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**AN ACT TO INCORPORATE THE UNITED
NATIONS CONVENTION ON CONTRACTS
FOR THE INTERNATIONAL CARRIAGE OF
GOODS WHOLLY OR PARTLY BY SEA INTO
THE LAWS OF GHANA**

**A Legislation Drafting Project submitted in partial fulfillment of the
requirements for the award of the Degree of Master of Laws (LL.M.) in
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Dedication

This legislation drafting project is dedicated to my wife, Agatha and all my girls especially Emmanuella who in addition to their prayers and support have had to endure my long absence from home at a time they needed my presence most all in the name of this academic endeavour.

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EXPLANATORY NOTE

Introduction

It is trite knowledge that for a considerable period of time a plethora of international carriage of goods conventions or regimes have operated and governed the carriage of goods by sea almost concurrently as far as international trade is concerned. These regimes are the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 1924¹ (Hague Rules), its subsequent Visby Amendments of 1968² (christened as the Hague-Visby Rules) and Special Drawing Rights (SDR's) Protocol of 1979³ respectively and lastly the United Nations Convention on the Carriage of Goods by Sea, 1978 the Hamburg Rules.⁴

Admittedly, these various regimes, having been constructed at various periods in the history of international trade and global economic development, would have been so constructed to meet some specific requirements of the industry during those periods. Be that as it may, the reality on the ground is a pointer to the fact that the various regimes have left in their trails some ambiguities and uncertainties between suppliers and users of shipping services, particularly with respect to the allocation of responsibilities and risks.

As a consequence, the *status quo* of the regimes of international carriage of goods by sea has been described primarily as a patchwork system of competing and outdated multilateral conventions namely, the Hague Rules, the Hague-Visby Rules and the

¹International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 1924 accessed at <http://www.admiraltylawguide.com/conven/hague>

² Visby Amendments to the Hague Rules (1968 Protocol) accessed at <http://www.jus.uio.no/lm/seacarriage.hague.visby>,

³ Protocol of 1979 Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 24 February 1924 as amended by the Protocol of 23 February 1968 accessed at <http://www.admiraltylawguide.com/conven/sdrpr>.

⁴ United Nations Convention on the Carriage of Goods by Sea, 1978, concluded on 31 March 1978 at Hamburg, Entry into force on 1 November 1992, No 29215, United Nations, Treaty Series, vol.1695, p.3.

Hamburg Rules.⁵ It is therefore important for the purposes of this explanatory note to provide an overview of the various regimes in terms of what they are made up of and the weaknesses that have emanated from their operations.

1.0 International Conventions Regulating Carriage of Goods by Sea

1.1 The Hague Rules

The Hague Rules, as has already been indicated in the introductory section of this note, were adopted on the 25th August, 1924 in Brussels and have been revered as representing the maiden attempt by the international community to achieve a workable and uniform ocean bill of lading in order to deal with the problem of ship owners regularly excluding themselves from all liability for loss of or damage to cargo⁶ while also achieving a certain level of predictability for the international carriage of goods.

Currently, it has been said that the Hague Rules form the basis of national legislations governing sea carriage of goods in almost all the world's major trading nations and probably constitute more than 90 percent of world trade.⁷

The Hague Rules are made up of sixteen (16) articles dealing with various subject matters ranging from definitions of the terms employed in the Rules,⁸ the responsibilities of the carrier which include the furnishing of a seaworthy ship⁹, the exercise of due care of cargo¹⁰ as well as requiring the carrier to issue a bill of lading¹¹ stating certain particulars as furnished in writing by the shipper unless there was no opportunity of checking, and, a time bar of one year within which the shipper may bring a suit against the carrier just to mention a few.¹² Reynolds has argued that the provision of the time limitation for suits

⁵ Sturley, M. F "Transport Law of the 21st Century: An introduction to the preparation , philosophy and potential impact of the Rotterdam Rules". , The Journal of International Maritime Law. Nov-Dec 2008, Vol. 14, Issue 6, p.2.

⁶ <http://www.oecd.org/sti/transport/maritimetransport>; accessed on 28/01/2014.

⁷ <http://www.oecd.org/sti/transport/maritimetransport>; accessed on 28/01/2014.

⁸ Article 1 of the Hague Rules.

⁹ Article 3 (1)

¹⁰ Article 3 (7)

¹¹ Article 5(3)

¹² Article 1 of the Hague Rules.

could have without any doubtful reasoning been accommodated within Article IV of the Rules.¹³

The Rules also have a litany of immunities enjoyed by the carrier including a list of excepted perils the most conspicuous of which is the defense of negligence in navigation or management, an entitlement to dispose of dangerous goods, liability in respect of delay, loss or damage to goods¹⁴ during the voyage.

After holding sway for almost forty years as the principal carriage of goods regime,¹⁵ the failings of the Hague Rules began to surface over time as a consequence of litigation and developments in shipping technology.¹⁶ Some of the difficulties of the Rules related to the limitation of liability afforded to the carrier which did not extend to the servants or agents of the carrier as was manifested in the case of *Alder v. Dickson*¹⁷ (which came to be known as the “Himalaya”), the calculation of limitation of liability in terms of packages or units was not sufficiently flexible to accommodate consolidation of cargo in containers,¹⁸ and problems that related basically to the probative value or effect of the bills of lading in respect of statements as to the amount of goods loaded and the apparent order and condition on shipment.¹⁹

In order to deal with these problems, the Comité Maritime International (CMI) produced a draft at a Conference at Stockholm in 1963 which was signed at the city of Visby on the Island of Gotland in the Baltic at the end of the Conference. Further work was done on them and, became the subject of an international Protocol to the 1924 Convention adopted at Brussels in 1968. They are therefore the Brussels Protocol to the 1924 Convention, and the rules as amended are called the Hague-Visby Rules. They came into

¹³ Reynolds, F. ,”Hague, Visby, Hamburg and Rotterdam-A Maritime Tour of Northern Europe” ; in Martinez Gutierrez, Norman (Ed), *Serving the Rule of International Maritime Law, Essays in Honor of Professor David Joseph Attard*. (2010), p.235.

¹⁴ Article 4(2) of the Hague Rules.

¹⁵ Reynolds, F; ” The Hague Rules, the Hague-Visby Rules and the Hamburg Rules”, available at <http://maritimejournal.murdoch.edu.au/archives/v/>; p.22.

¹⁶ Carr, I. , *International Trade Law*, 4th Edition, Routledge-Cavendish, London and New York, 2010, p. 230.

¹⁷ [1955] 1 QB 158.

¹⁸ Carr, I. , op. cit. p. 230.

¹⁹ Reynolds, F. , op. cit. p. 21

effect on 23 June, 1977 after ten nations (sufficient in number and tonnage as stipulated in Article 13 of the Brussels Protocol of 1968) ratified the amended Hague Rules.²⁰

The Hague-Visby Rules are therefore simply the Hague Rules with a fairly small number of alterations, some of which are important but not all conspicuous and could be said to be exactly the same as the Hague Rules.²¹ They are indeed the Hague Rules with certain amendments made in the interest of correcting the particular failings perceived then as having emerged from the operation of the Hague Rules as earlier enumerated in this note. It would therefore be appropriate in the next few paragraphs to identify the main amendments and for that matter the innovation that the Visby Protocol brought to the existing regime of carriage of goods by sea.

1.2 The Hague-Visby Rules

According to Reynolds, even though the changes precipitated by the amendments were minor, three provisions are discernible.²² First, it provided for the application as amendment to shipments out of a contracting State, or where there is a clause paramount²³ and therefore expanded the territorial application of the rules in order to deal with the conflict of law problems that attended to the Hague Rules. Article 10 of the Hague-Visby Rules clearly provide that when the contract of carriage falls within one of the cases set out in Article 10, then they could apply whatever the proper law of the contract was.²⁴ In other words, the rules apply by force of law and often to inwards and outwards shipment. The amendment was meant to cure or overcome the problem created by the *Vita Food Products v. Unus Shipping Co*²⁵ decision where the Hague Rules were not deemed by an English Court to have the force of law in the absence of a paramount clause.

The Hague-Visby Rules also brought improvements to the maximum limitation of liability of the carrier by introducing a new weight-based criterion; 10 francs per package

²⁰ Berlingieri, Francesco. ;" A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules", available at <http://www.uncitral.org/pdf/english/workinggroup/i>.

²¹ Reynolds, Francis. , op. cit. p. 22.

²² Reynolds, Francis. ,op. cit, p.241.

²³ Ibid.

²⁴ Zulkifli, H and Nazli, Is. , "The Weaknesses of the Hague Rules and the Extent of Reforms Made by the Hague-Visby Rules" , available at http://zulkiflihasan.files.wordpress.com/2008/06/micr_p.8.

²⁵ [1939] AC 277 (PC).

or unit or 30 francs per kilo gross weight of the goods lost or damaged. According to the Rules neither the carrier nor the ship in any event will or become liable for any loss or damage to the goods in an amount exceeding the equivalent of 666.67 units of account per package or 2 units of account per kilo, of gross weight of the goods lost or damaged, whichever is higher.²⁶

Similarly, where goods have been containerized, these limits will apply to each package or unit in the container as a whole.²⁷ The unit of account is the Special Drawing Rights (SDRs) of the International Monetary Fund.²⁸ The package and kilo limitations under the Hague-Visby Rules are uniform, being in Poincare gold francs or SDRs as are determined by the International Monetary Fund. This gives advantage to the contracting parties whereby the standard of limitation is uniform which also conforms with the intention of the Rules for the unification of the terms of international trade.

Notwithstanding the above amendments, it is important to bring to the fore that the Hague-Visby Rules have not impacted positively on the international regime of the carriage of goods by sea. Indeed, it has been observed that there was nothing to be gained considering the structure of the Visby-Protocol and has therefore aptly been described as only parasitical to the Hague Rules.²⁹ The Hague-Visby Rules have therefore come under a barrage of attacks particularly by developing countries (principally cargo owning) who believe that the operation of the “traditional maritime law” alongside certain aspects of international trade law have and continue to impair their balance of payments and has ensured their continued poverty and perpetual underdevelopment in an industrial age.³⁰

Indeed, one of the basic criticisms of the Hague-Visby Rules is the litany of exculpatory clauses commonly perceived by shipper interests to serve the interests of the carrier especially the so called nautical fault exception. The Protocols of 1968 in the main, deals with the limits of liability which to most shippers amounted to no more than “band aid” improvements that did not go far enough in addressing the perceived weaknesses of the

²⁶ Article IV Rule 5.

²⁷ *Ibid.*

²⁸ The SDR as a unit of account was introduced by the SDR Protocols.

²⁹ Reynolds, Francis. , *op. cit.* p.243.

³⁰ Carr, I. , *op. cit.* p.285.

Rules.³¹ This position is supported by Reynolds when he emphatically mentions that there is nothing to be gained from the Visby amendments considering its very structure, describing it as only parasitical to the Hague Rules except for the new Article 4 *bis*, which is unsatisfactorily tacked on and largely ineffective.³²

It is also often mentioned that the Hague-Visby Rules remain incompatible with the growing acceptance and penetration of electronic commerce which has virtually become synonymous with modern day international business transactions. It is to be noted that the 21st Century international shipping is moving in the direction of greater electronic commerce and paperless means of doing business but the present state of the law fails to furnish the appropriate legal framework.

Another criticism of the Hague-Visby Rules is related to the fact that it has been overtaken by developments in the shipping industry particularly in relation to the development and increasing use of containers in the trade. This has complicated matters as the rules governing the unit limitation of liability could not easily be accommodated.

Again, the one year time limit for bringing actions is too short since in practice, it takes longer than a year to establish the identity of the party against whom suit must be brought.³³ This identity crisis of the carrier is, corroborated by Tetley when he buttresses the point that it is not always an easy task, particularly because bill of lading forms are frequently very unclear as to the carrier's identity.³⁴ According to the Hague-Visby Rules, the carrier and the ship in any event will be discharged from all liability in respect of the goods unless suit is brought within one year of their delivery or of the date on which they would have been delivered.³⁵ The brevity of the time for initiating action against a carrier for loss or damage to cargo is further exacerbated by the unduly long court processes so that by the time the carrier is identified and all records properly assembled for litigation to proceed the time would have elapsed and the shipper's action time barred.

³¹Updating the Rules on International Carriage of Goods by Sea: The Rotterdam Rules. Available at <http://www.comitmaritime.org/uploads/Rotterdam>. p.3.

³² Reynolds, Francis. , op. cit. p.243.

³³ Carr, I. , op. cit. p.285.

³⁴ Tetley, W. , International Maritime and Admiralty Law, International Shipping Publication, 2002, p.104.

³⁵ Article III Rule 6.

According to Carr, the courts have construed this provision restrictively and if action is not to be time barred, it must be brought within one year in the jurisdiction in which the dispute or matter is to be decided.³⁶ In *the Compania Columbiana de Seguros v. Pacific SN Co*,³⁷ the plaintiff initiated action in the United States of America even though the bill of lading provided for exclusive English jurisdiction. By the time the mistake was discovered, the one year time limit had elapsed and the action was held to be time barred. It is crystal clear from the foregoing case that the time limitation of one year is inimical to the interest of the shipper and should have been expanded under the Visby- Protocol that sought to amend the Hague Rules.

In close proximity to the foregoing problem of the Hague-Visby Rules is also the complete absence of provisions relating to jurisdictional matters. This noted shortcoming of the Rules work seriously against developing economies. The gap motivates the inclusion by the carrier of ship-owner oriented clauses in the bill of lading. The net effect is that it prevents shippers from developing economies from bringing suits or seeking arbitration at destination countries where in fact almost all cargo claims arise. In such situations the local courts situated where the cargo arrives damaged or late, are bereft of jurisdiction and the poor shipper is left in the lurch.

Accordingly, only some countries ratified the Protocol and hence became parties to the so called Hague-Visby Rules. Others did not ratify and thus remained parties to the Hague Rules. For some countries, the Protocol was not far reaching as it did not deal comprehensively with the issues of liability, allocation of responsibilities and risks, as well as its lack of the necessary framework to accommodate the use of electronic commerce and the other modes of transport and therefore did not ratify.

In the light of the above criticisms of the Hague-Visby Rules and the uncertainties and ambiguities that trailed the regime, the United Nations Centre for Trade and Development (UNCTAD) conducted a study on the bills of lading and produced a report in 1970 which observed among others that the existing regime was unsatisfactory

³⁶ Carr, I., op. cit., p.285.

³⁷ [1963] 2 Lloyds Rep 527.

economically. According to the UNCTAD Report, the Hague-Visby Rules had the result of transferring wealth from developing to developed nations, in that it benefitted ship-owners and also the insurance industries in developed countries.³⁸ The objective of the work of UNCTAD was therefore to remove the ambiguities and uncertainties and to establish a balanced allocation of responsibilities and risks between the suppliers and users of shipping services.³⁹ Acting upon a recommendation by the UNCTAD Working Group, the United Nations Commission on International Trade Law (UNCITRAL), was mandated to come out with a revision of the Hague-Visby Rules.

1.3 The Hamburg Rules

The work of UNCITRAL culminated in the production of a new set of rules for the international shipment of goods which were adopted in 1978 at Hamburg with the official name the United Nations International Convention on the Carriage of Goods by Sea.⁴⁰ The Rules were christened as the “Hamburg Rules” as they were signed in Hamburg. The Rules were adopted with 20 ratifications by countries most of whom were not significant players in the international trade of the world.

It is important to note that the Hamburg Rules, to an appreciable level, attempted to remedy the weaknesses of the Hague-Visby Rules. Its expansion of the period of responsibility of the carrier, the more stringent regime of carrier responsibility, the unavailability of the long list of immunities including the negligence of navigation exception, the introduction of specific provisions on jurisdiction and the extension of the time limitation to two years are but a few of the improvements introduced by the regime.

In spite of the above advantages of the Hamburg Rules, the major maritime nations which contribute to almost two-thirds of the world’s total trade did not ratify the Rules. In effect, even though the Convention entered into force in November 1992, it was moribund at birth.⁴¹ The major maritime nations with significant contribution to world trade, contended that the mandatory character of the liability rules with respect to the scope of application of the Rules was too wide and the deletion of the exculpatory clauses

³⁸ Reynolds, F. , op. cit. p.243.

³⁹ Op.cit p.3.

⁴⁰ United Nations Convention on the Carriage Goods by Sea, 1978, United Nations, Hamburg 31 March 1976. Adopted by 34 Parties. Entered into force 1 November 1992. Treaty Series, Vol. 1695, p.3.

⁴¹ <http://www.comitemaritime.org/updates/Rotterdam.p.3>.

make the liability floor too slippery as compared to the tackle to tackle regime under the Hague-Visby Rules which they were used to.⁴²

The above position is reinforced by Reynolds when he observes that the mystery about the Rules is that while they were eagerly adopted by a number of jurisdictions keen to see reform and reduction of the power of ship owners as then perceived,⁴³ it was hardly able to sustain that reverence beyond the signatures. The failure of the Rules is largely attributed to a considerable extent to the implacable resistance of some ship owning interests who worked assiduously to starve it of the needed “oxygen of publicity.”⁴⁴

The above exposition has therefore created a stage for the application of a multiplicity of rules for international carriage of goods by sea.⁴⁵ While some countries have denounced the Hague Rules and become parties to the Hamburg Rules, there are others which are party to the Hague-Visby Rules and yet others are party to only the Hague Rules like Ghana.⁴⁶ There are also some which have not denounced the Hague Rules but have ratified the Hamburg Rules such as Nigeria.⁴⁷ There are yet other countries which have incorporated bits and pieces of the various rules into their municipal laws (the so called hybrids or mosaic system).⁴⁸ There is therefore currently a collection of various international rules for the carriage of goods by sea which has created a great deal of muddled confusion and uncertainty.

In the light of the foregoing picture, it came to be widely recognized by the international community that there was an urgent need for uniformity in the international carriage of goods by sea regime. Indeed, the existing carriage regimes have been overtaken by developments like containerization, multi-modalism and the penetration of e-commerce in international commercial transactions. This, undoubtedly, provided additional impetus and traction to the quest for a new international initiative that would be all encompassing,

⁴² [Ibid. p.4.](#)

⁴³ Reynolds, F. ,op. cit.. p.243.

⁴⁴ Ibid. p.244.

⁴⁵Mbiah, E. K; " International Transport Law for the 21st Century: The Rotterdam Rules", Unpublished Brief, p.4.

⁴⁶ Mbiah, E. K. , op.cit. p.4

⁴⁷ Ibid.

⁴⁸ Ibid.

prevent further fragmentation and bring about harmonization, modernization and predictability in the carriage of goods by sea.

Accordingly, the next section is devoted to examining this new international initiative.

1.4 The Rotterdam Rules

1.4.1 The processes leading to the construction of the Rotterdam Rules

The initial initiative for this Convention is traceable to 1996.⁴⁹ UNCITRAL informed of the gaps in the existing legal framework in respect of bills of lading and seaway bills, their relation to the rights and obligations of the seller, the buyer and the parties providing financing and the uncertainties caused by the emergence of electronic communication, asked the Secretariat to solicit views and possible solutions from States and international organizations (both intergovernmental and non-governmental) representing parties with an interest in international carriage of goods by sea.⁵⁰

Accordingly, an invitation was extended to the CMI which expressed their willingness to co-operate.⁵¹ Consequently, in 1998 the CMI was formally charged with the task of obtaining and analyzing views from all interested parties.⁵² In 2001, CMI submitted a report which resulted in the setting up of a Working Group on Transport Law.⁵³ In April 2002, the Working Group on Transport Law produced the Preliminary Draft Instrument on the Carriage of Goods by Sea.⁵⁴ As would be expected, the Draft Instrument underwent various amendments and the final version was adopted in 2008.

The United Nations adopted the text of its new Convention, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea on 11 December 2008.⁵⁵ The Resolution adopted by the General Assembly also recommended that the rules embodied in the Convention be called the “Rotterdam Rules “⁵⁶

⁴⁹ Carr, l. , op. cit. p. 305.

⁵⁰ Carr, l. , op. cit. p. 305.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid. p.306.

⁵⁴ Ibid.

⁵⁵ Resolution adopted by the General Assembly, A/Res/63/122, 2 February 2009.

⁵⁶ Ibid.

The Convention was officially opened for signature on 23 September 2009 and requires twenty ratifications, approvals or accessions to come into force. The new Convention is intended to supersede the Hague, Hague-Visby and Hamburg Rules as each State ratifies, accepts, approves or accedes to it will at the same time denounce the above mentioned Conventions and the protocol/protocols thereto to which it is a party, by notifying the Government of Belgium with respect to the Hague and Hague –Visby Rules while parties to the Hamburg Rules are expected to notify the United Nations which is depository for the Hamburg Rules to that effect with a declaration that the denunciation is to take effect from the date when the new Convention enters into force in respect of that State.⁵⁷

1.4.2 The Philosophy of the Rotterdam Rules

The single word that best describes the philosophy of the Rotterdam Rules could be “pragmatic”⁵⁸ but their pragmatism is exhibited in many forms – ranging from the process by which they were negotiated to the goals (particularly modernization and uniformity) that were designed to be accomplished.⁵⁹

From the beginning, UNCITRAL made it a point of reaching commercial interests and as a result representatives from organizations that act on behalf of various segments of the industry attended every meeting of the CMI’s International Sub-Committee. Commercial observers were also active participants at every session of the UNCTRAL Working Group. Again most of the national delegations that were active in the negotiations either included expert industry representatives as members of delegation or consulted regularly with industry representatives between sessions.⁶⁰

This unique approach ensured that the outcomes were generally representative of the interests of the parties.

As Mbiah puts it, “the Rotterdam Rules represent a rich alloy of sentiments of various interest groups – carriers, shippers, freight forwarders, insurance companies and not the

⁵⁷ Article 89 of the Rotterdam Rules.

⁵⁸ Sturley, Michael. , op. cit. p. 24.

⁵⁹ Ibid.

⁶⁰ Ibid.

least Governments who have interests in international trade and the carriage of that trade across various transport modes”.⁶¹

The Rules bring currency to the existing international legal regimes on the trade related aspects of international carriage of goods, seek to better allocate the risks and responsibilities of the shipper and the carrier as well as harmonize and modernize the law with a view to attaining uniformity so craved for by commercial partners. It is expected that this should lead to a reduction in overall transport costs, increase predictability and engender greater commercial confidence for international business transactions.⁶²

The next section of this explanatory note is therefore devoted to providing an overview of the new rules.

1.4.3 An overview of the Rotterdam Rules

In terms of comparison, the Rotterdam Rules could be said to be more comprehensive and extensive in its scope of application than its predecessor regimes of sea carriage. Indeed the nature of the rules suggest that its drafters contemplated it to be a “one- stop-shop” convention for the carriage of goods that adequately provides for the aspirations of ship owners and cargo interest as well as other relevant parties. It is therefore not surprising that it is made up of eighteen chapters and ninety six articles.⁶³

Chapter 1 of the Convention is devoted to the general provisions of the Rules. For instance the new Convention envisages a regime applicable from door to door rather than the tackle to tackle and port to port coverage favored by the Hague-Visby and Hamburg regimes respectively, provided that the carriage includes a sea leg and that sea leg involves cross-border transport.⁶⁴ This undoubtedly, is an innovation that the Rules bring into the international carriage of goods by sea through the unification of the various regimes under a multimodal transport regime. It also provides that a contract under the

⁶¹ Mbiah, E. K. , *Balancing Shipper and Carrier Interest : An Analysis of Some Salient Features of the Rotterdam Rules and its Predecessor Treaties: A PhD Thesis submitted to the World Maritime University, Malmo, Sweden in Fulfilment of the requirement for the degree of Doctor of Philosophy, February,2011*,p. iv.

⁶² *Ibid.*

⁶³ The Rotterdam Rules.

⁶⁴ Article 1.

Rules is to be against the payment of freight.⁶⁵ Goods for the purposes of the Rules means wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.

Another area worth considering is the applicability of the Rules which is dealt with by Chapter 2 of the Convention. The new Convention applies to contracts of carriage where the place of receipt and place of delivery are in different States, and the port of loading of a sea carriage and port of discharge of the same sea carriage are in different States.⁶⁶ There is however, no provision that requires that both places/ports must necessarily be Contracting States. Similarly, the convention does not apply to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee or any other interested party.⁶⁷ It is also important to note however, that the Rules exclude certain categories of contracts in their application particularly in liner transportation.⁶⁸ These include charter parties and other contracts for the use of a ship or any space thereon. However, the Rules will apply to contracts of carriage of non –liner transportation if there is no charter party or other contract between parties for the use of a ship or any space thereon. It would also be applicable in situations where a transport document or electronic transport record is issued.⁶⁹

One of the imminent gaps existing in the current carriage of goods by sea regimes is the absence and use of transport documents and electronic transport records vis-à-vis the growing acceptance and penetration of electronic commerce in modern transactions in the industry. The current regimes fail to furnish the requisite legal framework that provides adequate basis for e-commerce. It is against this backdrop that the new Convention has made provisions in Chapter 3 that permit the use of electronic transport records if the shipper and carrier so agree or consent to its usage.⁷⁰ Accordingly, the issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance,

⁶⁵ Ibid.

⁶⁶ Article 5.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Article 6.

⁷⁰ Article 8.

possession or transfer of a transport document.⁷¹ The introduction of e-commerce by the Rules is therefore one of the ways by which the Convention has responded to the quest and clarion call for the modernization of the carriage of goods by sea regime.

Chapter 4 of the Convention is devoted to provisions dealing with the obligations of the carrier. With respect to the period of responsibility of the carrier for the goods, the Convention provides that it begins when the carrier or a performing party receives the goods for carriage and ends when they are delivered.⁷² The rules also oblige the carrier to properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods. With respect to the voyage by sea, the carrier is bound before, at the beginning of and during the entire period to exercise due diligence to make and keep the ship seaworthy, properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage as well as make and keep the holds and other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.⁷³

It is relevant in the review of the carrier's obligation to address briefly the Rotterdam Rules' concepts of "performing parties" and "maritime performing parties". Performing parties are essentially the carrier's subcontractors of any kind.⁷⁴ They are persons other than the carrier who perform or undertake to perform any of the carrier's obligations in relation to the goods, directly or indirectly at the carrier's request or under his supervision or control- a definition capable of encompassing a large circle of individuals.⁷⁵ These performing parties do not become directly liable under the Rules but they may naturally incur liabilities under some other legal framework. If a performing party is liable under some such other legal framework, the carrier is not vicariously liable by virtue of the Rotterdam Rules; the liability of the carrier is based on the Rotterdam Rules and for breaches that result from the acts of omissions of these third parties.

⁷¹ Ibid.

⁷² Article 12.

⁷³ Article 14.

⁷⁴ Article 1(6).

⁷⁵The Rotterdam Rules in a Nutshell, available at http://www.fd.unl.pt/docentes_docs/ma/wlcs_MA_201

Maritime performing parties are performing parties that carry out obligations in relation to the goods, from the point in time of arrival of the goods at the port of loading until their departure from the port of loading.⁷⁶ By way of example, stevedores would obviously qualify as a maritime performing party, unless retained by the shipper. A freight forwarder who carries the goods on a land leg would qualify if he also handles the goods within the port area. It is important to note however, that unlike the performing parties, the maritime performing party is liable on the same contractual terms as the carrier with the same defences and limits. They are subject to more or less the same liabilities as the carrier provided some part of their performance was carried out in a contracting state and the damage to the cargo is related to their part of the performance of the carriage contract.⁷⁷ However, in a situation where the carrier and the maritime performing party are both liable under the Rules, liability shall be joint and several.⁷⁸ Undoubtedly, these innovations of the Rotterdam Rules have settled and brought a lot more clarity to the Himalaya problem that has attended to the Hague-Visby Rules.

The carrier's liability for loss, damage as well as delay in delivery of the goods is the subject matter of Chapter 5 of the Convention. According to the provisions covered herein, the carrier is liable if the claimant is able to prove that the loss, damage or delay or the event or circumstance that contributed to it took place during the period that the carrier had responsibility for the goods.⁷⁹ In the light of this provision therefore the carrier is presumed to be at fault unless he proves that the cause of the loss, damage or delay was not attributable to his fault or any person (master, crew of ship, performing party) who undertakes any of the carrier's responsibilities.⁸⁰

In the same vein however, the Convention also allows the carrier a host of defences and immunities which include acts of god, perils, dangers and accidents of the sea or other navigable waters; war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions; acts or omissions of the shipper; saving or attempting to save life at sea and reasonable measures to avoid or attempt to avoid damage to the environment.⁸¹ Visibly

⁷⁶ Article 1(7).

⁷⁷ Article 19.

⁷⁸ Article 20.

⁷⁹ Article 17.

⁸⁰ Article 18.

⁸¹ Article 17.

missing, however, from the listed immunities available to the carrier is the omnibus nautical fault regime of the Hague-Visby Rules. This development is indeed a novelty and of great significance and enormous relief to the shipper. Indeed, under the Hague-Visby Rules the carrier, his servants and agents are exonerated from liability where damage or loss is as a result of their negligence in the management of the ship. This has now been jettisoned by the Rotterdam Rules and could have significant effect in increasing the carrier's liabilities. Also relevant and worth mentioning is the fact that under the Rotterdam Rules the carrier's responsibility with respect to seaworthiness is now not only before and at the beginning of the voyage, as prevails under the Hague-Visby Rules, but shall continue throughout the entire voyage. It should however, be noted that in spite of the above a number of the exculpatory clauses of the Hague-Visby Rules have been maintained by the Rotterdam Rules.

By way of scope, the Rotterdam Rules also apply to all types of cargo including deck cargo and live animals as provided for in Chapter 6. According to the Rules, cargo qualifies as deck cargo on the basis of statutory requirements and that, it is carried in containers or vehicles that are fit for deck carriage. The decks must be specially fitted to carry such containers or vehicles or that the carriage on deck is in accordance with the contract of carriage, or the customs, usage and practice in the trade in question as well as being contingent on agreement between the parties to the contract.⁸² It should however, be noted that the carrier under these circumstances is not liable for loss or damage or delay emanating from the special risks inherent to such carriage.⁸³ This provision basically mimics that contained in the Hamburg Rules which were however manifestly absent in the Hague and Hague-Visby Rules and could be said to be one of responses of the new Convention to accommodate some of the developments in the industry that had overtaken the older regimes of carriage by sea particularly containerization.

In terms of comparison, it can be said without any shade of doubt that the new Convention covers more grounds with respect to the responsibilities of the shipper than the existing regimes and these are captured in Chapter 7. Relatively speaking, there are no obligations on the shipper with respect to the Hague-Visby Rules except for the fact that he shall not ship dangerous goods. The Hamburg Rules however, provide that the

⁸² Article 25.

⁸³ Ibid.

shipper shall not ship dangerous goods unless he has informed the carrier about the nature of the particular goods. The Hamburg Rules also require the shipper to indemnify the carrier from losses occasioned by the carriage of such goods. Furthermore, the shipper under the Hamburg Rules is required to guarantee the accuracy of the information provided to the carrier in respect of the labels and marks on the goods. By far the most elaborate provisions on the obligation of the shipper are contained in the Rotterdam Rules. A good number of these obligations of the shipper under the Rotterdam Rules represent a codification of practice.⁸⁴ The shipper is obliged under the Rotterdam Rules to deliver goods ready for carriage and in such conditions as to withstand the potential perils and vagaries of the sea voyage so as not to cause harm to persons or property.⁸⁵ If the loading and stowing of the goods fall within the obligations of the shipper, he is required to undertake these activities properly and carefully. Similarly, the shipper has additional responsibilities to provide information, instructions and documents in a timely manner⁸⁶ and most importantly to bring to the attention of the carrier if the character or nature of the goods is dangerous and shall accordingly mark and label them as such in conformity with any law, regulation or requirements of public authorities.⁸⁷ The shipper is therefore presumed liable for loss or damage sustained by the carrier if he proves that such loss or damage is consequent to the breach of the shipper's obligation under the convention.⁸⁸

Another important innovation of the new Convention is the expansion of the time limitation for bringing an action or suit. The paucity of the time allowed under the Hague-Visby Rules, which is one year, inherently makes it difficult for a shipper to bring an action if the carrier reneges on his obligation under the contract of carriage. Chapter 13 of the new Convention deals with this exhaustively. Specifically the Rules provide that no judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation may be instituted after the expiration of a period of two years.⁸⁹ The provision gives ample time to a claimant to establish the identity of the carrier which is the shipper's bane under the Hague-Visby Rules. This provision is in consonance with the time limitation provided by the Hamburg Rules, which is two years from the time the

⁸⁴ Updating the Rules on International Carriage of Goods by Sea: The Rotterdam Rules op. cit.. p.11..

⁸⁵ Article 27.

⁸⁶ Article 29.

⁸⁷ Article 32.

⁸⁸ Article 30.

⁸⁹ Article 62.

goods are delivered or should have been delivered. In addition, provision has been made by the Rules for the extension of the time for suit so that an action for indemnity by a person held liable may be instituted after the expiration of the period provided that the indemnity action is instituted within the time allowed by the applicable law in the jurisdiction where proceedings are instituted or ninety days from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.⁹⁰ Again, actions against the identified carrier may be instituted after the expiration of the period provided in Article 62 if the action is instituted within the circumstances cited immediately above.⁹¹

According to Berlingieri, the formulation of the provision on the time suit in the Hamburg Rules as well as the Rotterdam Rules is opposite to that of the Hague-Visby Rules in that it considers the time from the standpoint of the claimant rather than from that of the defendant.⁹² The limitation period is one year for the Hague-Visby Rules, while Rotterdam borrows the two year period from the Hamburg Rules.

Chapter 14 of the Rotterdam Rules is devoted to jurisdictional matters. The Rules provide that proceedings against the carrier can be instituted in a competent court at the domicile of the carrier, place of receipt agreed in the contract of carriage, place of delivery of carriage, port where goods were initially loaded or the port where the goods finally were discharged from the ship.⁹³ It is important to observe however, that the jurisdiction provisions in the Rules are not a radical departure from that of the Hamburg regime. There is rather a complete lack of jurisdiction provisions in the Hague-Visby Rules which works seriously against developing economies. This situation motivates the inclusion by carriers of ship-owner oriented jurisdiction clauses in the bills of lading. The inclusion of the provisions on jurisdiction is thus a positive development that would put a fetter on exclusive court or arbitration agreements.

Similarly, proceedings against a maritime performing party may be instituted at the domicile of the maritime performing party, port/ports where goods are received or

⁹⁰ Article 63.

⁹¹ Article 65.

⁹² Berlingieri, Francesco. , "A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules", p.36, available at http://www.uncitral.org/pdf/english/working_group/1.

⁹³Article 66.

delivered by the maritime performing party or the port where the maritime performing party performs activities in relation to the goods.⁹⁴ It is however worth noting that the Convention as it stands in relation to jurisdiction permits ratifying countries to opt in or opt out of the clause.⁹⁵ In that regard, it is important to note that mere ratification of the Rules by a State does not result in it being bound by the provisions on jurisdiction. Rather the provisions bind only States that make a declaration to that effect. Because of this so-called “opt-in opt out” system, parties to a contract of carriage are advised to investigate not only whether the country in which the dispute is brought to a court is a party to the Rules but also whether it has made such declarations.⁹⁶

Ghana will opt out of the jurisdiction provisions of the new rules not because they are unsatisfactory or inadequate but primarily so because Ghana already has a similar law in the High Court (Civil Procedure) Rules, 2004 (CI.47) with provisions which mimic the jurisdictional provisions of the Rules. In other words the existing Rules herein mentioned would adequately serve the purpose.

The arbitration provision of the Rotterdam Rules are contained in Chapter 15 and provides that the parties to the contract may agree that any dispute that may arise relating to the carriage of goods shall be referred to arbitration.⁹⁷ The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at any place designated for that purpose in the arbitration agreement or the domicile of the carrier, the place of receipt agreed in the contract of carriage, the place of delivery agreed in the contract of carriage or the port where the goods are initially loaded on a ship or the port where the goods are finally discharged.⁹⁸ It is important to note that the arbitration provisions are also subject to the “opt in and opt out” system and a contracting state must necessarily declare to be bound by those provisions.

Just like the jurisdiction provision, Ghana will opt out of the arbitration provisions of the Rules because there exist already in the statutes an Alternative Dispute Resolution Act,

⁹⁴ Article 68.

⁹⁵ Article 74.

⁹⁶ The Rotterdam Rules in a Nutshell, available at http://www.fd.unl.pt/docentes_docs/ma/wlcs_MA_201.

⁹⁷ Article 75.

⁹⁸ *ibid.*

2010 (Act 795) that will govern the process if parties in a dispute elect to resolve the matter by arbitration.

Chapter 16 of the new Convention deals with the validity of contractual terms and makes the contract of carriage void if it directly or indirectly excludes or limits the obligations of the carrier or maritime performing party, directly or indirectly excludes or limits the liability of the carrier or maritime performing party for breach of an obligation under the convention.⁹⁹ Similarly, the Chapter provides that any term in the contract that seeks to directly or indirectly exclude, limit or increase the obligations of the shipper, consignee, controlling party, holder or documentary shipper renders the contract void. Also, any term that directly or indirectly excludes limits or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under the convention is void.¹⁰⁰

The Rotterdam Rules also introduce the concept of volume contracts.¹⁰¹ According to the Rules volume contracts mean a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time and that the specification of the quantity may include a minimum, a maximum or a certain range.¹⁰² This definition is fraught with uncertainty as there is no minimum quantity, period of time, frequency or number of shipments.¹⁰³ It has been argued that within the context of the Rotterdam Rules the provisions on volume contracts remain the most controversial.¹⁰⁴ The Rules provide for derogation and set out some mandatory clauses to guide the conduct of transactions with respect to volume contracts compared to the one way mandatory regimes of both the Hague-Visby and Hamburg Rules. This provision, just like the jurisdiction and arbitration provisions is subject to the “opt-in opt-out” system and countries will accordingly be required to elect appropriately if they would wish to be bound by the provision or not. With all intents and purposes, Ghana will opt out and accordingly declare not to be bound by the volume contract provisions of the

⁹⁹ Article 79.

¹⁰⁰ *Ibid.*

¹⁰¹ Article 80.

¹⁰² Article 1(2).

¹⁰³ Updating the Rules on International Carriage of Goods by Sea: The Rotterdam Rules, *op. cit.* p.13.

¹⁰⁴ *Ibid.*

Rules as it appears to have been incorporated to only meet the whims and caprices of some powerful States in the arena of international trade and carriage by sea.

The above overview of the areas covered by the new Convention is by no means exhaustive. Suffice it however to mention that the instrument covers in addition various areas of existing mandatory liability regimes in the field of carriage of goods by sea akin to the Hague, Hague-Visby and Hamburg Rules. It however goes further to modernize the existing legal regime in relation to current practice by covering areas such as freight, transfer of rights, right of control and the right to sue.

1.4.4 Critique of the Rotterdam Rules

Already a number of criticisms have been leveled against the Rotterdam Rules to the extent that one could aptly describe it as dead at birth. According to the critics, the Convention fails to provide uniform rules of liability throughout the stages of transport.¹⁰⁵ It is further noted that it gives precedence to mandatory rules in unimodal transport conventions in cases where a loss or damage can be attributed to a particular stage of the multi-modal transport.

Again, even though the Rules attempt to distribute risk and liability between carriers and cargo interests, the view is widely held especially amongst cargo interest that the balance is disproportionately skewed in favor of the carrier.¹⁰⁶

Tetley has also argued that one of the major shortcomings of the Rotterdam Rules is the multiple opting-outs made to explicit rules and cites the most egregious examples as those of the jurisdiction and arbitration provisions.¹⁰⁷ It is worth noting that each opt-in provision in the Rotterdam Rules decreases uniformity of the law and thereby introduce uncertainty that will discourage international commerce.¹⁰⁸ This undoubtedly, defeats one of the strongest objectives of the Rotterdam Rules with respect to achieving uniformity of the rules.

¹⁰⁵ Mbiah, E.K. op.cit. p.3.

¹⁰⁶ Ibid.

¹⁰⁷ Tetley, W. ,” A summary of some of the general criticisms of the UNCITRAL Convention (the Rotterdam Rules), in Martinez Guterrez, Norman, *Serving the Rule International Maritime Law, Essays in Honor of Professor David Joseph Attard*, Routledge, London and New York.(2010), p.253.

¹⁰⁸ Jose Alcantara et al. ,” *Particular Concerns with Regard to the Rotterdam Rules*” April, 2010, p.8.

Many observers have also noted that the volume contracts exemptions is a most worrying development that favors the large scale stakeholders and allows them to make their own rules. Such a situation will indubitably end up with the large scale stakeholders gaining such market power to enable them hold the international supply chain to ransom. This nomenclature of the rules is likened to such freedom on an international basis in the banking sector that recently created a worldwide financial crisis.¹⁰⁹

Some have also argued that the interpretation of the Rules is made a little more difficult. This is because tried and tested provisions which provide certainty are jettisoned in an attempt to review the structure, substance and text of the existing regimes.¹¹⁰

Others have made the point that the very language of the Rules is tough, complex and verbose which might have been borne out of political wrangling as well as the quest and zeal to fill the gaps in the previous carriage of goods by sea conventions. In that regard it is argued that the structure of the drafting makes it convoluted, complex and unwieldy with extensive cross referencing. This position is shared also by both Tetley¹¹¹ and Reynolds.¹¹² It is important however, that the Rules are construed in an objective manner and in accordance with Articles 31¹¹³ and 32¹¹⁴ of the 1969 Vienna Convention on the Law of Treaties which state that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be assigned to the terms of the treaty in their context and in the light of its object and purpose. If such construction creates ambiguous or obscure meaning or leads to a result that is manifestly absurd or unreasonable, recourse may be had to the relevant *travaux preparatoires*.

Those that argue in favor of the new Convention point to the deletion of the nautical fault rule, the continuing obligations of due diligence and seaworthiness, the inclusion of the provisions on delay, the higher limits of liability, the extension of time for suit, the

¹⁰⁹ Ibid. p.10.

¹¹⁰ Mbiah E. K. , op. cit., p.3.

¹¹¹ Tetley, W. , op. cit. p.252.

¹¹² Reynolds, Francis. , op. cit. p.248.

¹¹³ Vienna Convention on the Law of Treaties 1969,Article 31,United Nations, Treaty Series, vol 1155.

¹¹⁴ Ibid.

widening of the period of responsibility, the opening up of the forum and the door-to-door possibilities that it offers.¹¹⁵

It is expected that the harmonization and modernization of the international legal regime, coupled with the attempt to balance carrier and cargo interest should lead to a reduction in transaction costs, increased predictability and greater commercial confidence in international business transactions.

It is important to note that no attempt to balance the interests of carriers and cargo owners can come out with provisions or a regime that would be perfectly satisfactory to both. Like compromises, no one leaves completely satisfied but all leave in the hope that they have taken away something and this can more or less be related to an oxymoronic situation.

Having taken cognizance of the above, it is important to concede that looking at the generality of the new Convention, it would involve more significant changes for some countries than others. This derives from the fact that the Rotterdam Rules, in a very considerable measure, draw on the Hague-Visby and Hamburg Rules incorporating significant elements from each. Consequently those countries that have already adopted a national law incorporating major Hague-Visby and Hamburg elements are less likely to see significant changes in their legal systems under the new regime (although from the very nature of the compromise, every country can expect some significant changes to be made).¹¹⁶ On the other hand those countries that still adhere to the Hague Rules are more likely to see greater changes.¹¹⁷

The patchwork of conflicting laws that seem to be symptomatic of the international carriage of goods by sea regime does a poor job in providing international traders with uniform and predictable laws that can govern their transactions consistently wherever they do business.¹¹⁸

¹¹⁵ Mbiah, E. K. , op.cit. p.3.

¹¹⁶ Sturley, M. F. ,op. cit. p.2

¹¹⁷ Ibid.

¹¹⁸ Ibid

In the light of the above illumination on the rules, it would be said that the decision to elect to ratify and make the new Rules part of a country's laws would be contingent on a number of factors which may be circumstantial to the individual country in relation to how their present regimes meet the aspirations of its commercial operators as well as government policy.

2.0 Ghana's case for incorporating the Rotterdam Rules into its municipal laws

Ghana is party to the Hague Rules. In order to make the Convention operational in Ghana, Parliament passed the Bills of Lading Act, 1961 (Act 42). Consequently, all carriage of goods by sea transactions have been done within the framework of this legislation.

The enactment of the Bills of Lading Act, 1961 (Act 42) and its provisions contained in section 10, repealed the Carriage of Goods by Sea Ordinance (Cap 24) and also the United Kingdom Bills of Lading Act, 1855 (18 and 19 Vict, C111)¹¹⁹ which were both part of the Received Law and had hitherto governed all carriage of goods transactions in Ghana.

Accordingly, it could be said that the Hague Rules have held sway in the carriage of goods by sea transactions in Ghana for well over fifty (50) years. During this period a number of observations and complaints have been made by commercial operators with regard to certain provisions of the Hague Rules that have been annihilating to their businesses and for which they see the provisions in the Rotterdam Rules as improvements on the *status quo*.

One of such innovations of the Rotterdam Rules that make it more receptive to Ghana is the fact that as a shipping services user the making of seaworthiness a continuing obligation over the entire voyage brings a sigh of relief to the shipper and boosts his overall confidence in the international carriage of goods by sea regime. While the Hague Rules provide that the carrier must exercise due diligence to make the ship seaworthy during the voyage, the Rotterdam Rules require a higher standard of care reflected in the

¹¹⁹ Section 10 of the Bills of Lading Act, 1961 (Act 42).

obligations imposed on the carrier to exercise due diligence before, at the beginning and during the entire voyage.

The extension of the time limitation for bringing a suit against the carrier for short delivery or loss of or damage to cargo from one year under the Hague Rules to two years as provided for in the Rotterdam Rules is a welcome improvement as far as the Ghanaian shipper is concerned. This is very important in view of the fact that court processes in themselves are long and involving and that by the time the carrier is identified and all records properly assembled for the case to be heard time would have elapsed under the Hague Rules. The Ghanaian shipper is assured that by this extension of the time limitation to two years he can appropriately have the opportunity to ventilate his claim and receive justice.

Another motivating factor for Ghana to incorporate the Rotterdam Rules into its municipal laws is the introduction and use of electronic documentation and records, which is becoming pervasive and more acceptable as the way to go in contemporary international business transactions. As earlier noted, the industry is moving in the direction of greater e-commerce but the current law does not furnish the appropriate framework and platform to bolster that development. The modernization of the law would therefore afford Ghanaian shippers the opportunity to transact and interact with their partners on the same electronic platform making international transactions and business much easier.

The case for incorporating the Rotterdam Rules into Ghana's legislation is also predicated on the fact that it has done away with the controversial nautical fault rule, and included provisions on delays, increased the limits of liability, tightened conditions for invoking the fire exception, widened the scope of application and expanded the scope for the assumption of jurisdiction amongst others.

If for nothing at all, the uniformity, stability, certainty, predictability and modernization that the Rotterdam Rules bring into international carriage of goods by sea is good enough reason for them to be adopted and integrated into the Ghanaian legal framework.

In addition to the above, it creates the needed flexibility for multimodal contracts which to a large measure represents a codification of current shipping practice.

For all these reasons the Rotterdam Rules represent a welcome improvement over the current regime of the Hague Rules operating in Ghana, and should therefore be incorporated into the municipal laws of Ghana.

3.0 The Procedure for Incorporating the Rotterdam Rules into the Municipal Laws of Ghana

Ghana as a former colony of Britain follows the dualist tradition when it comes to matters of incorporating international conventions to which it is a party. By inference therefore all conventions to which Ghana is a party must first and foremost be incorporated into the municipal or domestic law before it can become enforceable internally and particularly by the courts.

The process of incorporation may be by an Act of Parliament or a Resolution of Parliament.¹²⁰ It is important to mention that the former method is usually the case. However, irrespective of which method is adopted it is preceded by a Cabinet Approval. The process of incorporation can be considered under two stages; the Pre-Cabinet approval and the Post Cabinet Approval stages.

At the pre-cabinet stage, the relevant sponsoring ministry seeks the advice of the Attorney General primarily on the legal obligations of Ghana with respect to the particular treaty and whether or not the provisions of the treaty are in conflict with any existing domestic legislation.¹²¹ After this clearance a cabinet memorandum is forwarded by the appropriate ministry for the necessary approval.¹²² The cabinet memorandum should state inter alia the background information on the treaty in question, the benefits to Ghana and the obligation of Government. Copies of the treaty must accompany the memorandum.

¹²⁰ Section 75(2) of the Constitution of the Republic of Ghana, 1992.

¹²¹ Section 1 of the Treaty Manual of the Republic of Ghana.

¹²² Ibid.

When cabinet has reviewed and satisfied itself with the request for incorporation, the relevant Ministry is notified by a letter with a copy to the Attorney General for the purpose of issuing drafting instructions for the preparation of the bill. After the legislative drafting process is completed, the draft bill and an explanatory memorandum is submitted back to the Cabinet for its review and final approval and subsequently laid before Parliament. Parliament passes the bill into an Act which thereafter is submitted for presidential assent. After the President has assented to it, it is gazetted to take effect.¹²³

If the incorporation is by a Parliamentary Resolution, the process is almost the same, save that instead of voting on the bill, Parliament passes a resolution.

Given the nature of the Rules and the predominant practice in Ghana with respect to the domestication of conventions or treaties into the municipal legal terrain, the Convention will be drafted into a domestic legislation so that when the Convention comes into effect internationally, the Courts will have jurisdiction and the necessary enablement to apply it when cases bearing on the Rules are brought before them. Accordingly, the new Carriage of Goods Wholly or Partly by Sea Act will replace and repeal the Bills of Lading Act, 1961 (Act 64) that has provided the legal regime for the carriage of goods by sea in Ghana. In that light, the necessary provision will be made in the new law to facilitate the repeal.

It is however, instructive to mention that even though Ghana is a signatory to the Rotterdam Rules, it is not yet a party to the Rules. In other words Ghana has not acceded to the Rules. Accordingly, an Instrument of Accession will be prepared for Ghana to express its consent to be bound by the Rules.

Again, in consonance with the provisions of Article 89 of the Rules, Ghana will prepare an Instrument of Denunciation in respect of the Hague Rules as already indicated in the penultimate paragraph. It needs to be intimated however, that denouncing the Hague Rules will not affect the application of the Bills of Lading Act currently in operation, as Ghana did not make its scope of application provision applicable in its laws. The Act, to a large measure follows the United Kingdom's Carriage of Goods by Sea Act, 1924 and

¹²³ Section 1 of the Treaty Manual of the Republic of Ghana.

applies to outbound shipment. In respect of the majority of carriage of goods contracts, the Rules are incorporated by virtue of the Clause Paramount. It is the hope that the Rotterdam Rules, when it comes into force, would cure this defect.

The Convention is attached hereto as a schedule.

3.1 Methodology of Incorporation

The Convention, nearly in its entirety has been incorporated into the Draft Carriage of Goods Wholly or Partly by Sea Act for consideration so that it could fully and immediately come on stream in Ghana when it comes into force internationally.

It is however, important to indicate that a few of the Articles of the Convention have been omitted in view of the peculiarities and circumstances of Ghana. In that respect, Ghana is availing itself of the “opt-in opt-out” clauses of the rules and has accordingly opted out of the provisions of Chapters 14 and 15 dealing with Jurisdiction and Arbitration matters and the reasons for this election has been adequately articulated earlier in this Explanatory Note.

Similarly, Ghana will be opting out of the Volume Contract provisions as contained in Article 80 of the Rules as it does not stand to benefit from them.

It must also be explicated at this point that the provisions of Article 1 of the Convention which principally deals with matters of interpretation and definitions has been incorporated in the Draft Carriage of Goods Wholly or Partly by Sea Act as section 73. This is only to bring the arrangements of the provisions in consonance with the practice and treatment of all laws in Ghana.

It would again be realized, that the Chapters and Articles as they appear in the Convention have also been transformed into Parts and Sections in the Draft Act for the same reasons provided immediately above.

The Act when it comes into force will govern all transactions related to the Carriage of Goods Wholly or Partly by Sea and in that respect will repeal the Bills of Lading Act, 1961 (Act 42) which hitherto had constituted the principal legislative framework for the Carriage of Goods by Sea in Ghana as already alluded to above.

THE REPUBLIC OF GHANA



INSTRUMENT OF ACCESSION

BY GHANA,

WHEREAS the United Nations Convention for the Carriage of Goods Wholly or Partly by Sea (hereinafter referred to as ‘the Rotterdam Rules’), was adopted by the General Assembly of the United Nations Organization on 11 December 2008 in New York.

AND WHEREAS Article 89 of the Convention provides that any State may accede to it;

NOW THEREFORE, Ghana having signed the Convention, hereby ACCEDES to it and undertakes faithfully to abide by all the provisions contained therein.

IN WITNESS THEREOF, the Minister of Foreign Affairs as authorized by ... will deposit the Instrument herewith.

DATE

SIGNED

(MINISTER OF

FOREIGN AFFAIRS)

THE REPUBLIC OF GHANA



INSTRUMENT OF DENUNCIATION

BY GHANA,

WHEREAS the United Nations Convention for the Carriage of Goods Wholly or Partly by Sea (hereinafter referred to as ‘the Rotterdam Rules’), was adopted by the General Assembly of the United Nations Organization on 11 December 2008 in New York.

AND WHEREAS Article 89 of the Convention provides that any State acceding to it shall at the same time denounce the convention it is party to currently;

NOW THEREFORE, Ghana having acceded to the Convention, hereby DENOUNCES the International Convention for the Unification of Certain Rules Relating to Bills of Lading, 1924.

IN WITNESS THEREOF, the Minister of Foreign Affairs as authorized by ... will deposit the instrument herewith with the Netherlands Government.

DATE

SEAL

FOREIGN AFFAIRS)

SIGNED

(MINISTER OF