reason compromises and concessions were used during negotiations. However, in recognition of such a difficult task undertaken by participants in the Hamburg Rules, there were some positive advances in the law that came out of the Convention of 1978.

Under the Hamburg Rules;

The following aspects of the Rules are amongst other things considered important:

- (a) The period of responsibility is extended to cover the entire period when the goods are in the charge of the carrier;
- (b) Its provisions apply to the contract of carriage and not merely to bills of lading, charterparties remaining, however, excluded as in the Hague Rules;
- (c) When carriage is performed by a person other than the carrier, the "actual" carrier is made jointly and severally responsible with the carrier to the extent that both parties are liable;

- (d) The long list of exceptions exonerating the carrier from liability is eliminated. The carrier is instead made 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. He can escape liability if he proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. The exception of fire is removed as such, and the carrier is liable if the claimant proves that the fire was caused by fault or neglect of the carrier. The carriage of live animals, which was not covered by the Hague Rules, is brought into the new Convention by making the carrier liable unless loss or injury to them arose from any special risks inherent in such carriage;
- (e) The Hague Rules' exception of "any reasonable deviation" is dropped, but the carrier is immune for loss, damage or delay to goods resulting from measures to save life and from reasonable measures to save property at sea;
- (f) The carrier is made liable for loss or damage to deck cargo if the cargo is carried contrary to agreement with the shipper, usage or regulation, and results solely from deck carriage;
- (g) The imposition of inconvenient venues for litigation or arbitration is in effect barred by virtue of claimants being permitted to bring legal actions, including arbitration proceedings, in various listed venues, which include the port of discharge.

Uniformity of the law:

At present this may be difficult to achieve. There are currently three conventions in force including the Hamburg Rules which cover carriage of goods by sea. Therefore, in principle States parties to any such conventions must adopt any of such conventions which they have ratified, in toto. In practice however States are selecting articles from conventions that are relevant to their circumstances and adopting them to its municipal law. For instance, the USA and Australia are currently making their new versions of COGSA by basically mixing and matching the Hague/Visby and Hamburg regimes. The CMI is currently considering options for reform which take either the Hague Rules or the Hamburg Rules as a

reference point for an improved international regime.

Western Samoa's case:

Perhaps the first obvious question is why Western Samoa favours the Hamburg Rules, especially in the face of the current international disarray on the subject matter. Being a small developing island State with a small fleet, it is better for Western Samoa to subscribe to the Hamburg Rules than to its predecessors. Western Samoa is not a party to the Hamburg Rules nor to its predecessors.

Indeed, it is generally accepted - at least in theory - that the Hamburg Rules are pro-shipper and cargo owning nations, including Western Samoa. As alluded to above, the exemptions from liability afforded to carriers under the Hague Rules were seen as inequitable in modern times from the point of view of shippers. It was also argued that the scope of liability should be extended beyond the "tackle to tackle" loading to discharge period of carrier responsibility so as to include the point from where the carrier or his agent took charge of the goods until that of delivery to the consignee. Western Samoa supported such views simply because of the fact that her interests are those of shippers and cargo owners.

In addition, by reference to proposals for amendments to the Australian COGSA 1991 (implementing the Hamburg Rules), it is seen as necessary for Western Samoa to look at such proposals critically and adopt what is appropriate and relevant for its local situation.

Australia is one of the strong trading nations with Western Samoa.

Some of the proposals that may be useful for Western Samoa to consider and decide whether or not to adopt are as follows:

- (a) **Deck cargo:** that is, deck cargo be covered by the liability regime, provided that, no later than the time of booking, the specific stowage requirements of the shipper have been notified to and agreed by the carrier.
- (b) **Duration of liability:** carrier liability be extended to the period where the cargo is in the carrier's care within the limits of the wharf of terminal at port of lading and discharge.
- (c) **Coverage of importers:** the COGSA should specify that, where the contract of carriage does not incorporate one of the international conventions, importers' contracts of carriage are covered by the international convention in force in the Act.

- (d) **Delays:** Carriers be made liable for loss due to delay, to the Hamburg Rules limit of 2.5 times the freight payable on the goods delayed, except where the delay is an "excusable delay". These excuses are similar to those listed in Marine Insurance Act 1906 (U.K.).

Generally, apart from what has been said above, the Hamburg Rules should benefit Western Samoa, for instance in the case of making the carrier responsible for the loss of or damage to goods, including live animals. Currently, the Government of Western Samoa is promoting cattle farming to help boost the agricultural sector of the local economy. But most of these live animals are imported from overseas, especially Australia. However, it is foreseeable that in practical terms, there are economical problems under the Hamburg Rules. For instance, the majority of Western Samoa's trading partners are States subscribing to the Hague/Visby Rules. Obviously, this would have some impact on the international trade situation for Western Samoa and the local economy.

ARRANGEMENT OF SECTIONS FOR WESTERN SAMOA'S COGSA 1997

PART I: Preliminary:

This is the standard format use for any legislation in Western Samoa and for COGSA as well. Basically, it states the title, indicates when the Act will come into force and gives relevant definitions.

PART II: Liability of carrier:

As the title indicates, this Part focuses on the liability of the carrier. That is, such liability is based on the presumption of fault of the carrier. The carrier has a duty to provide a seaworthy ship which is to be judged on the same basis as his duty towards the cargo, and both obligations are to run throughout the period of carriage. However, the carrier is excused from liability in certain situations as outlined in section 13. The burden of proof in all cases of loss or damage to cargo is on the carrier because he would be most likely to have knowledge of the facts. However, this burden shifts away from carrier in respect of damage caused by fire. But the carrier would still be liable if the cargo owner proves that the loss or damage caused by fire resulted from fault or neglect of carrier, or his agents in not taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.

This Part also outlines special provisions for certain eventualities. It is recognised that certain types of cargo, such as live animals or deck cargo, present problems of assimilation to any set formula of carrier liability.

The limitation of liability for the carrier is included for the benefit of not only the carrier but the shipper. For the former, it enables him to calculate his risks in advance and so to establish uniform and cheaper freight rates. However, such right to limit liability for the carrier can be denied for loss, damage or delay resulting from acts or omission done with intent to cause loss, or recklessly and with knowledge that such loss, damage or delay would probably result. For the latter, it enables him to know the extent of potential loss which he must insure.

PART III: Liability of the shipper:

This Part deals with situations where the shipper will be held

liable, especially with regards to shipping dangerous goods. Rules are specified that the shipper must mark and label such goods and he must also inform the carrier of the nature of such goods. The shipper must also include an express statement on the bill of lading that goods are dangerous.

PART IV: Transport documents:

This Part deals with the issue of bill of lading. That is, once the carrier has taken the goods into his charge, he is required on demand of the shipper to issue a bill of lading containing items of information as listed in section 16 of the Act. The shipper is required to indemnify the carrier against any loss resulting from inaccuracies in the particulars supplied by him.

The carrier is excused from acknowledging particulars which he knows or has reasonable grounds for suspecting are inaccurate, and he is now required to "insert in the bill of lading a reservation specifying these inaccuracies". While such particulars in a bill of lading are prima facie evidence against the carrier, they only become conclusive in favour of a bona fide transferee of the bill if he "has acted in reliance on the description of the goods therein."

The carrier will have no right to indemnity against the shipper if his intention in issuing the bill of lading was to defraud a third party, including a consignee, who acts in reliance on the description of the goods in the bill of lading.

PART V: Claims and actions:

This Part specifies that actions are time-barred if judicial and arbitral proceedings have not been instituted within a period of two years from the time the goods have been delivered or should have been delivered. This limit applies irrespective of whether proceedings have been instituted by the carrier or the cargo-owner.

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.

As for the issue of jurisdiction, the plaintiff is given a wide choice of competent courts in which to initiate judicial or arbitral proceedings, including the port of discharge.

PART VI: Supplementary provisions:

This Part deals inter alia with the question when a clause in the bill of lading becomes null and void if it derogates "directly or indirectly" from the provisions of the Act. And for general average, this Act allows the application of provisions in the contract of carriage by sea or in the national law.

PART VII: Miscellaneous:

This refers to amendments of relevant legislation and for the repeal of the Sea Carriage of Goods Ordinance 1960 and other related legislation.

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1997 No.

AN ACT relating to the carriage of goods by sea and to give effect to the Hamburg Rules resulting from the United Nations Convention on the Carriage of Goods by Sea, 1978.

BE IT ENACTED by the Parliament of Western Samoa in session assembled, and by the authority of the same, as follows:

PART I

PRELIMINARY

1. Short title and commencement -

(1) This Act may be cited as the Carriage of Goods by Sea Act 1997.

(2) This Act shall come into force on such date to be appointed by the Head of State acting on the advice of Cabinet by Order.

2. Definitions -

In this Act, unless the context otherwise requires -

"Act" means the Carriage of Goods by Sea Act 1997;

"Actual Carrier" means any person to whom the performance of the carriage of 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;

"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 the named person, or to order, or to bearer, constitutes such an undertaking;

"Carrier" means any person by whom or in whose name a contract of carriage of goods by sea has been concluded;

"Consignee" means the person entitled to take delivery of the goods;

"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 other means is deemed to be a contract of carriage by sea for the purposes of this Act only in so far as it relates to the carriage by sea;

"Contracting State" means a State which has consented to be bound by the United Nations Convention on the Carriage of Goods by Sea done at Hamburg, 1978 (Hamburg Rules), whether or not the Hamburg Rules has

entered into force;

"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;

"Writing" includes, inter alia, telegram and telex.

3. Application -

- (1) The provisions of this Act are applicable to all contracts of carriage by sea between two different States, if:
 - (a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State; or
 - (b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State; or
 - (c) 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 a Contracting State, or
 - (d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or
 - (e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Act or the

legislation of any State giving effect to the rules under the United Nations Convention on the Carriage of Goods by Sea, 1978 are to govern the contract.

- (2) The provisions of this Act are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.

- (3) The provisions of this Act are not applicable to charterparties. However, where a bill of lading is issued pursuant to a charterparty, the provisions of the Act 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.

- (4) If a contract provides for future carriage of goods in a series of shipments during an agreed period, the provisions of this Act apply to each shipment. However where a shipment is made under a charterparty, the provisions of sub-section (3) of this section apply.

4. Interpretation of the Act -

In the interpretation and application of the provisions of this Act regard shall be had to its international character and to the need to promote uniformity.

PART II

LIABILITY OF THE CARRIER

5. Period of responsibility -

- (1) The responsibility of the carrier for the goods under this Act 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.
- (2) For the purpose of sub-section (1) above, the carrier is deemed to be in charge of the goods:
- (a) 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;
- (b) 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) In sub-sections (1) and (2) of this section, 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.

6. Basis of liability -

(1) 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 section 5, 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.

(2) 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.
- (3) 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 section 5 of this Act within 60 consecutive days following the expiry of the time for delivery according to sub-section (2) of this section.
- (4) (a) 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.
- (b) 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 combined 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.

7. Limits of liability -

- (1) (a) The liability of the carrier for loss resulting from loss or damage to goods according to section 6 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.

- (b) The liability of the carrier for delay in delivery according to section 6 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.
 - (c) In no case shall the aggregate liability of the carrier, under both sub-sections (1)(a) and (1)(b) of this section, exceed the limitation which would be established under sub-section (1)(a) for total loss of the goods with respect to which such liability was incurred.
- (2) For the purpose of calculating which amount is the higher in accordance with sub-section (1)(a) of this section, the following rules apply:
- (a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.

- (b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.
- (3) Unit of account means the unit of account mentioned in section 28.
- (4) By agreement between the carrier and the shipper, limits of liability exceeding those provided for in section 7(1) may be fixed.

8. Application to non-contractual claims -

- (1) The defences and limits of liability provided for in this Act apply in any action against the carrier in respect of loss 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.
- (2) 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 Act.

- (3) Except as provided in section 9, the aggregate of the amounts recoverable from the carrier and from any persons referred to in subsection (2) shall not exceed the limits of liability provided for in this Act.

9. Loss of right to limit responsibility -

- (1) The carrier is not entitled to the benefit of the limitation of liability provided for in section 7 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.

- (2) Notwithstanding the provisions of section 8(2), a servant or agent of the carrier is not entitled to the benefit of the limitation of liability provided for in section 7 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.

10. Deck cargo -

- (1) 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.

- (2) 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.
- (3) Where the goods have been carried on deck contrary to sub-section (1) of this section or where the carrier may not under sub-section (2) of this section invoke an agreement for carriage on deck, the carrier, notwithstanding sub-section (1) of section 6, 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 section 7 or section 9 of this Act, as the case may be.
- (4) 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 section 9.

11. Liability of the carrier and actual carrier -

- (1) 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 Act. 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.
- (2) All the provisions of this Act governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of sub-sections (2) and (3) of section 8, and of sub-section (2) of section 9 apply if an action is brought against a servant or agent of the actual carrier.
- (3) Any special agreement under which the carrier assumes obligations not imposed by this Act or waives rights conferred by this Act 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.
- (4) Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.

- (5) 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 Act.
- (6) Nothing in this section shall prejudice any right of recourse as between the carrier and the actual carrier.

12. Through carriage -

- (1) Notwithstanding the provisions of sub-section (1) of section 11, 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. Nevertheless, any stipulation limiting or excluding such liability is without effect if no judicial proceedings can be instituted against the actual carrier in a court competent under sub-sections (1) and (2) of section 22. The burden of proving that any loss, damage or delay in delivery has been caused by such an occurrence rests upon the carrier.
- (2) The actual carrier is responsible in accordance with the provisions of sub-section (2) of section 11 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge.

13. Delay -

- (1) The carrier is liable for loss due to delay in delivery, except where the delay is an excusable delay because it was:
- (a) due to a deviation authorised by the shipper or any other holder of the bill of lading; or
 - (b) caused by circumstances beyond the control of the master or the carrier; or
 - (c) reasonably necessary to comply with an express or implied seaworthy warranty of ship; or
 - (d) reasonably necessary for the safety of the ship or cargo; or
 - (e) for the purposes of saving human life or aiding a ship in distress where human life may be in danger; or
 - (f) reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or

(g) caused by barratrous conduct of the master or crew.

PART III

LIABILITY OF THE SHIPPER

14. General rule -

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.

15. Special rules on dangerous goods -

- (1) The shipper must mark or label in a suitable manner dangerous goods as dangerous.
- (2) 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:
 - (a) the shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and

- (b) the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.
- (3) Sub-section (2) 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.
- (4) If, in cases where sub-section (2) (b) of this section 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 section 6.

PART IV

TRANSPORT DOCUMENTS

16. Issue of bill of lading -

- (1) 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.

- (2) 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.

- (3) The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.

17. Contents of bill of lading -

- (1) The bill of lading must include, inter alia, the following particulars:
 - (a) 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;
 - (b) the apparent condition of the goods;
 - (c) the name and principal place of business of the carrier;

- (d) the name of the shipper;
 - (e) the consignee if named by the shipper;
 - (f) 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;
 - (g) the port of discharge under the contract of carriage by sea;
 - (h) the number of originals of the bill of lading, if more than one;
 - (i) the place of issuance of the bill of lading;
 - (j) the signature of the carrier or a person acting on his behalf;
 - (k) the freight to the extent payable by the consignee or other indication that freight is payable by him;
 - (l) the statement referred to in subsection (3) of section 25;
 - (m) the statement, if applicable, that the goods shall or may be carried on deck;
 - (n) the date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties; and
 - (o) any increased limit or limits of liability where agreed in accordance with section 7(4).
- (2) 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 sub-section (1) of this section, must state that the goods are on board a named ship or ships, and the date or dates of loading. 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 section does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in its definition in section 2.

18. Bills of lading: reservations and evidentiary effect -

- (1) 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.

- (2) 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.

- (3) Except for particulars in respect of which and to the extent to which a reservation permitted under sub-section (1) of this section has been entered:
 - (a) 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

 - (b) 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.

- (4) A bill of lading which does not, as provided in sub-section (1)(k) of section 17, 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.

19. Guarantees by the shipper -

- (1) 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.

- (2) 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.

- (3) 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 sub-section (2) of this section, 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 sub-section (1) of this section.

- (4) In the case of intended fraud referred to in sub-section (3) of this section, the carrier is liable, without the benefit of the limitation of liability provided for in this Act, 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.

20. Documents other than bill of lading -

Where a carrier issues a document other than a bill of lading to evidence the receipt of the goods to be carrier, 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.

PART V**CLAIMS AND ACTIONS****21. Notice of loss, damage or delay -**

- (1) 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.
- (2) Where the loss or damage is not apparent, the provisions of sub-section (1) of this section apply correspondingly if notice in writing is not given within 15 consecutive days after the day when the goods were handed over to the consignee.
- (3) 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.
- (4) 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.
- (5) 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 consecutive days after the day when the goods were handed over to the consignee.
- (6) If the goods have been delivered by an actual carrier, any notice given under this section to him shall have the same effect as if it has been given to the carrier, and any notice given to the carrier shall have the effect as if given to such actual carrier.
- (7) 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 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with sub-section (2) of section 5, 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

this shipper, his servants or agents.

- (8) For the purpose of this section, 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.

22. Limitation of actions -

- (1) Any action relating to carriage of goods under this Act is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.
- (2) 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.
- (3) The day on which the limitation period commences is not included in the period.
- (4) 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.

- (5) An action for indemnity by a person held liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted. However, the time allowed shall not be less than 90 days commencing 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.

23. Jurisdiction -

- (1) In judicial proceedings relating to carriage of goods regulated by this Act the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

- (a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or
- (b) 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
- (c) the port of loading or the port of discharge; or

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

- (2)
 - (a) Notwithstanding the preceding provisions of this Section, an action may be instituted in the courts of any port or place in a Contracting 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. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in sub-section 1 of this section for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.

 - (b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest.

- (3) No judicial proceedings relating to carriage of goods under this Act may be instituted in a place not specified in sub-sections (1) or (2) of this section. The provisions of this section do not constitute an obstacle to the jurisdiction of the Contracting States for provisions or protective measures.

- (4)
 - (a) Where an action has been instituted in a court competent under sub-sections (1) or (2) of this section or where judgement has

been delivered by such a court, no new action may be started 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 the country in which the new proceedings are instituted;

(b) for the purpose of this section 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;

(c) for the purpose of this section, the removal of an action to a different court within the same country, or to a court in another country, in accordance with sub-section (2) (a) of this section is not to be considered as the starting of a new action.

(5) Notwithstanding the provisions of the preceding sections, 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.

24. Arbitration -

(1) Subject to the provisions of this section, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods regulated by this Act shall be referred to

arbitration.

- (2) 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.

- (3) The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:
 - (a) 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; or

- (b) any place designated for that purpose in the arbitration clause or agreement.
- (4) The arbitrator or arbitration tribunal shall apply the rules of this Act.
- (5) The provisions of sub-sections (3) and (4) of this section are deemed to be part of every arbitration clause or agreement, and any terms of such clause or agreement which is inconsistent therewith is null and void.
- (6) Nothing in this section 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.

PART VI

SUPPLEMENTARY PROVISIONS

25. Contractual stipulations -

- (1) 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 Act. 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.
- (2) Notwithstanding the provisions of sub-section (1) of this section, a carrier may increase his responsibilities and obligations under this Act.
- (3) 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 Act which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.
- (4) 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 section, or as a result of the omission of the statement referred to in sub-section (3) of this section, the carrier must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this Act for any loss 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, provided that costs incurred in the

action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.

26. General average -

- (1) Nothing in this Act shall prevent the application of provisions in the contract of carriage by sea or national law regarding the adjustment of general average.
- (2) With the exception of section 22, the provisions of this Act 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.

27. Other conventions -

- (1) This Act does not modify the rights or duties of the carrier, the actual carrier and their servants and agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships in so far as these are applicable in Western Samoa.
- (2) The provisions of sections 23 and 24 of this Act do not prevent the application of the mandatory provisions of any other multilateral convention already in force as regards Western Samoa at the date of this Act relating to matters dealt with in the said sections, provided

that the dispute arises exclusively between parties one of whom has his principal place of business in Western Samoa and the other of whom has his principal place of business in a State member of any such other convention. However, this sub-section does not affect the application of sub-section (4) of Section 23.

(3) No liability shall arise under the provisions of this Act for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or

(b) by virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

(4) No liability shall arise under the provisions of this Act for any loss of or damage to or delay in delivery of luggage for which the carrier

is responsible under any international convention or national law relating to the carriage of passengers and their luggage by sea.

- (5) Nothing contained in this Act prevents the State of Western Samoa from applying any other international convention which is already in force at the date of this Act and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than transport by sea. This section also applies to any subsequent revision or amendment of such international convention.

28. Unit of account -

- (1) The unit of account referred to in section 7 of this Act is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in section 7 are to be converted into the national currency of Western Samoa according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of the national currency of Western Samoa, 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. The value of the national currency of Western Samoa in terms of the Special Drawing Right is to be calculated in a manner determined by the Central Bank of Western Samoa.

(2) The limits of liability provided for in this Act shall be fixed as:

12,500 monetary units per package or other shipping unit of 37.5
monetary units per kilogramme of gross weight of the goods.

(3) The monetary unit referred to in sub-section (2) of this section corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amounts referred to in sub-section (2) of this section into Western Samoan currency is to be made according to this Act.

(4) The calculation mentioned in the last sentence of sub-section (1) and the conversion mentioned in sub-section (3) is to be made in such a manner as to express in Western Samoan currency as far as possible the same real value for the amounts in section 7 as is expressed there in units of account.

PART VII

MISCELLANEOUS

29. Absolute undertaking to provide a seaworthy ship not implied -

There is not to be implied in any contract for the carriage of goods by sea to which this Act applies any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

30. Bills of Lading to be subject to the Act -

- (1) Every bill of lading or similar document of title issued in Western Samoa which contains or is evidence of any contract to which this Act applies shall contain an express statement that it is to have effect subject to the provisions of the United Nations Convention on the Carriage of Goods by Sea, 1978 as enacted in this Act.
- (2) Every owner, charterer, master, or agent who issues any such bill of lading or similar document of title without complying with this section shall be liable on summary conviction to a fine of [\$ 500].

31. Repeals -

- (1) The Sea Carriage of Goods Ordinance 1960 is repealed.
- (2) The Sea Carriage of Goods Ordinance 1960, as in force prior to the commencement of this Act, continues to apply to a contract of carriage of goods by sea if:
 - (a) the contract was made before the commencement of this Act;
and
 - (b) that Act would have applied but for the operation of subsection (1) of this section.

32. Amendments and Savings -

Nothing in this Act shall affect the operation of section 282(4) and other relevant sections of The Customs Act 1977.