FINAL EXAMINATION

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. Questions will be weighted in accordance with the amount of time suggested for each question. Please write legibly, leave a margin on the left-hand side of the page, and start each question on a new page.

Use only your examination identification number to identify your blue book. If you use more than one blue book, identify each one ("No. 1 of 2," "No. 2 of 2," etc.), be sure that your exam ID number is on each one, and insert all others into the first one.

Your exam ID number is the last six digits of your social security number followed by the numerals "59." Thus, if your social security number is 123-45-6789, your exam ID number will be 456789-59.
QUESTION ONE
(Suggested time: one hour)

On September 23, 2009, at an official signing ceremony in Rotterdam in the Netherlands, delegates from sixteen countries formally expressed their support for a new international convention on maritime shipment of goods called the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. The United States was one of them. Subsequent expressions of support, called “signings,” have increased the number of signatories to twenty-four.

In honor of the city where this ceremony took place (which is, not coincidentally, the busiest seaport in Europe), this Convention is called the Rotterdam Rules.

The Rotterdam Rules are the result of intergovernmental negotiations that took place between 2002 and 2009 within the United Nations Commission for International Trade Law (“UNCITRAL”), working from a first draft prepared by the Comité Maritime International (“CMI”). The objective was to take the long-overdue necessary step to bring international shipping law into the modern era of containerized cargo, multi-modal transportation under through bills of lading, and electronic documentation.

There is, however, a long road from “signing” to sufficient multinational ratification of the Rotterdam Rules. The convention provides that it shall come into force once twenty nations have ratified it. To date, only one, Spain, has ratified it. The United States has not ratified it. In fact, President Obama has not even submitted it to the Senate for debate on ratification. The obstacles to ratification around the world appear to vary from the merely chauvinistic to the hypertechnical. There is substantial opposition from freight forwarders generally. The United Kingdom,
Canada and Australia have not indicated support. Germany is critical of the Convention’s complexity. Some European nations are concerned that the Rotterdam Rules will conflict with laws governing inland domestic carriage by water.

On the other hand, the Rotterdam Rules enjoy substantial support both internationally and, in the United States, domestically. The United Nations General Assembly adopted the Convention in December, 2008. The World Shipping Council and the CMI have endorsed it. (The CMI is an international umbrella organization of national associations concerned with maritime law and associated commerce). In the United States the Maritime Law Association of the United States and the House of Delegates of the American Bar Association formally support ratification.

The high politics of international trade are beyond the scope of this course in Admiralty and Maritime Law. However, the examination and comparison of legal texts is emphatically the province of lawyers and law students. This question asks you to identify and compare the Rotterdam Rules to the United States’s Carriage of Goods by Sea Act (“COGSA”) in the seven areas set out below.

The Rotterdam Rules have been distributed to you. Please do not be intimidated by their thirty-nine pages. You are being asked to do a job that lawyers often have to do: to locate relevant text material in a text with which you are not familiar (here the Rotterdam Rules), to compare it to text material in a text with which you are familiar (here COGSA), and to explain the differences between them in the light of your general knowledge of the subject matter (here Admiralty and Maritime Law). In short, this question asks you how the Rotterdam Rules, if they should be ratified and come into force in the United States, will change the law of the present COGSA.
In the case of each of the seven subject matter areas listed below, please (1) identify and correctly cite (by section and, if necessary, subsection) the relevant provisions of COGSA, (2) identify and correctly cite (by section and, if necessary, subsection) the relevant provisions of the Rotterdam Rules, and (3) explain the difference or differences between them.

The seven subject matter areas are as follows:

1. Temporal period of the carrier’s responsibility for the goods.
2. Extent of carrier’s responsibility to make and keep the ship seaworthy and properly crewed, equipped and supplied.
3. Carrier’s defense of error in navigation or management of the vessel.
4. Carriage of cargo on deck.
5. Responsibility of carrier for containers in which cargo is shipped.
6. Money limits of carrier’s liability for damage to, or loss of, goods. [NOTE: the Rotterdam Rules express limitation of liability in terms Special Drawing Rights ("SDR’s") established by the International Monetary Fund ("IMF"). SDR’s are units of value calculated by the IMF by reference to a basket of national currencies. At this time one SDR is equal to about U.S. $1.54].
7. Damages for delay by carrier in delivery of goods.

GO ON TO THE NEXT PAGE
QUESTION TWO
(suggested time: thirty minutes)

Some years ago there appeared in the newspapers a story about an elderly Bostonian who saved his money for a Caribbean cruise. Off the coast of St. Croix, while gaping at female fellow passengers in their bikini bathing suits, he dropped his false teeth overboard. They were retrieved by a frogman from the cruise vessel’s crew. Is the frogman entitled to a salvage award? Why or why not?

QUESTION THREE
(Suggested time: forty-five minutes)

Two occupants of a pleasure boat ("Boaters") were injured, requiring hospitalization, when a tow of barges pushed by the defendant's ship collided with the pleasure boat on the Ohio River. In the course of the ship's emergency maneuvers subsequent to the collision a seaman employed by the ship's owner ("Seaman") lost his footing on a ladder, fell, and also was injured requiring hospitalization. Seaman fell because a rung was missing from the ladder; Seaman knew this, but forgot about it in the excitement following the collision.

Compare the remedies of Boaters to the remedies of Seaman.

Your comparison should include (but need not be limited to) similarities and differences in jurisdiction, matters to be proven, burdens of proof, damages recoverable, right to jury trial, and the role of contributory or comparative negligence.
QUESTION FOUR
(suggested time: forty-five minutes)

The boys and girls from Comstock College were racing on navigable waters in their sailboat Nancy Reagan at the yacht races sponsored by the Narragansett Bay Yacht Racing Association. At the finish line of their event, Nancy Reagan was struck from astern by Frankfurter University’s boat Happy Hotdog. Damage to Nancy Reagan was substantial. At a protest hearing the Race Committee of the Yacht Racing Association absolved Nancy Reagan of any fault in the collision and disqualified Happy Hotdog on the grounds that the latter had violated Rule 37.2 of the International Yacht Racing Rules. (This rule requires that a yacht clear astern keep clear of a yacht clear ahead).

There is a tradition in yacht racing that the losing party to a protest pays the damages, if any, to the other party’s boat. Frankfurter, however, citing budget and fiscal pressures, refused to pay for the damage to Nancy Reagan. Comstock, accordingly, sued Frankfurter in the federal district court for the district of Rhode Island. Frankfurter filed an answer to the complaint which raised the affirmative defense of assumption of risk, arguing that by entering the race Comstock’s team had assumed the risk of collision with another boat.

At trial, the judge found Frankfurter 100% negligent in the collision citing Happy Hotdog’s violation of Rule 37.2. However, the judge ruled in Frankfurter’s favor on the assumption of risk defense, and ordered that judgment be entered for Frankfurter.

The assumption of risk doctrine, as explained in the Prosser & Keeton Torts treatise, is
quite narrowly defined and restricted by two or three elements or requirements: first, the plaintiff must know that the risk is present, and he must further understand its nature; and second his choice to incur it must be free and voluntary. Since in the ordinary case there is no conclusive evidence against the plaintiff on these issues, they are normally for the [fact finder] to decide.

The trial judge specifically found that Comstock knew of the risk of boat collisions in yacht racing and understood that such collisions could cause damage that might be expensive to repair. The trial judge also found that Comstock’s decision to enter the race was free and voluntary.

Comstock appealed to the United States Court of Appeals for the First Circuit. Comstock’s brief argues that the doctrine of assumption of risk is unknown to, and inconsistent with major principles of, admiralty law. Comstock cites, among other examples, abolition by the Jones Act (in 1920) of the maritime employer’s assumption-of-risk defense to suits by injured seamen.

In reply, Frankfurter’s brief cites many cases from the world of competitive sporting events including Hackbart v. Cincinnati Bengals, 601 F.2d 516 (10th Cir. 1979), a case read by first-year law students in the Prosser casebook. These cases hold that when one enters a sporting event one consents to, and assumes the risk of, physical contact, at least in the absence of conduct on the part of the defendant that can be characterized as “willful, wanton and reckless.”

How should the Circuit Court decide the case? Consider the arguments of the two parties as sketched above. Consider any additional arguments that the parties might find it worthwhile to make. You are free to add your own views as to what the public policy should be. Do not fail to come to a conclusion.
Resolution adopted by the General Assembly

[on the report of the Sixth Committee (A/63/438)]

63/122. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Concerned that the current legal regime governing the international carriage of goods by sea lacks uniformity and fails to adequately take into account modern transport practices, including containerization, door-to-door transport contracts and the use of electronic transport documents,

Noting that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Convinced that the adoption of uniform rules to modernize and harmonize the rules that govern the international carriage of goods involving a sea leg would enhance legal certainty, improve efficiency and commercial predictability in the international carriage of goods and reduce legal obstacles to the flow of international trade among all States,

Believing that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

Noting that shippers and carriers do not have the benefit of a binding and balanced universal regime to support the operation of contracts of carriage involving various modes of transport,
Recalling that, at its thirty-fourth and thirty-fifth sessions, in 2001 and 2002, the Commission decided to prepare an international legislative instrument governing door-to-door transport operations that involve a sea leg.¹

Recognizing that all States and interested international organizations were invited to participate in the preparation of the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea and in the forty-first session of the Commission, either as members or as observers, with a full opportunity to speak and make proposals,

Noting with satisfaction that the text of the draft Convention was circulated for comment to all States Members of the United Nations and intergovernmental organizations invited to attend the meetings of the Commission as observers, and that the comments received were before the Commission at its forty-first session,²

Taking note with satisfaction of the decision of the Commission at its forty-first session to submit the draft Convention to the General Assembly for its consideration,³

Taking note of the draft Convention approved by the Commission,⁴

Expressing its appreciation to the Government of the Netherlands for its offer to host a signing ceremony for the Convention in Rotterdam,


2. Adopts the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, contained in the annex to the present resolution;

3. Authorizes a ceremony for the opening for signature to be held on 23 September 2009 in Rotterdam, the Netherlands, and recommends that the rules embodied in the Convention be known as the “Rotterdam Rules”;

4. Calls upon all Governments to consider becoming party to the Convention.

67th plenary meeting
11 December 2008

Annex

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

The States Parties to this Convention,

Reaffirming their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

⁴ Ibid., annex I.
Convinced that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contributes to universal economic cooperation among all States on a basis of equality, equity and common interest, and to the well-being of all peoples,


Mindful of the technological and commercial developments that have taken place since the adoption of those conventions and of the need to consolidate and modernize them,

Noting that shippers and carriers do not have the benefit of a binding universal regime to support the operation of contracts of maritime carriage involving other modes of transport,

Believing that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

Have agreed as follows:

Chapter 1
General provisions

Article 1
Definitions

For the purposes of this Convention:

1. “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.

2. “Volume contract” means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.

3. “Liner transportation” means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.

4. “Non-liner transportation” means any transportation that is not liner transportation.

5. “Carrier” means a person that enters into a contract of carriage with a shipper.

6. (a) “Performing party” means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or
delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

(b) “Performing party” does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.

7. “Maritime performing party” means a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

8. “Shipper” means a person that enters into a contract of carriage with a carrier.

9. “Documentary shipper” means a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.

10. “Holder” means:

(a) A person that is in possession of a negotiable transport document; and
(b) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.

11. “Consignee” means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.

12. “Right of control” of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.

13. “Controlling party” means the person that pursuant to article 51 is entitled to exercise the right of control.

14. “Transport document” means a document issued under a contract of carriage by the carrier that:

(a) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

15. “Negotiable transport document” means a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.

16. “Non-negotiable transport document” means a transport document that is not a negotiable transport document.

17. “Electronic communication” means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.
18. "Electronic transport record" means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

19. "Negotiable electronic transport record" means an electronic transport record:

(a) That indicates, by wording such as “to order”, or “negotiable”, or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being "non-negotiable" or "not negotiable"; and

(b) The use of which meets the requirements of article 9, paragraph 1.

20. "Non-negotiable electronic transport record" means an electronic transport record that is not a negotiable electronic transport record.

21. The “issuance” of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.

22. The “transfer” of a negotiable electronic transport record means the transfer of exclusive control over the record.

23. "Contract particulars" means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.

24. "Goods" means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.

25. "Ship" means any vessel used to carry goods by sea.

26. "Container" means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.

27. "Vehicle" means a road or railroad cargo vehicle.

28. "Freight" means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.

29. "Domicile" means (a) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation or central registered office, whichever is applicable, (ii) central administration or (iii) principal place of business, and (b) the habitual residence of a natural person.

30. "Competent court" means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.
Article 2
Interpretation of this Convention

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Article 3
Form requirements

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 19, paragraph 2; 23, paragraphs 1 to 4; 36, subparagraphs 1 (b), (c) and (d); 40, subparagraph 4 (b); 44; 48, paragraph 3; 51, subparagraph 1 (b); 59, paragraph 1; 63; 66; 67, paragraph 2; 75, paragraph 4; and 80, paragraphs 2 and 5, shall be in writing. Electronic communications may be used for these purposes, provided that the use of such means is with the consent of the person by which it is communicated and of the person to which it is communicated.

Article 4
Applicability of defences and limits of liability

1. Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:
   
   (a) The carrier or a maritime performing party;

   (b) The master, crew or any other person that performs services on board the ship; or

   (c) Employees of the carrier or a maritime performing party.

2. Any provision of this Convention that may provide a defence for the shipper or the documentary shipper applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their subcontractors, agents or employees.

Chapter 2
Scope of application

Article 5
General scope of application

1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:

   (a) The place of receipt;

   (b) The port of loading;

   (c) The place of delivery; or

   (d) The port of discharge.
2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

Article 6
Specific exclusions
1. This Convention does not apply to the following contracts in liner transportation:
   
   (a) Charter parties; and
   
   (b) Other contracts for the use of a ship or of any space thereon.

2. This Convention does not apply to contracts of carriage in non-liner transportation except when:

   (a) There is no charter party or other contract between the parties for the use of a ship or of any space thereon; and

   (b) A transport document or an electronic transport record is issued.

Article 7
Application to certain parties

Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charter party or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.

Chapter 3
Electronic transport records

Article 8
Use and effect of electronic transport records

Subject to the requirements set out in this Convention:

(a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and

(b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

Article 9
Procedures for use of negotiable electronic transport records

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:

   (a) The method for the issuance and the transfer of that record to an intended holder;

   (b) An assurance that the negotiable electronic transport record retains its integrity;
(c) The manner in which the holder is able to demonstrate that it is the holder; and

(d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1 (a) (ii) and (c), the electronic transport record has ceased to have any effect or validity.

2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.

Article 10
Replacement of negotiable transport document or negotiable electronic transport record

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:

   (a) The holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;

   (b) The carrier shall issue to the holder a negotiable electronic transport record that includes a statement that it replaces the negotiable transport document; and

   (c) The negotiable transport document ceases thereafter to have any effect or validity.

2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:

   (a) The carrier shall issue to the holder, in place of the electronic transport record, a negotiable transport document that includes a statement that it replaces the negotiable electronic transport record; and

   (b) The electronic transport record ceases thereafter to have any effect or validity.

Chapter 4
Obligations of the carrier

Article 11
Carriage and delivery of the goods

The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.

Article 12
Period of responsibility of the carrier

1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.

2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.
(b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.

3. For the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:

(a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or

(b) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage.

Article 13
Specific obligations

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.

2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

Article 14
Specific obligations applicable to the voyage by sea

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

(a) Make and keep the ship seafaring;

(b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and

(c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

Article 15
Goods that may become a danger

Notwithstanding articles 11 and 13, the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment.

Article 16
Sacrifice of the goods during the voyage by sea

Notwithstanding articles 11, 13, and 14, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety
or for the purpose of preserving from peril human life or other property involved in
the common adventure.

Chapter 5
Liability of the carrier for loss, damage or delay

Article 17
Basis of liability

1. The carrier is liable for loss of or damage to the goods, as well as for delay in
delivery, if the claimant proves that the loss, damage, or delay, or the event or
circumstance that caused or contributed to it took place during the period of the
carrier’s responsibility as defined in chapter 4.

2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of
this article if it proves that the cause or one of the causes of the loss, damage, or
delay is not attributable to its fault or to the fault of any person referred to in
article 18.

3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of
this article if, alternatively to proving the absence of fault as provided in
paragraph 2 of this article, it proves that one or more of the following events or
circumstances caused or contributed to the loss, damage, or delay:

(a) Act of God;

(b) Perils, dangers, and accidents of the sea or other navigable waters;

(c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil
commotions;

(d) Quarantine restrictions; interference by or impediments created by
governments, public authorities, rulers, or people including detention, arrest, or
seizure not attributable to the carrier or any person referred to in article 18;

(e) Strikes, lockouts, stoppages, or restraints of labour;

(f) Fire on the ship;

(g) Latent defects not discoverable by due diligence;

(h) Act or omission of the shipper, the documentary shipper, the controlling
party, or any other person for whose acts the shipper or the documentary shipper is
liable pursuant to article 33 or 34;

(i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the
carrier or a performing party performs such activity on behalf of the shipper, the
documentary shipper or the consignee;

(j) Wastage in bulk or weight or any other loss or damage arising from
inherent defect, quality, or vice of the goods;

(k) Insufficiency or defective condition of packing or marking not performed
by or on behalf of the carrier;

(l) Saving or attempting to save life at sea;

(m) Reasonable measures to save or attempt to save property at sea;

(n) Reasonable measures to avoid or attempt to avoid damage to the
environment; or
(a) Acts of the carrier in pursuance of the powers conferred by articles 15 and 16.

4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:

(a) If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies; or

(b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 18.

5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:

(a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods; and

(b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) it complied with its obligation to exercise due diligence pursuant to article 14.

6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.

Article 18

Liability of the carrier for other persons

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

(a) Any performing party;

(b) The master or crew of the ship;

(c) Employees of the carrier or a performing party; or

(d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

Article 19

Liability of maritime performing parties

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and
(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

Article 20
Joint and several liability

1. If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this Convention.

2. Without prejudice to article 61, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Convention.

Article 21
Delay

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed.

Article 22
Calculation of compensation

1. Subject to article 59, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 43.

2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 of this article except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 16.

Article 23
Notice in case of loss, damage or delay

1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of
loss of or damage to the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days at the place of delivery after the delivery of the goods.

2. Failure to provide the notice referred to in this article to the carrier or the performing party shall not affect the right to claim compensation for loss of or damage to the goods under this Convention, nor shall it affect the allocation of the burden of proof set out in article 17.

3. The notice referred to in this article is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the person to which they have been delivered and the carrier or the maritime performing party against which liability is being asserted.

4. No compensation in respect of delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.

5. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.

6. In the case of any actual or apprehended loss or damage, the parties to the dispute shall give all reasonable facilities to each other for inspecting and tallying the goods and shall provide access to records and documents relevant to the carriage of the goods.

Chapter 6
Additional provisions relating to particular stages of carriage

Article 24
Deviation

When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 61.

Article 25
Deck cargo on ships

1. Goods may be carried on the deck of a ship only if:
   
   (a) Such carriage is required by law;

   (b) They are carried in or on containers or vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or vehicles; or

   (c) The carriage on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.

2. The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article, but the carrier is not liable for loss of or damage to such goods, or delay in their delivery, caused by the special risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs 1 (a) or (c) of this article.
3. If the goods have been carried on deck in cases other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and is not entitled to the defences provided for in article 17.

4. The carrier is not entitled to invoke subparagraph 1 (c) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic transport record in good faith, unless the contract particulars state that the goods may be carried on deck.

5. If the carrier and shipper expressly agreed that the goods would be carried under deck, the carrier is not entitled to the benefit of the limitation of liability for any loss of, damage to or delay in the delivery of the goods to the extent that such loss, damage, or delay resulted from their carriage on deck.

**Article 26**

*Carriage preceding or subsequent to sea carriage*

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier’s period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier’s activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier’s liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

**Chapter 7**

**Obligations of the shipper to the carrier**

**Article 27**

*Delivery for carriage*

1. Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.

2. The shipper shall properly and carefully perform any obligation assumed under an agreement made pursuant to article 13, paragraph 2.

3. When a container is packed or a vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container or vehicle, and in such a way that they will not cause harm to persons or property.
Article 28
Cooperation of the shipper and the carrier in providing information and instructions

The carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party.

Article 29
Shipper's obligation to provide information, instructions and documents

1. The shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary:

   (a) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and

   (b) For the carrier to comply with law, regulations or other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.

2. Nothing in this article affects any specific obligation to provide certain information, instructions and documents related to the goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.

Article 30
Basis of shipper's liability to the carrier

1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.

2. Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 31, paragraph 2, and 32, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34.

3. When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 34.

Article 31
Information for compilation of contract particulars

1. The shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 36, paragraph 1; the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any.

2. The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this
article. The shipper shall indemnify the carrier against loss or damage resulting from the inaccuracy of such information.

Article 32
Special rules on dangerous goods

When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:

(a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and

(b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.

Article 33
Assumption of shipper's rights and obligations by the documentary shipper

1. A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 55, and is entitled to the shipper's rights and defences provided by this chapter and by chapter 13.

2. Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.

Article 34
Liability of the shipper for other persons

The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.

Chapter 8
Transport documents and electronic transport records

Article 35
Issuance of the transport document or the electronic transport record

Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option:

(a) A non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record; or

(b) An appropriate negotiable transport document or, subject to article 8, subparagraph (a), a negotiable electronic transport record, unless the shipper and the
carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage or practice of the trade not to use one.

**Article 36**

**Contract particulars**

1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper:

   (a) A description of the goods as appropriate for the transport;
   
   (b) The leading marks necessary for identification of the goods;
   
   (c) The number of packages or pieces, or the quantity of goods; and
   
   (d) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include:

   (a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;
   
   (b) The name and address of the carrier;
   
   (c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and
   
   (d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.

3. The contract particulars in the transport document or electronic transport record referred to in article 35 shall further include:

   (a) The name and address of the consignee, if named by the shipper;
   
   (b) The name of a ship, if specified in the contract of carriage;
   
   (c) The place of receipt and, if known to the carrier, the place of delivery; and
   
   (d) The port of loading and the port of discharge, if specified in the contract of carriage.

4. For the purposes of this article, the phrase “apparent order and condition of the goods” in subparagraph 2 (a) of this article refers to the order and condition of the goods based on:

   (a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and
   
   (b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or electronic transport record.

**Article 37**

**Identity of the carrier**

1. If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification.
2. If no person is identified in the contract particulars as the carrier as required pursuant to article 36, subparagraph 2(b), but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner.

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

Article 38
Signature

1. A transport document shall be signed by the carrier or a person acting on its behalf.

2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier’s authorization of the electronic transport record.

Article 39
Deficiencies in the contract particulars

1. The absence or inaccuracy of one or more of the contract particulars referred to in article 36, paragraphs 1, 2 or 3, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.

2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be:

   (a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or

   (b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship.

3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them, the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the carrier or a performing party received them.

Article 40
Qualifying the information relating to the goods in the contract particulars

1. The carrier shall qualify the information referred to in article 36, paragraph 1, to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper if:

   (a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is false or misleading; or
(b) The carrier has reasonable grounds to believe that a material statement in the transport document or electronic transport record is false or misleading.

2. Without prejudice to paragraph 1 of this article, the carrier may qualify the information referred to in article 36, paragraph 1, in the circumstances and in the manner set out in paragraphs 3 and 4 of this article to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper.

3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container or vehicle, or when they are delivered in a closed container or vehicle and the carrier or a performing party actually inspects them, the carrier may qualify the information referred to in article 36, paragraph 1, if:

(a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or

(b) The carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information.

4. When the goods are delivered for carriage to the carrier or a performing party in a closed container or vehicle, the carrier may qualify the information referred to in:

(a) Article 36, subparagraphs 1 (a), (b), or (c), if:

(i) The goods inside the container or vehicle have not actually been inspected by the carrier or a performing party, and

(ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and

(b) Article 36, subparagraph 1 (d), if:

(i) Neither the carrier nor a performing party weighed the container or vehicle, and the shipper and the carrier had not agreed prior to the shipment that the container or vehicle would be weighed and the weight would be included in the contract particulars; or

(ii) There was no physically practicable or commercially reasonable means of checking the weight of the container or vehicle.

Article 41
Evidentiary effect of the contract particulars

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 40:

(a) A transport document or an electronic transport record is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars;

(b) Proof to the contrary by the carrier in respect of any contract particulars shall not be admissible, when such contract particulars are included in:

(i) A negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith; or
(ii) A non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith;

(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any of the following contract particulars included in a non-negotiable transport document or a non-negotiable electronic transport record:

(i) The contract particulars referred to in article 36, paragraph 1, when such contract particulars are furnished by the carrier;

(ii) The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and

(iii) The contract particulars referred to in article 36, paragraph 2.

Article 42
"Freight prepaid"

If the contract particulars contain the statement "freight prepaid" or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.

Chapter 9
Delivery of the goods

Article 43
Obligation to accept delivery

When the goods have arrived at their destination, the consignee that demands delivery of the goods under the contract of carriage shall accept delivery of the goods at the time or within the time period and at the location agreed in the contract of carriage or, failing such agreement, at the time and location at which, having regard to the terms of the contract, the customs, usages or practices of the trade and the circumstances of the carriage, delivery could reasonably be expected.

Article 44
Obligation to acknowledge receipt

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

Article 45
Delivery when no negotiable transport document or negotiable electronic transport record is issued

When neither a negotiable transport document nor a negotiable electronic transport record has been issued:

(a) The carrier shall deliver the goods to the consignee at the time and location referred to in article 43. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier;
(b) If the name and address of the consignee are not referred to in the contract particulars, the controlling party shall prior to or upon the arrival of the goods at the place of destination advise the carrier of such name and address;

(c) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(d) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary shipper pursuant to subparagraph (c) of this article is discharged from its obligations to deliver the goods under the contract of carriage.

Article 46
Delivery when a non-negotiable transport document that requires surrender is issued

When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The carrier shall deliver the goods at the time and location referred to in article 43 to the consignee upon the consignee properly identifying itself on the request of the carrier and surrender of the non-negotiable document. The carrier may refuse delivery if the person claiming to be the consignee fails to properly identify itself on the request of the carrier, and shall refuse delivery if the non-negotiable document is not surrendered. If more than one original of the non-negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity;

(b) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;
(c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

Article 47
Delivery when a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 43 to the holder:

(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), upon the holder properly identifying itself; or

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;

(b) The carrier shall refuse delivery if the requirements of subparagraph (a) (i) or (a) (ii) of this paragraph are not met;

(c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity. When a negotiable electronic transport record has been used, such electronic transport record ceases to have any effect or validity upon delivery to the holder in accordance with the procedures required by article 9, paragraph 1.

2. Without prejudice to article 48, paragraph 1, if the negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rules apply:

(a) If the goods are not deliverable because (i) the holder, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, subparagraph 10 (a) (i), or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(b) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph 2 (a) of this article is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic
transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;

(c) The person giving instructions under subparagraph 2 (a) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph 2 (e) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;

(d) A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods pursuant to subparagraph 2 (b) of this article, but pursuant to contractual or other arrangements made before such delivery acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods;

(e) Notwithstanding subparagraphs 2 (b) and 2 (d) of this article, a holder that becomes a holder after such delivery, and that did not have and could not reasonably have had knowledge of such delivery at the time it became a holder, acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

Article 48
Goods remaining undelivered

1. For the purposes of this article, goods shall be deemed to have remained undelivered only if, after their arrival at the place of destination:

(a) The consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in article 43;

(b) The controlling party, the holder, the shipper or the documentary shipper cannot be found or does not give the carrier adequate instructions pursuant to articles 45, 46 and 47;

(c) The carrier is entitled or required to refuse delivery pursuant to articles 44, 45, 46 and 47;

(d) The carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested; or

(e) The goods are otherwise undeliverable by the carrier.

2. Without prejudice to any other rights that the carrier may have against the shipper, controlling party or consignee, if the goods have remained undelivered, the carrier may, at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require, including:

(a) To store the goods at any suitable place;

(b) To unpack the goods if they are packed in containers or vehicles, or to act otherwise in respect of the goods, including by moving them; and

(c) To cause the goods to be sold or destroyed in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.
3. The carrier may exercise the rights under paragraph 2 of this article only after it has given reasonable notice of the intended action under paragraph 2 of this article to the person stated in the contract particulars as the person, if any, to be notified of the arrival of the goods at the place of destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper.

4. If the goods are sold pursuant to subparagraph 2 (c) of this article, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred by the carrier and any other amounts that are due to the carrier in connection with the carriage of those goods.

5. The carrier shall not be liable for loss of or damage to goods that occurs during the time that they remain undelivered pursuant to this article unless the claimant proves that such loss or damage resulted from the failure by the carrier to take steps that would have been reasonable in the circumstances to preserve the goods and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps.

Article 49
Retention of goods

Nothing in this Convention affects a right of the carrier or a performing party that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due.

Chapter 10
Rights of the controlling party

Article 50
Exercise and extent of right of control

1. The right of control may be exercised only by the controlling party and is limited to:

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;

(b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and

(c) The right to replace the consignee by any other person including the controlling party.

2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.

Article 51
Identity of the controlling party and transfer of the right of control

1. Except in the cases referred to in paragraphs 2, 3 and 4 of this article:

(a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party;

(b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its
notification of the transfer by the transferor, and the transferee becomes the controlling party; and

(c) The controlling party shall properly identify itself when it exercises the right of control.

2. When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document by transferring the document to that person without endorsement. If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control; and

(b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

3. When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and

(c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

4. When a negotiable electronic transport record is issued:

(a) The holder is the controlling party;

(b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1; and

(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

Article 52
Carrier's execution of instructions

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 50 if:

(a) The person giving such instructions is entitled to exercise the right of control;

(b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and
(c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.

2. In any event, the controlling party shall reimburse the carrier for any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.

3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.

4. The carrier's liability for loss of or damage to the goods or for delay in delivery resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 17 to 23, and the amount of the compensation payable by the carrier shall be subject to articles 59 to 61.

Article 53
Deemed delivery

Goods that are delivered pursuant to an instruction in accordance with article 52, paragraph 1, are deemed to be delivered at the place of destination, and the provisions of chapter 9 relating to such delivery apply to such goods.

Article 54
Variations to the contract of carriage

1. The controlling party is the only person that may agree with the carrier to variations to the contract of carriage other than those referred to in article 50, subparagraphs 1 (b) and (c).

2. Variations to the contract of carriage, including those referred to in article 50, subparagraphs 1 (b) and (c), shall be stated in a negotiable transport document or in a non-negotiable transport document that requires surrender, or incorporated in a negotiable electronic transport record, or, upon the request of the controlling party, shall be stated in a non-negotiable transport document or incorporated in a non-negotiable electronic transport record. If so stated or incorporated, such variations shall be signed in accordance with article 38.

Article 55
Providing additional information, instructions or documents to carrier

1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to the goods not yet provided by the shipper and not otherwise reasonably available to the carrier that the carrier may reasonably need to perform its obligations under the contract of carriage.

2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions or documents to the carrier, the shipper shall provide them. If the carrier, after reasonable effort, is unable to locate the shipper, the documentary shipper shall provide such information, instructions or documents.
Article 56
Variation by agreement

The parties to the contract of carriage may vary the effect of articles 50, subparagraphs 1 (b) and (c), 50, paragraph 2, and 52. The parties may also restrict or exclude the transferability of the right of control referred to in article 51, subparagraph 1 (b).

Chapter 11
Transfer of rights

Article 57
When a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:

   (a) Duly endorsed either to such other person or in blank, if an order document; or

   (b) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.

2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

Article 58
Liability of holder

1. Without prejudice to article 55, a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.

2. A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.

3. For the purposes of paragraphs 1 and 2 of this article, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:

   (a) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or

   (b) It transfers its rights pursuant to article 57.

Chapter 12
Limits of liability

Article 59
Limits of liability

1. Subject to articles 60 and 61, paragraph 1, the carrier’s liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the
goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

2. When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.

3. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

**Article 60**

*Limits of liability for loss caused by delay*

Subject to article 61, paragraph 2, compensation for loss of or damage to the goods due to delay shall be calculated in accordance with article 22 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable pursuant to this article and article 59, paragraph 1, may not exceed the limit that would be established pursuant to article 59, paragraph 1, in respect of the total loss of the goods concerned.

**Article 61**

*Loss of the benefit of limitation of liability*

1. Neither the carrier nor any of the persons referred to in article 18 is entitled to the benefit of the limitation of liability as provided in article 59, or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier's obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

2. Neither the carrier nor any of the persons mentioned in article 18 is entitled to the benefit of the limitation of liability as provided in article 60 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.
Chapter 13
Time for suit

Article 62
Period of time for suit

1. No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under this Convention may be instituted after the expiration of a period of two years.

2. The period referred to in paragraph 1 of this article commences on the day on which the carrier has delivered the goods or, in cases in which no goods have been delivered or only part of the goods have been delivered, on the last day on which the goods should have been delivered. The day on which the period commences is not included in the period.

3. Notwithstanding the expiration of the period set out in paragraph 1 of this article, one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party.

Article 63
Extension of time for suit

The period provided in article 62 shall not be subject to suspension or interruption, but the person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

Article 64
Action for indemnity

An action for indemnity by a person held liable may be instituted after the expiration of the period provided in article 62 if the indemnity action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(b) Ninety days commencing from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.

Article 65
Actions against the person identified as the carrier

An action against the bareboat charterer or the person identified as the carrier pursuant to article 37, paragraph 2, may be instituted after the expiration of the period provided in article 62 if the action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(b) Ninety days commencing from the day when the carrier has been identified, or the registered owner or bareboat charterer has rebutted the presumption that it is the carrier, pursuant to article 37, paragraph 2.

Chapter 14
Jurisdiction
Article 66
Actions against the carrier

Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 67 or 72, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:

(a) In a competent court within the jurisdiction of which is situated one of the following places:

(i) The domicile of the carrier;

(ii) The place of receipt agreed in the contract of carriage;

(iii) The place of delivery agreed in the contract of carriage; or

(iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or

(b) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.

Article 67
Choice of court agreements

1. The jurisdiction of a court chosen in accordance with article 66, subparagraph b), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:

(a) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated or (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and

(b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.

2. A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if:

(a) The court is in one of the places designated in article 66, subparagraph (a);

(b) That agreement is contained in the transport document or electronic transport record;

(c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and

(d) The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement.

Article 68
Actions against the maritime performing party

The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:
(a) The domicile of the maritime performing party; or

(b) The port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performs its activities with respect to the goods.

Article 69
No additional bases of jurisdiction

Subject to articles 71 and 72, no judicial proceedings under this Convention against the carrier or a maritime performing party may be instituted in a court not designated pursuant to article 66 or 68.

Article 70
Arrest and provisional or protective measures

Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless:

(a) The requirements of this chapter are fulfilled; or

(b) An international convention that applies in that State so provides.

Article 71
Consolidation and removal of actions

1. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, the action may be instituted only in a court designated pursuant to both article 66 and article 68. If there is no such court, such action may be instituted in a court designated pursuant to article 68, subparagraph (b), if there is such a court.

2. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, a carrier or a maritime performing party that institutes an action seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum pursuant to article 65 or 68 shall, at the request of the defendant, withdraw that action once the defendant has chosen a court designated pursuant to article 66 or 68, whichever is applicable, where the action may be recommenced.

Article 72
Agreement after a dispute has arisen and jurisdiction when the defendant has entered an appearance

1. After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.

2. A competent court before which a defendant appears, without contesting jurisdiction in accordance with the rules of that court, has jurisdiction.
Article 73
Recognition and enforcement

1. A decision made in one Contracting State by a court having jurisdiction under this Convention shall be recognized and enforced in another Contracting State in accordance with the law of such latter Contracting State when both States have made a declaration in accordance with article 74.

2. A court may refuse recognition and enforcement based on the grounds for the refusal of recognition and enforcement available pursuant to its law.

3. This chapter shall not affect the application of the rules of a regional economic integration organization that is a party to this Convention, as concerns the recognition or enforcement of judgements as between member States of the regional economic integration organization, whether adopted before or after this Convention.

Article 74
Application of chapter 14

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

Chapter 15
Arbitration

Article 75
Arbitration agreements

1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at:

   (a) Any place designated for that purpose in the arbitration agreement; or

   (b) Any other place situated in a State where any of the following places is located:

   (i) The domicile of the carrier;

   (ii) The place of receipt agreed in the contract of carriage;

   (iii) The place of delivery agreed in the contract of carriage; or

   (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.

3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if the agreement is contained in a volume contract that clearly states the names and addresses of the parties and either:

   (a) Is individually negotiated; or

   (b) Contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement.
4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:

(a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article;

(b) The agreement is contained in the transport document or electronic transport record;

(c) The person to be bound is given timely and adequate notice of the place of arbitration; and

(d) Applicable law permits that person to be bound by the arbitration agreement.

5. The provisions of paragraphs 1, 2, 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is void.

Article 76
Arbitration agreement in non-liner transportation

1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the provisions of this Convention apply by reason of:

(a) The application of article 7; or

(b) The parties' voluntary incorporation of this Convention in a contract of carriage that would not otherwise be subject to this Convention.

2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:

(a) Identifies the parties to and the date of the charter party or other contract excluded from the application of this Convention by reason of the application of article 6; and

(b) Incorporates by specific reference the clause in the charter party or other contract that contains the terms of the arbitration agreement.

Article 77
Agreement to arbitrate after a dispute has arisen

Notwithstanding the provisions of this chapter and chapter 14, after a dispute has arisen the parties to the dispute may agree to resolve it by arbitration in any place.

Article 78
Application of chapter 15

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

Chapter 16
Validity of contractual terms
Article 79
General provisions

1. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

   (a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;

   (b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or

   (c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 18.

2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

   (a) Directly or indirectly excludes, limits or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or

   (b) Directly or indirectly excludes, limits or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.

Article 80
Special rules for volume contracts

1. Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.

2. A derogation pursuant to paragraph 1 of this article is binding only when:

   (a) The volume contract contains a prominent statement that it derogates from this Convention;

   (b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;

   (c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and

   (d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.

3. A carrier’s public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.

4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 14, subparagraphs (a) and (b), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in article 61.
5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:

(a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and

(b) Such consent is not solely set forth in a carrier’s public schedule of prices and services, transport document or electronic transport record.

6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

Article 81

Special rules for live animals and certain other goods

Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier or of a person referred to in article 18, done with the intent to cause such loss of or damage to the goods or such loss due to delay or done recklessly and with knowledge that such loss or damage or such loss due to delay would probably result; or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and that no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

Chapter 17

Matters not governed by this convention

Article 82

International conventions governing the carriage of goods by other modes of transport

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

(a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;

(b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;

(c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or
(d) Any convention governing the carriage of goods by inland waterways to
the extent that such convention according to its provisions applies to a carriage of
goods without trans-shipment both by inland waterways and sea.

Article 83
Global limitation of liability

Nothing in this Convention affects the application of any international
convention or national law regulating the global limitation of liability of vessel
owners.

Article 84
General average

Nothing in this Convention affects the application of terms in the contract of
carriage or provisions of national law regarding the adjustment of general average.

Article 85
Passengers and luggage

This Convention does not apply to a contract of carriage for passengers and
their luggage.

Article 86
Damage caused by nuclear incident

No liability arises under this Convention for damage caused by a nuclear
incident if the operator of a nuclear installation is liable for such damage:

(a) Under the Paris Convention on Third Party Liability in the Field of
Nuclear Energy of 29 July 1960 as amended by the Additional Protocol of
28 January 1964 and by the Protocols of 16 November 1982 and 12 February 2004,
the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 as
amended by the Joint Protocol Relating to the Application of the Vienna Convention
and the Paris Convention of 21 September 1988 and as amended by the Protocol to
Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of
12 September 1997, or the Convention on Supplementary Compensation for Nuclear
Damage of 12 September 1997, including any amendment to these conventions and
any future convention in respect of the liability of the operator of a nuclear
installation for damage caused by a nuclear incident; or

(b) Under national law applicable to the liability for such damage, provided
that such law is in all respects as favourable to persons that may suffer damage as
either the Paris or Vienna Conventions or the Convention on Supplementary
Compensation for Nuclear Damage.

Chapter 18
Final clauses

Article 87
Depositary

The Secretary-General of the United Nations is hereby designated as the
depository of this Convention.
Article 88
Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States at Rotterdam, the Netherlands, on 23 September 2009, and thereafter at the Headquarters of the United Nations in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 89
Denunciation of other conventions

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the International Convention for the Unification of certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924, to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading, signed at Brussels on 23 February 1968, or to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979, shall at the same time denounce that Convention and the protocol or protocols thereto to which it is a party by notifying the Government of Belgium to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

2. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978 shall at the same time denounce that Convention by notifying the Secretary-General of the United Nations to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

3. For the purposes of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraphs 1 and 2 of this article that are notified to the depositary after this Convention has entered into force are not effective until such denunciations as may be required on the part of those States in respect of these instruments have become effective. The depositary of this Convention shall consult with the Government of Belgium, as the depositary of the instruments referred to in paragraph 1 of this article, so as to ensure necessary coordination in this respect.

Article 90
Reservations

No reservation is permitted to this Convention.

Article 91
Procedure and effect of declarations

1. The declarations permitted by articles 74 and 78 may be made at any time. The initial declarations permitted by article 92, paragraph 1, and article 93, paragraph 2,
shall be made at the time of signature, ratification, acceptance, approval or accession. No other declaration is permitted under this Convention.

2. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

3. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

4. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

5. Any State that makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. The withdrawal of a declaration, or its modification where permitted by this Convention, takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Article 92
Effect in domestic territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. When a Contracting State has declared pursuant to this article that this Convention extends to one or more but not all of its territorial units, a place located in a territorial unit to which this Convention does not extend is not considered to be in a Contracting State for the purposes of this Convention.

4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 93
Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. When the number of Contracting States is relevant in this Convention, the regional economic integration organization does not count as a Contracting State in addition to its member States which are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence
has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration pursuant to this paragraph.

3. Any reference to a "Contracting State" or "Contracting States" in this Convention applies equally to a regional economic integration organization when the context so requires.

Article 94
Entry into force

1. This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.

2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State.

Article 95
Revision and amendment

1. At the request of not less than one third of the Contracting States to this Convention, the Secretary-General of the United Nations shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

Article 96
Denunciation of this Convention

1. A Contracting State may denote this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at New York, this eleventh day of December two thousand and eight, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.
FINAL EXAMINATION

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. The total time for this examination is three hours. There are four questions. Questions will be weighted equally and you should spend equal amounts of time on each question. Please write legibly and leave a margin on the left-hand side of the page.

Use only your examination identification number to identify your blue book or blue books and this white examination paper. Your exam ID number is the last six digits of your social security number followed by the numerals “59.” Thus, if your social security number is 123-45-6789, your exam ID number will be 456789-59.

If you use more than one blue book, please be sure that your exam ID number is on each and number the blue books ("No. 1 of 2," "No. 2 of 2," etc.).

All litigation described in this examination is taking place in American courts, and American law applies to all.
QUESTION ONE

This Question One consists of five questions which require only a brief answer.

1. Injured seaman Barnacle, plaintiff in a Jones Act case, caused the arrest of the ship on board which he was injured. After the accident the ship had been sold twice. The present owner retained attorney Philander S. Podsnap to secure the release of the ship. Podsnap filed a motion to vacate the arrest warrant, citing the following reasons: (a) the present owner had no contract with Barnacle; (b) Barnacle’s claim was never recorded with the Department of Transportation; and (c) the present owner is a bona fide purchaser of the ship, which he bought free and clear of all encumbrances. Does Podsnap have a clue about what he is doing? Explain.

2. Captain Coyne (as he insists on being called when afloat) was rowing his three-meter vessel Knotty Buoy on the Merrimack River when he bumped into an object just below the surface. It was the corpse of cocaine king Ricky Trafficks, murdered by a business competitor. Captain Coyne put a line around its foot, towed the corpse to shore, tied it to a tree, and alerted police to its location. Alongside the corpse, Coyne found floating in the water a wallet containing $25,000 in cash. Is Coyne entitled to keep the money? Explain.

3. With his father’s permission, twenty-one year old William took out his father’s boat for a day of water skiing in Buzzards Bay. He was towing a skier with two other friends in the boat when he collided with another vessel, killing one of the passengers. Father was in California at the time. Wrongful death suit is brought against father and son. Father petitions for limitation of his liability to the value of his boat which he says is $7000. How will the Court rule on father’s petition? Explain.
4. Old Faithful Insurance Co. ("Old Faithful") issued a policy of insurance for one year beginning July 1, 2009, to Halfhitch, covering his vessel, a 2008 37-foot Midnight Express (and trailer). The policy included a "theft warranty" relating to periods of out-of-water storage that conditioned coverage upon certain precautions to be taken by the insured. In October, 2009, Halfhitch took the boat out of the water, trailered it, and drove it to his parents' home where he locked it to a shed in their backyard. Subsequently, boat and trailer disappeared.

Halfhitch claimed on his policy. Old Faithful declined coverage on the grounds that Halfhitch had not complied with the required precautions. Old Faithful commenced an action in federal admiralty court seeking a declaratory judgment that it was not liable to Halfhitch. Admiralty jurisdiction, yes or no? Explain. Why, most likely, does Old Faithful want admiralty jurisdiction?

5. The Kingpost family rented a houseboat from Houseboat Vacations at Lake Havasu in Arizona, a navigable waterway. The houseboat was tied up to the shore. On the night before they were to take the houseboat out, the family slept aboard. It was summertime and hot. The family closed all the windows and turned on the air conditioning. All were seriously injured by carbon monoxide fumes within the houseboat, caused by faulty equipment.

Before the Kingpost family brought suit, Houseboat Vacations sued in federal court, alleging admiralty jurisdiction, to limit liability. Admiralty jurisdiction, yes or no? Explain. Why does Houseboat Vacations want admiralty jurisdiction?
QUESTION TWO

The Reverend Solomon Uplight is a retired Episcopal parish priest and a widower. After a career tied to parish and rectory, he decided that he wanted to travel. He learned that cruise lines will sometimes offer free passage to clergymen and clergywomen in exchange for furnishing chaplain services on board. He wrote to several cruise lines proposing this arrangement. One, White Star Line, sent back a favorable response. After some not-acrimonious negotiations, it was agreed that the Rev. Uplight would cruise on one of the company’s vessels for three winter months of the year in the Caribbean or Mediterranean sea, and for three summer months of the year in North Pacific, Baltic or Scandinavian Arctic waters. In exchange, Rev. Uplight would conduct a daily morning prayer service and a nondenominational Sunday morning service.

This arrangement remained in effect for several years to the mutual satisfaction of both parties. Attendance at the daily morning prayer services was small, but the Sunday services proved surprisingly popular. Almost certainly this was due to the Rev. Uplight’s encouragement of passengers to participate in the services as singers and readers, and to the reverend’s own sermons. Although he avoided contentious social topics, he preached with wit and insight about Bible texts that he chose. He generally devoted two days of preparation to each Sunday service. Also, from time to time he provided spiritual counseling to passengers, hearing from sundry conscience-troubled adulterers, perjurers, bearers of false witness, and the like.

For each cruise the Rev. Uplight was issued a passenger ticket marked “free” in the column indicating the fare paid. The ticket bore the words “Passage Contract” and “issued subject to the terms and conditions on page 1-3.” Not surprisingly, these terms and conditions did not include any right to maintenance and cure.
On each cruise, Rev. Uplight was assigned to a passenger stateroom, ate with the passengers, and was treated in all respects like a passenger except for his chaplaincy duties. He did not sign the ship’s articles. He never received a direct order from the master or any other of the ship’s officers.

On a Sunday morning in January, 2010, when the ship was in port in St. Maarten in the Dutch West Indies, Rev. Uplight experienced chest pains during his Sunday morning service. These grew worse during the day. On Sunday afternoon he reported to the ship’s sick bay. He was examined by the ship’s doctor who diagnosed acute cardiomyopathy (i.e. a heart attack), the treatment of which would be well beyond the capacities of the sick bay. With his consent, Rev. Uplight was put ashore to be rushed to a general hospital. There he underwent emergency care, diagnostic testing and quadruple-bypass surgery, followed by rehabilitation, after which he flew home. He never returned to the ship, nor cruised again.

The bill for hospital and medical services was $47,000. Rev. Uplight was enrolled in Medicare, but Medicare will not pay for hospital and medical services rendered outside the United States. Retired parish priests are rarely wealthy, and Rev. Uplight was no exception. He asked if White Star Lines would pay the bill. White Star Lines declined.

Rev. Uplight consulted a lawyer, who filed suit against White Star Lines in an appropriate federal court for cure and damages for failure to pay cure (maintenance being waived). White Star Lines answered that Rev. Uplight was not an employee of the cruise line but rather an independent contractor analogous to the ship’s doctor. White Start Lines sought summary judgment on this defense. What result? Why?

Assume that summary judgment is denied because the facts set out above leave open triable issues. Identify remaining triable issues.
QUESTION THREE

"Fire is the peril most dreaded by all mariners, and a peril most difficult to combat in a fully laden ship." In re Liberty Shipping Corp., 509 F.2d 1249, 1250 (9th Cir. 1975). That being so, maritime law has developed unique provisions relating to losses caused by fire at sea. Your attention is specially invited to ss. 4(2)(b) and 4(6) of the Carriage of Goods by Sea Act (COGSA).

On November 9, 2008, the containership M/V Irish Pennant was off the east coast of the United States, en route to Norfolk, Virginia. At approximately 7:20 A.M. the vessel shuddered. Within moments, dense smoke covered the ship. The master of the vessel, Captain Michael Balitzky, rushed to the bridge. After checking the wind, he turned the ship to starboard. The wind cleared the smoke from the deck, and he saw flames rising from cargo hold 3 where a 22-ton hatch cover had been blown off into the water, free and clear of the ship, by the force of an explosion.

The chief officer, who had the watch, had already sounded a general alarm that alerted the crew to assemble. The crew began fighting the fire, wearing fire suits and using hoses and pumps. The crew continued to fight the fire until late afternoon, when the captain ordered most of the crew to abandon ship. A lifeboat was launched at 6 P.M., carrying away fourteen crew members and leaving only the captain and a handful of others behind. As the fourteen crew members looked back from the lifeboat, they saw Irish Pennant ablaze, with flames and smoke rising high from the middle third of the ship. One of the crew members took a photograph:

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The captain and the others who remained aboard Irish Pennant continued to fight the fire and operate the vessel. They finally abandoned ship at 2:00 A.M., after yet another explosion, when the captain decided that it was no longer safe to remain on board. The vessel had been on fire for more than eighteen hours, and portions of her deck and shell plating had turned red and white hot. The captain collected the vessel's log books and charts, and he and the remaining crew members evacuated, transferring from Irish Pennant via a lifeboat to the M/V Sealand Uruguay, a southbound containership that had been standing by approximately half a mile away.

Irish Pennant continued to burn for three weeks. Most of its cargo was destroyed or damaged. The vessel itself was declared a total constructive loss and eventually was scrapped. The ship had been purchased for $16.43 million but the estimated cost of repairs was $18 million.
Irish Pennant was bound from Pusan, Republic of Korea, where she had taken on six containers containing a total of 300 drums of thiourea dioxide ("TDO") originally exported from the Peoples’ Republic of China. TDO is a white, odorless powder used as a reducing agent and in the bleaching of protein fibres such as paper, paper pulp, and textiles. At the time of the shipment in question, TDO was considered a stable compound under normal conditions.

The International Maritime Organization ("IMO") has developed a code, the International Maritime Dangerous Goods Code ("IMDG Code") to govern the carriage of dangerous goods aboard ships. The IMDG Code is relied on by shippers, manufacturers, stowage planners and ships’ crews to make decisions on the carriage and stowage of dangerous goods by sea. At the time of this incident, TDO was not listed as a hazardous or dangerous cargo in the IMDG Code, nor in the U.S. Department of Transportation’s Hazardous Materials Table published in the Code of Federal Regulations. However, expert investigation of the hulk of Irish Pennant in the aftermath of the fire concluded that the cause of the fire and explosion was a self-accelerating exothermic (i.e. heat-producing) reaction in one or more drums of TDO, caused by chemical decomposition, which ignited fires and explosions in the remaining drums. For the purposes of this question, assume that any plaintiff will be able to prove that self-ignition of the TDO was the cause of the explosion, fire, and loss of ship and cargo.

(In the aftermath of the destruction of Irish Pennant, TDO is now listed as a hazardous cargo in both the IMDG Code and in Code of Federal Regulations).

The TDO in question was manufactured by a Chinese firm which sold it to China National Chemicals Import & Export Corp. ("Sinochem"). Sinochem was the shipper of the TDO aboard Irish Pennant, per the bill of lading.
The following claims arose out of the above-described loss. In each case, (a) identify the basis or bases (if any) on which the plaintiff’s claim could be founded. (b) Also identify defenses (if any) which might be raised by the defendant. Finally, (c) evaluate the likely outcome.

1. Owners of Irish Pennant v. Sinochem;
2. Sinochem and consignees of TDO v. Irish Pennant and her owners;
3. Owners of cargo other than TDO v. Irish Pennant and her owners;

QUESTION FOUR

The framers of the United States Constitution, and the members of the first Congress which passed the Judiciary Act of 1789, had no experience of maritime activity which was non-commercial or recreational in nature. Today, however, there are more than sixteen million registered recreational boats in this country.

Americans buy, sell, mortgage, register, repair, collide, damage, salvage and operate these boats under a regime of law which originated in the context of oceangoing commerce. An argument can be made that the recreational boat is more nearly analogous to the family car than it is to the oceangoing or river-going commercial vessel. Accordingly, so goes this argument, recreational boating should be governed by principles of land-based activity such as owning and driving cars rather than by principles of admiralty and maritime law.

Offer your comments on the proposition that recreational boating should not be governed by principles of admiralty and maritime law. You may agree or disagree, in whole or in part, but be sure to make a coherent argument supported by material that you have studied in this course.
ADimiralty and Maritime Law
Mr. Martin
May 16, 2009
Exam identification no. __________________________

Final Examination

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. The total time for this examination is three hours. There are four questions. Questions will be weighted according to the amount of time suggested for each question. Please write legibly and leave a margin on the left-hand side of the page.

Use only your examination identification number to identify your blue book or blue books and this white examination paper. Your exam ID number is the last six digits of your social security number followed by the numerals “59.” Thus, if your social security number is 123-45-6789, your exam ID number will be 456789-59.

If you use more than one blue book, please be sure that your exam ID number is on each and number the blue books ("Nd. 1 of 2," "No. 2 of 2," etc.).
QUESTION ONE
(suggested time: thirty minutes)

While sailing aboard a friend's yacht, a woman was injured when a sudden swell threw her into a chair. After getting out of the hospital, she asked the lawyer who had handled her house closing to file suit. If the lawyer is a general practitioner who has no maritime experience, should he or she decline the representation? See The Florida Bar v. Gallagher, 366 So.2d 397 (Fla. 1978). A public reprimand, with costs, was imposed on the lawyer who accepted representation of a client with the knowledge that he was neither qualified nor competent to handle her maritime personal injury claim, and... took no substantial steps thereafter to become qualified in the area through study and investigation. Respondent neglected timely to file suit on the client's behalf, and the claim was barred by the applicable statute of limitations.

(The bar discipline was, of course, over and above the lawyer's liability to his client for malpractice damages).

Outcomes such as this have caused admiralty to be considered full of traps for the unwary. Identify three traps for the unwary that you have encountered in your study of Admiralty and Maritime Law and briefly explain how a lawyer's ignorance of the maritime law could compromise the representation of his or her client, with bar discipline and malpractice damages possibly resulting.
QUESTION TWO
(suggested time: forty-five minutes)

It was a case of financial unseaworthiness.

In May of 2008 the M/V Gaboon, a bulk carrier flying the Maltese flag, took on a cargo of steel plates at Visakhapatnam, India, for transport to the ports of Houston and Mobile in the United States pursuant to a contract of carriage between Gaboon’s owner, Busted & Disgusted Transport (“B&D”), and Mysore Heavy Industries (“MHI”), the owner of the cargo, evidenced by bills of lading which recited receipt of the cargo in good order and condition. Later, after sailing to the port of Paradip, India, the ship picked up an additional cargo of ferrochrome for transport to New Orleans.

While the ship was loading in India, the ship’s master and a representative of B&D discussed the upcoming voyage. The master, aware that the cargo of steel would suffer damage if exposed to sea water, expressed concern that the ship would encounter high winds and rough seas traveling around the Cape of Good Hope in winter. His apprehension was magnified by the condition of the hatch covers, which had been in disrepair for some time and which, the master believed, would allow ingress of water into the holds. The master requested permission to make the voyage through the Suez canal instead. Unwilling to pay the Suez canal tolls, B&D’s representative ordered the ship to proceed around Africa. He also told the master to patch the hatch covers with asphalt roofing. So directed and equipped, Gaboon departed for the United States.

In late June the master’s concerns were realized when the ship encountered seas so rough that the ship’s log describes “waves covering the deck” for several days. Seawater penetrated into the cargo holds, necessitating the operation of the bilge pumps for a week.
Upon arrival at New Orleans, its first port of call in the United States, Gaboon was arrested by its preferred ship mortgage holder, Intergalactic Bank ("Bank"). The ship had outstanding debts to various creditors including Bank. Bank held a preferred ship mortgage on Gaboon in a total amount $8,000,000 and, on the basis of nonpayment, Bank initiated an in rem action against Gaboon.

MHI also arrested Gaboon, asserting a maritime lien in the amount of $700,000 for damage to its cargo. MHI sued Gaboon in rem, and B&D in personam, on two claims: (1) breach of the contract of carriage, and (2) negligence on the part of B&D. With the ship under arrest and immobilized in New Orleans, MHI was also obliged to incur an expense of $180,000 to unload the steel plates and transport them to the consignees in Houston and Mobile. MHI asserted an additional maritime lien in this amount and joined this later claim against both defendants to its original one.

Neither B&D, nor anyone on behalf of Gaboon, answered the complaint. In October, 2008, MHI obtained a default judgment against Gaboon in rem and against B&D in personam in the amount of $880,000.

In February of 2009 the United States Marshal sold Gaboon. The proceeds of the sale, $4,615,000, were lodged with the clerk of the United States District Court. From these funds, outstanding wages owed to the master and crew, and debts to domestically based suppliers, were paid. Nevertheless, more than four million dollars remains in custody of the Court.

You represent MHI. What arguments will you make to persuade the Court that MHI’s claims have priority over Bank’s $8,000,000 preferred ship mortgage (in admiralty vernacular, that MHI’s judgment “primes” Bank’s preferred ship mortgage)?

Note that MHI has two claims against the res: (1) cargo damage, and (2) the cost of unloading and transporting the cargo. Be sure to discuss both of them.

[Note: twenty per cent (20%) of the exam credit on this question will be awarded for accurate and stylistically correct citations to Title 46, U.S. Code.]
QUESTION THREE
(suggested time: forty-five minutes)

Mason and Mitchell were seamen recruited by Anthony Tilda, the owner and captain of the fishing vessel Kitty M., in contemplation of an upcoming fishing trip. Preliminarily to the trip they were to assist in performing certain repairs to the Kitty M. At Tilda’s direction they brought the Kitty M. from Provincetown, Massachusetts, to Falmouth, docking it at the boatyard of Cape Cod Marine Services where the repair work was to be done. Tilda agreed to pay Mason and Mitchell $250 per day while they were engaged in the repair work. Once the fishing trip commenced they would be paid, in accordance with custom in the commercial fishery, a “lay” or share of the catch.

On the morning of May 15, 2008, Mason and Mitchell rendered minor assistance to employees of Cape Cod Marine Services who were removing the fishing vessel’s engine for an overhaul. On the afternoon of that day Captain Tilda ordered them to clean the engine room. He provided them with tools for the task which consisted of a spray gun with hose attachment, an unlabeled five-gallon bucket containing a cleaning agent known as Verisol, and a steam cleaner. Captain Tilda had received this equipment from Cape Cod Marine Services.

In accordance with Captain Tilda’s instructions, Mason and Mitchell proceeded to spray an area of the engine room with Verisol, to scrape the grime, and then to apply the steam cleaner. They worked without respirators or any other equipment to protect against any toxic fumes. Soon after they commenced working the engine room began to fill with steam, and the men experienced difficulty breathing. They started coughing. Although they took frequent breaks in fresh air, their symptoms worsened. After Mason collapsed on the engine room floor, Mitchell summoned help. Both men were taken by ambulance to Falmouth Hospital where they were admitted as inpatients. As a consequence of this experience, Mason and Mitchell were unable to participate in the fishing trip and were disabled from working for
several weeks. Each received a bill from Falmouth Hospital in excess of $10,000.
Neither has health insurance. They turned the hospital bills over to Tilda for
payment, but the bills have not been paid. The foregoing facts are undisputed.

Mason and Mitchell sued Captain Tilda alleging (1) a claim for maintenance,
cure, and wages to the end of the voyage, (2) a claim for damages for failure to pay
maintenance and cure, (3) Jones Act negligence, and (4) unseaworthiness. As a part
of their initial disclosure they identified as an expert witness Thinwhistle, a professor
of occupational medicine. Tilda’s lawyer deposed Professor Thinwhistle who
testified that Verisol is a toxic industrial solvent. Its harmful effect on the body
varies in accordance with the duration and intensity of exposure. It is particularly
hazardous when used in spray form because droplets of solvents are absorbed via the
respiratory system if no respirator is worn. Its effects on the body include kidney and
liver damage.

Mason’s and Mitchell’s lawyer took Captain Tilda’s deposition. Captain Tilda
testified that he asked the foreman at Cape Cod Marine Services for equipment to
clean the engine room. The foreman supplied the tools and the bucket of Verisol
without any comment or warning. Captain Tilda asserted that he did not know, and
had no reason to know, anything about Verisol’s toxic qualities. He thought the
contents of the bucket to be a detergent, and nothing in its color or odor suggested
anything else. Plaintiffs Mason and Mitchell have no information to the contrary.

On the foregoing record Captain Tilda moved for summary judgment in his
favor on all counts of the complaint. Mason and Mitchell cross-moved for summary
judgment in their favor on all counts of the complaint. How should the judge rule on
the cross-motions for summary judgment? Why? Be sure that your answer addresses
each count of the complaint. If, on any count, summary judgment should be denied
because triable issues remain unresolved, identify the triable issues.
QUESTION FOUR
(suggested time: one hour)

Containerization radically lowered the cost of ocean transport benefitting both producers and consumers of goods. Reduced transportation costs directly contribute to the phenomenon called globalization. However, along the way to becoming the norm for ocean shipping of non-bulk cargos, containerization encountered rocks and shoals of a legal description. Containerization was not visible even on the horizon when the Carriage of Goods by Sea Act was passed in 1936, and Congress has not amended COGSA to accommodate this new reality. (One result is the confusing litter of cases attempting to reconcile containerization with COGSA's $500 per package limitation of liability, turning on the question whether or not a container is a "package," and, if the container is not the "package," what is?). Also, the Supreme Court has not had an occasion to reverse or modify its holding in St. John's N. F. Shipping Corp. v. S. A. Companhia Geral, 263 U.S. 119 (1923) ("St. John's"), a copy of which is being distributed along with this examination.¹

Writing in 1975, Gilmore and Black observed:

Of late years there has been a tendency to import the notion of "deviation" into situations where no change of route is involved, on the theory that various forms of misconduct of the carrier are so serious as to amount to a departure from the whole course of the contract, with the consequence that the bill of lading protection is ousted, as in the case of deviation properly so called, and the insurer's liability reimposed. The stowage of cargo on deck, when stowage underdeck is called for by contract or custom, has been held to have this effect [citing St. John's] .... It would seem unwise to extend analogically and by way of metaphor a doctrine of doubtful justice under modern conditions, of questionable status under COGSA, and of highly penal effect.

¹ Read this case with care. Note that, in accordance with earlier Supreme Court case reporting practice, the first four pages are a summary of the argument for the petitioner. The actual opinion of the Court does not begin until p. 122.
This problem is becoming acute with the advent of containerization.... Most containers are designed to be carried safely on deck, and, for technical reasons of ship’s balance, and loading and unloading, it cannot be foretold which of a ship’s load of containers it will be necessary to carry on deck. It is therefore often (if not normally) impossible to issue a “below deck” bill of lading at the time of receipt of the container. On the other hand, the issuance of an “on deck” bill takes the goods out of the protection of COGSA and so impairs or destroys the commercial acceptability of the bill— and may turn out to have been quite unnecessary, since in fact the goods may be carried below deck. Gilmore & Black, The Law of Admiralty, 182-183 (2d ed. 1975).

Fuji Business Machines (“Fuji”) contracted with Darkstar Transport, Inc.(“Darkstar”), to ship a container load of forty-four photocopiers from Yokohama, Japan, to Long Beach, California aboard Darkstar’s vessel Darkstar Sirius. Upon delivery to Darkstar Sirius, Darkstar issued a clean bill of lading to Fuji. Sirius is a specially designed container ship with greater carrying capacity above deck than below deck. The vessel has a stowage system on deck consisting of five-tier stacking frames which use a “twist-lock” system to secure containers to the frames. Once secured, Darkstar’s operating manual requires insertion of locking pins to insure that the twist-locks stay in the locked position.

Darkstar loaded Fuji’s container on deck in a stacking frame. Later, the Chief Mate testified that the twist-lock securing Fuji’s container to the stacking frame was in the locked position prior to commencement of the voyage. He admitted, however, that he did not insert the locking pin. Based on his twenty years of experience, the Chief Mate believed the locking pins “unnecessary;” he had never seen the twist-lock moved from locked to unlocked, even in severe storm conditions.

Nevertheless, during very rough weather, the twist-locks came unlocked. Fuji’s container (and ten others) fell overboard. Fuji sued to recover the full value of the container. Darkstar denied liability but also countered with a motion to limit its liability to $22,000 (forty-four copiers at $500 per copier) in the event that liability was found against it.
Believing his decision to be controlled by the Supreme Court’s holding in St. John’s, the district court judge awarded summary judgment to Fuji in the amount of the actual value of the copiers, $230,028.48. Darkstar appealed to the United States Court of Appeals. The Circuit Court reversed and remanded the case for trial.

**Part A.**
(twenty per cent of this question)

In your own words, explain why the district court judge awarded Fuji $230,028.48.

**Part B.**
(forty per cent of this question)

Using (as did the Circuit Court) the tools of legal analysis, explain why the Circuit Court reversed the district court, notwithstanding the Supreme Court’s precedent in St. John’s.

**Part C.**
(forty per cent of this question)

Upon remand to the district court, what will be the issues to be tried?

END OF EXAMINATION
"This rule seems to be as effectual a test to prevent unjust discrimination against the shareholders as could well be devised. It embraces a class which constitutes the body politic of the State, who make its laws and provide for its taxes. They can not be greater than the citizens impose upon themselves. It is known as sound policy that, in every well-regulated and enlightened state or government, certain descriptions of property, and also certain institutions—such as churches, hospitals, academies, cemeteries, and the like—are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordained that it should be uniform.

"The objection is a singular one. At the time Congress enacted this rule as a limitation against discrimination, it was well known to that body that these securities in the hands of the citizen were exempt from taxation. It had been so held by this court, and, for abundant caution, had passed into a law.

"The argument founded on the objection, if it proves anything, proves that these securities should have been taxed in the hands of individuals to equalize the taxation; and, hence, that Congress by this clause in the proviso intended to subject them, as thus situated, to taxation; and, therefore, there was error in the deduction. This we do not suppose is claimed. But if this is not the result of the argument, then, the other conclusion from it is, that Congress required that the commissioners should deduct the securities, and at the same time intended the deduction, if made, should operate as a violation of the rate of the tax prescribed. We dissent from both conclusions."

That view of the matter has been adopted and given effect in all subsequent cases presenting the question. Lienberger v. Rouse, 9 Wall. 468, 475; Hepburn v. School Directors, 23 Wall. 480, 485; Adams v. Nashville, 95 U. S.
Silence in a bill of lading may give rise to a promise to carry cargo under deck, but in every such case this is due to the fact that the surrounding circumstances are such as to make a reasonable man presume that the shipowner will carry the cargo under deck. Silence of itself is not a promise. It is the surrounding circumstances which speak. There are three leading classes of cases: (1) where shipment under deck is customary and there is no controlling contract; (2) where shipment on or under deck, at ship's option, is customary and there is no controlling contract; (3) where custom is controlled by contract.

(1) On the first class, where shipment under deck is customary, and no contract controls, see, The Delaware, 14 Wall. 579; The Sarnia, 278 Fed. 459. These cases squarely support the three classifications above set forth. In both, goods were carried in a trade where it was customary to carry under deck and nothing was stated in the bill of lading about the place of shipment. In both, testimony was offered to modify the custom by an oral contract, and the court refused to admit such evidence on the ground of the parol evidence rule. With such evidence shut out, both courts construed the bill of lading, which thus constituted the entire contract between the parties, to give a promise to carry under deck. In the absence of a proved contract modifying the custom, the custom spoke when the bill of lading was silent.

(2) Where shipment on or under deck, at ship's option, is customary, and there is no controlling contract, the usual bill of lading is issued, making no mention of stowage on deck, and the consignee cannot complain if cargo is stowed on deck. If the shipper wishes to find out if the cargo has been stowed on deck he must inquire. This type of cases dates from the earliest days and is referred to in the summary of the law given in The Delaware, supra. An example is The Del Norte, 234 Fed. 667; Barber v. Brace, 3 Conn. 9.

(3) Deck shipment controlled by contract. There is nothing inconsistent between a bill of lading with no loading endorsement on it, and a written contract allowing shipment on deck. The two documents should be construed together. The leading case is Lawrence v. Minturn, 17 How. 100. See Gould v. Oliver, 4 Bing. 134. The Delaware and The Sarnia, where relied on by the opinion of the court below in the present case, deal with the parol evidence rule and the construction of the bill of lading in the absence of a provable written agreement. In order that there may be no misconception as to the scope of the decisions, they expressly state that if there was a clean bill of lading and written consent to stow on deck, the carrier can stow on deck. In Lawrence v. Minturn the written consent was expressed exactly as it was in the instant case in the freight contract.

(4) No duty on carrier to notify shipper as to stowage. The cargo owner asks this Court to find that there was an implication in the contract that notice of the place of stowage would be stated in the bill of lading. There is no reason for the implication; notice to the shipper of the deck stowage was not essential to the carriage of the resin, and, if the shipper required notice as to how the option was to be exercised, it should have so provided in the contract of affreightment. Armour & Co. v. Walford, [1921] 3 K. B. D. 473.

The freight contract as drawn up by the shipper's broker was the basic agreement. It set forth the terms of carriage, named the vessel, the freight rate, the nature and the amount of cargo and stipulated that the shipment might be stowed on deck at ship's option. It further stated that it was subject to the conditions of the Act of Congress of February 13, 1893, and to terms of bills of lading in use by the vessel's agents.

The nature of a bill of lading is such that it operates both as a receipt and as evidence of the contract of car-

In any event, the liability of the schooner should have been limited to the invoice cost of the cargo as provided by the bill of lading.

It was error to hold that the bill of lading and all its terms were wiped out by the absence of a notation on the bill of lading that the shipment was on deck. The consent to deck stowage was sufficiently evidenced in the bill of lading as issued when that document is read in conjunction with the freight contract that preceded it.

Under the circumstances of this case, the deck stowage is not analogous to a voluntary deviation, and the effect of such deviation, namely, the wiping out of the conditions of a bill of lading, is not involved. In deviating, the ship breaches the entire contract and should not be allowed to revive it for the purpose of cutting down the damages. *The Sarnia*, 278 Fed. 459, distinguished. See *The Hadji*, 18 Fed. 459; *The Oneida*, 128 Fed. 687.

Mr. E. Curtis Rouse, with whom Mr. J. Dexter Crowell was on the brief, for respondent.

Mr. Justice McReynolds delivered the opinion of the Court.

The General Commercial Company, Ltd., doing business as commission merchant and exporting concern at New York, in May, 1918, sold 800 barrels of rosin c. i. f. to the respondent, a Brazilian corporation, and procured a written freight reservation or agreement from the agents of the schooner St. Johns N. F. to carry the goods to Rio de Janeiro, "on or under deck, ship's option," and subject "to terms of bills of lading in use by steamer's agents." The rosin was loaded on board June 11th and clean receipts—without endorsement concerning stowage—were given therefor. A day or two later, upon prepayment of freight, the ship issued a clean bill of lading in the usual form. It contained no reference to the prior freight agreement. The goods were placed on deck, but neither the shipper nor the consignee knew this until after the loss occurred. There was no general custom at the port so to stow goods of this kind for such a voyage. The vessel was a general ship carrying many kinds of merchandise and no charter-party question is involved. She sailed from New York June 19th. Before reaching Rio de Janeiro she encountered a storm and for sufficient cause the master jettisoned the rosin in order to relieve her. The loss resulted directly from the ondeck stowage; the underdeck cargo was safely delivered.

Respondent libeled the schooner and demanded the value of the goods at destination. It claims that by issuing the clean bill of lading the vessel in effect notified the shipper that she had exercised the option specified by the freight agreement and would stow under deck. Also, that the ship broke her contract as by deviation and thereby lost the benefit of limitation or relieving clauses in the bill.

The owners maintain that as the freight agreement gave an option as to place of stowage it was unnecessary for the bill of lading to specify the action taken in respect thereto, and that silence did not amount to a promise to carry under deck. Moreover, that consent to deck stowage sufficiently appeared by the bill of lading read
with the freight agreement and therefore there was no
departure and no ground for assessing damages.

The court below sustained the position of the respond-
ent and decreed accordingly. 280 Fed. 553.

We find no conflict between the written original freight
contract and the bill of lading. The former referred to
a bill thereafter to be issued and made the place of stow-
age optional with the ship. When issued under such
circumstances the bill amounted to a declaration that the
option had been exercised and the goods would go under
deck.

We are not dealing with a case arising under a general
port custom permitting above deck stowage notwithstanding a clean bill, with notice of which all shippers are
charged. When there is no such custom and no express
contract in a form available as evidence, a clean bill of
lading imports under deck stowage. *The Delaware, 14
Wall. 579, 602, 604, 605. Upon this implication respond-
ent had the right to rely. To say that the shipper as-
sented to stowage on deck is not correct. It gave the ves-
sel an option, and the clean bill of lading amounted to a
positive representation by her that this had been exer-
cised and that the goods would go under deck.

By stowing the goods on deck the vessel broke her
contract, exposed them to greater risk than had been
agreed and thereby directly caused the loss. She accord-
ingly became liable as for a deviation, cannot escape by
reason of the relieving clauses inserted in the bill of lading
for her benefit, and must account for the value at

destination. Generally, the measure of damages for loss
of goods by a carrier when liable therefor is their value at
the destination to which it undertook to carry them.
*Lawrence v. Minturn, 17 How. 100, 111; Mobile & Mont-
gomery Ry. Co. v. Jursey, 111 U. S. 584, 596; New York,
L. E. & W. R. Co. v. Estill, 147 U. S. 591, 616; Chicago,
97, 100; Royal Exchange Shipping Co. v. Dixon, 12 A. C.
[1887] 11; *The Sarnia, 278 Fed. 469; Hutchinson on Car-
riers, vol. 3, § 1360; Carver on Carriage of Goods by Sea,

The decree below is affirmed.

SUPERIOR WATER CO. v. SUPERIOR.

SUPERIOR WATER, LIGHT & POWER COMPANY
v. CITY OF SUPERIOR ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 57. Argued October 9, 1923.—Decided November 12, 1923.

1. Where a municipality, with express power from the legislature,
enters into a contract whereby in consideration of the construc-
tion, maintenance and operation of a water system by a water
company it grants the company the exclusive right to maintain
and operate for a specified period and agrees to extend the term
when it expires or to purchase the entire plant at a price to be
determined by capitalizing the net earnings of the year preceding
the purchase, the rights acquired by the company are rights of
property which are not subject, under the Constitution, to be
impaired by subsequent legislation attempting to substitute for the
company's franchises an "indeterminate permit" to continue in
force until the municipality shall elect to purchase upon terms to
be fixed by a state commission. P. 135.

1 The bill of lading provides—
"The carrier shall not be liable for loss or damage occasioned by,
due to or arising from causes beyond the carrier's control, by the act
of God, vis major, by collision, stranding, jettison or wreck, perils of
the sea or other waters, by fire from any cause or wheresoever
occurring."

"In computing any liability for negligence or otherwise, by the
shipowner as carrier or otherwise, regarding any property hereby
receipted for no value shall be placed on the said property higher
than the invoice cost not exceeding $100 per package (or such other
value as may be expressly stated herein), nor shall the shipowner be
held liable for any profits or consequential or special damages, and
the shipowner shall have the option of replacing any lost or damaged
goods."
FINAL EXAMINATION

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. There are four questions. Questions will be weighted according to the amount of time suggested for each question. Please write legibly and leave a margin on the left-hand side of the page. Use only your social security number to identify your blue book or blue books and this white examination paper. If you use more than one blue book, please be sure that your social security number is on each and number the blue books ("No. 1 of 2," "No. 2 of 2," etc.).
QUESTION ONE
(suggested time: thirty minutes)

The *Knotty Buoy*, a three-meter yacht owned by renowned MSL Professor Michael Coyne, was cruising in the Merrimack River above Lawrence, MA. Captain Coyne, as he insists on being called when afloat, was at the oars. While proceeding upstream on a reach from Bait Shop Point to Tavern Landing, Coyne came upon Valerie Tanktop who was alone aboard her boat *Sea Minus*. *Sea Minus* was broken down and drifting. Coyne offered his help and that of his vessel *Knotty Buoy*. Ms. Tanktop accepted a ride to shore where she was able to telephone a nearby marina which sent out a boat that towed *Sea Minus* in for repairs.

Captain Coyne is now thinking of putting in for a salvage award. Does he have a claim? Assuming that he has a claim, how will he enforce it?

QUESTION TWO
(suggested time: fifteen minutes)

Briefly but accurately define the following terms:

1. In rem jurisdiction.
2. Mare librium.
3. In custodia legis.
4. Error in extremis.
5. Force majeure.
QUESTION THREE
(suggested time: forty-five minutes)

In March, 2007, American Starch & Chemical Co. ("American Starch") entered into a contract of carriage with Murmansk Shipping Co. ("Murmansk") for the shipment of 830 metric tons of bagged tapioca starch aboard M/V Magnitogorsk from Sriracha Seaport Terminal, Thailand, to Portland, Maine. Tapioca starch is obtained from the root of the manioc or cassava plant. It is used for edible purposes and in large quantities for the manufacture of glue and sizing. The agreed-upon freight was $55,000.

While stevedores were loading starch into holds 3 and 5 of the vessel in the night hours on July 22, 2007, there was a tropical rainstorm at approximately 3:30 A.M. During the storm some of the bags in holds 3 and 5 got wet because the hatches to both these holds were open.

Second officer Kniazev was in charge of the cargo on that watch. He first sensed the possibility of rainfall at about 3:20 A.M. because a light drizzle had started. He discussed the situation with the stevedores for two or three minutes. At 3:22 or 3:23 A.M. Kniazev made the decision to close the hatches to holds 3 and 5. He called for four standby seamen to do the job. These seamen were called from their quarters and took two or three minutes to arrive on deck. At approximately 3:25 A.M. Kniazev ordered two seamen to proceed to hold 3, and worked with the other two seamen to start closing hold 5. Hold 3 takes about eight to nine minutes to close with two able bodied seamen.

Kniazev had already started closing the hatch on hold 5 when the seamen arrived at about 3:25 and it took another seven minutes to complete the job. Accordingly, the hatches for hold 5 were closed at approximately 3:32 A.M., about two minutes after the downpour started. At this point, 3:32 A.M., Kniazev went to hold 3 to help the other two seamen finish the closing. It took a small amount of time before hold 3 was secured, putting the final closing time at approximately 3:35 A.M., five minutes after the downpour started.
In hold 3 there were 664 blue bags each holding one ton of tapioca starch. In hold 5 there were 331 half-ton orange bags holding a different grade of tapioca starch. After the holds were closed Kniazev inspected the blue and orange bags and saw that many of them had become wet and that some water had pooled on the tops of the bags. Later that day, several samples were tested, revealing unacceptable moisture content (an indication that microbiological growth might be afoot). American Starch’s Thai representatives suggested off-loading the tapioca for a full inspection but the ship’s captain refused, and the vessel left the loading pier for Portland.

En route, the ship stopped at Masinloc in the Philippines to load a shipment of bulk chrome ore. The bill of lading for the chrome ore identified the port of discharge as Portland, but the destination was changed (at some point en route) to Montreal where the bulk chrome ore was discharged. The Montreal detour entailed an extra 1500 miles (nine days of travel time) before docking at Portland.

Upon the ship’s arrival at Portland, American Starch detected some high levels of mold in the cargo, and determined that none of the tapioca starch could be sold to its customers because it could not guarantee that any of the cargo met standards for microbiological content.

M/V Magnetogorsk proceeded on to New York where American Starch timely commenced an action in rem against the vessel and in personam against Murmansk. American Starch sold the tapioca at a deep discount to a foreign company for animal consumption, and claims as damages $819,039.17, the difference between the market value of the tapioca and the price paid by its foreign buyer.

Relevant terms of the bill of lading for the tapioca are as follows:

“COGSA shall govern before loading and after discharge and throughout the entire time the goods are in the Carrier’s custody.

“The vessel has the liberty to sail at any port or ports in any order, for any purpose, and also to deviate for the purpose of saving life or property.”

What will be the principal issues in this litigation?
QUESTION FOUR  
(suggested time: ninety minutes)

Suzanne Rigby comes to see you at your office. She tells you that she is a widow. Her husband, Rex Rigby, was killed in an accident on an oceanographic research vessel, the R/V Benthic Spy, operating out of New Bedford, Massachusetts. She says that the ship is owned by a corporation, Ships Unlimited, Inc., and chartered by her late husband’s employer, Deep Ocean Resources, Inc. (“Deep Ocean”). Deep Ocean is a company that is trying to find economically feasible methods of recovering mineral resources from the deep ocean floor. These mineral resources are sometimes called “manganese nodules” after one of their principal component substances. So far, nobody has found a way to bring manganese nodules to the surface at a cost which does not greatly exceed the cost of producing the same mineral substances from terrestrial ores. Deep Ocean is trying to change this.

The recovery of manganese nodules depends, first of all, on successfully locating concentrations of them. Up until now, prospecting has required the use of underwater robot vehicles capable of operating at great ocean depths. This is a very expensive prospecting technique and, in fact, the cost of deep-ocean prospecting is a major component of the cost differential noted above. Deep Ocean is engaged in testing an experimental computer-based prospecting system which relies only on data accessible from the surface of the ocean. Rex was a senior computer scientist employed on this mission.

He was also a gourmet cook who enjoyed preparing Chinese food. He would often volunteer to take a turn in the ship’s galley and produce an excellent Chinese lunch or dinner. Shipmates and fellow scientists who paid condolence calls on Valerie after Rex’s death told her how much they appreciated the lunches and dinners that Rex cooked, especially since the regular ship’s cook invariably served hot dogs for lunch and deep-fat fried chicken for supper. Rex’s efforts in this regard were indirectly the cause of his death. While carrying a case of #10 tin cans to the galley
from a locker below, he slipped on a stairway (called a “ladder” afloat) and fell backward, breaking his neck. Some of the shipmates and fellow scientists who visited Valerie told her that the ladder’s non-slip coating had worn away at the time of his fall (since repaired) and that the light bulb which illuminated the ladder had burned out (since replaced). These visitors also told her that she had a claim under the Jones Act. Benthic Spy was 100 miles off the coast at the time of Rex’s death.

Naively, Valerie asked Deep Ocean’s Human Resources Director about the Jones Act claim. The Director told Valerie to apply for workers’ compensation benefits payable to survivors by the company’s workers’ compensation insurer. He said that she wasn’t eligible under the Jones Act because her late husband was a computer scientist, not a seaman. Becoming less naive by the day, she asked the Director to put this advice in writing. She shows you Deep Ocean’s written response which mentions a statute that you have never heard of, called the Oceanographic Research Vessels Act.

Valerie explains to you that she is the mother of the couple’s three young children, twin boys age six and a girl age four. The family was totally dependent on her late husband’s income. He was well started in a career as a computer scientist, but up until the date of his death the family had put aside very little in the way of savings and these are now exhausted. The workers’ compensation benefit that will be payable to her and the children as survivors will be, she estimates, about enough the buy the groceries or to pay the rent, but not both. She is going to take on the role of involuntary breadwinner but fears that child care costs will eat up most of her earnings.

You promise to do some necessary research and to evaluate her claim, advising her in writing, however, that you have not at this time undertaken to represent her in any action against anybody. You can be generous with the promise of research because you have an excellent law student intern, Cheddar Wurst, who will do the research for you. Unfortunately Cheddar has got to go back to her law school in Andover to study for exams. She does, however, turn over to you the fruits of her
preliminary inquiry into Valerie’s possible claims. These are reproduced and distributed to you, on contrasting color paper. They are:

1. The Oceanographic Research Vessels Act, P.L. 89-99, 79 Stat. 424 ("ORVA"). This Act was passed in 1965.

2. The very brief legislative history pertaining to the Act found at 1965 U. S. Code Cong. & Adm. News 2383, where is printed the report of the House Committee on Merchant Marine and Fisheries.

3. Sennett v. Shell Oil Co., 325 F.Supp 1 (E.D. La. 1971). Cheddar left you a note pointing out that this opinion was written by Judge Alvin B. Rubin, then a district judge, who was later promoted to the Fifth Circuit Court of Appeals (the country’s busiest admiralty circuit) where he became nationally recognized as an authority on admiralty.

4. Two circuit court cases. Cheddar’s note says that there is no case in the Supreme Court, nor in the First Circuit, nor in the District of Massachusetts, on ORVA. These are the only two circuit court cases on the subject: Presley v. Vessel Caribbean Seal, 709 F.2d 406 (5th Cir. 1983), and Craig v. M/V Peacock, 760 F.2d 953 (9th Cir. 1985).

(Ninety per cent of this question). Review the materials that Cheddar found for you. Then write a memorandum summarizing your research and conclusions. No particular memorandum format is required.

(Ten per cent of this question). Will you agree to represent Valerie in litigation against Ships Unlimited, Deep Ocean, the R/V Benthic Spy, or any combination of them? Why or why not?

END OF EXAMINATION
FINAL EXAMINATION

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. There are four questions. Questions will be weighted according to the amount of time suggested for each question. If there are subdivisions within a question, the question will tell you the weight to be accorded to each subdivision. Please write legibly and leave a margin on the left-hand side of the page. Use only your social security number to identify your blue book and this white examination paper. If you use more than one blue book, please be sure that your social security number is on each and number the blue books ("No. 1 of 2," "No. 2 of 2," etc.).

Question One is to be answered in blanks on this white examination paper. Questions Two, Three and Four are to be answered in blue books. Fill in your social security number in the space above and turn in this white examination paper along with your blue book or blue books.
QUESTION ONE
(suggested time: thirty minutes)

In May 2005 Tall Pony Productions ("Tall Pony") leased a mobile stage from its manufacturer and owner, Stageline Mobile Stage ("Stageline"). Tall Pony wanted the stage in connection with an HBO Sinbad Special television production scheduled to take place in St. Maarten, a Dutch dependency in the Caribbean. Tall Pony contracted with Tropical Shipping and Construction Co. ("Tropical") to transport the stage from the port of Palm Beach, Florida, to St. Maarten on board Tropical's vessel M/V Tropic Tide.

When the mobile stage is folded up, it can be pulled by a diesel tractor on the highway as if it were a regular tractor-trailer rig. When the stage is folded down, the walls of the trailer form the floor of the stage, and internal aluminum superstructures fold up to form metal rigging for attaching lights, roofing and windwalls. The manufacturer's promotional materials claim that "Stageline has not reinvented the wheel, it's reinvented the stage on wheels." The stage sells for $250,000.

The bill of lading for the voyage from Palm Beach to St. Maarten contained a "Clause Paramount" (see casebook, p. 650-651) providing that the bill of lading was subject to the provisions of the Carriage of Goods by Sea Act ("COGSA") with respect to all aspects of the contract of carriage: before loading, after discharge, and during the entire time when the cargo is in the carrier's possession. The bill of lading also contained a "Himalaya Clause" extending the COGSA defenses and protections to
the carrier's agents and contractors. In the bill of lading, the cargo was described as [quantity] "1" [description] "mobile stage."

Tropical employed Birdsall, a stevedoring company, to load the stage onto the vessel by the use of a crane. The crane used by Birdsall was manufactured by a Swedish company, Bromma. During the course of the loading the crane failed. This caused the stage to drop to the dock, resulting in its total destruction. Consistent with the adage that "the show must go on," Tall Pony made arrangements to secure a replacement and transport it to St. Maarten.

Tall Pony's lease contract with Stageline provided that Tall Pony should be liable for loss of or damage to the stage while in Tall Pony's possession. To protect itself, Tall Pony had purchased "open cargo" or "open sea" insurance coverage from Seven Seas Insurance Co. ("Seven Seas") covering loss of or damage to the stage while in transit to St. Maarten. Seven Seas paid Tall Pony $250,000 on Tall Pony's claim under the marine insurance policy. (Tall Pony, of course, is obliged to pay the $250,000 to Stageline in accordance with their lease contract).

Seven Seas, as subrogee, then commenced an action against Tropical, Birdsall, and Bromma.

Part A. (1/6 of this question)

Assume that the crane's failure was caused by the negligence of Tropical. How much can Seven Seas recover from Tropical?

$ 0
$ 500
$ 250,000

3
Part B. (1/6 of this question)

Assume that the crane's failure was caused by the negligence of Birdsall, but not that of Tropical. How much can Seven Seas recover from Birdsall?

$ 0 ________

$ 500 ________

$ 250,000 ________

Part C. (1/6 of this question)

Assume that the crane's failure was caused by a defect that was present when the crane left its manufacturer, Bromma. How much can Seven Seas recover from Bromma?

$ 0 ________

$ 500 ________

$ 250,000 ________

Part D. (1/2 of this question)

Assume that Tropical and/or Birdsall have paid Seven Seas on any successful subrogated claim. Tall Pony, however, also incurred expenses of $50,000 in securing the replacement stage. Its marine insurance policy, provided by Seven Seas, did not cover this loss because the policy was limited to the value of the goods shipped. Can Tall Pony now recover its uninsured loss of $50,000 from:

Tropical, if Tropical was negligent?

YES ______ NO ______;

Birdsall, if Birdsall was negligent?

YES ______ NO ______;
Bromma, if the crane was defective when it left the manufacturer, Bromma?

YES ____ NO ____.

QUESTION TWO
(suggested time: one hour)

The international character of the maritime shipping industry has stimulated international conventions' dealing with a multitude of topics. One of these is the 1976 "International Convention on Limitation of Liability for Maritime Claims (with attachment)" which is printed at p. 179-188 of your casebook supplement and which, in this question, will be called "the 1976 Convention." This convention has been accepted by many countries in the world, including most of the major maritime trading countries, but not by the United States.

In the United States, limitation of liability for maritime claims is governed by the Limitation of Shipowner's Liability Act of 1851 (now 46 App. U.S.C. ss. 181-189, printed in your casebook supplement and called in this question "American law" or "the American law"). According to a leading writer, "This 1851 Act, badly drafted even by the standards of the time, continues in effect today"¹ in unmodernized language and with amendments adopted

¹ A treaty among numerous nations (as opposed to a bilateral treaty) is called a "convention," e.g. the United Nations Convention on the Law of the Sea).

in patchwork fashion over 150 years. "It is difficult to understand why the United States has not adhered to the 1976 Limitation Convention."³

This question calls on you to compare the 1976 Convention to American law. Your instructor is aware that you are not familiar with the 1976 Convention. Your task is therefore to read the unfamiliar text, to understand it well enough to answer some questions, and to compare it to a text (the American law) with which you are familiar. That is a job which lawyers often do.

Part A of this question asks you to compare the 1976 Convention to American law in three particular respects. Part B of this question asks you to solve a problem involving calculation of dollar limits of liability under the 1976 Convention and under American law. For grading purposes, Part A and Part B will be weighted equally.

For convenience, so that you will not have to keep flipping pages back and forth, the 1976 Convention is being distributed with this examination, printed on contrasting color paper.

Part A.

Briefly compare the provisions of the 1976 Convention to American law with respect to each of the following subjects:

1. What persons or parties are entitled to take advantage of limitation of liability? Give an example of a person or party who

³ id., 806.
would be able to take advantage of limitation of liability under the 1976 Convention, but not under American law.

2. What acts on the part of a person or party seeking limitation will disqualify that person or party from securing the advantages of limitation? Give an example of a person or party that would be disqualified under American law, but not under the 1976 convention, or vice versa.

3. What is the basic difference between the 1976 Convention and American law with respect to the method of calculating the maximum amount of the shipowner's liability, if limitation of liability is successfully sought?

**Part B. A problem of calculation**

On July 25, 1956, in a dense fog off Nantucket Island, the Norwegian-flag liner M/V *Stockholm* collided with the pride of the Italian merchant fleet, the liner M/V *Andrea Doria* of 30,000 tons. *Andrea Doria* was only four years old and was often called the most beautiful passenger liner in the world. She was making her 100th crossing of the Atlantic Ocean and was bound for New York. She was certified to carry 1200 passengers and on this voyage (as on almost all her voyages) she was completely booked. In the collision, 46 passengers and five crew members were killed.

Within an hour of the collision, *Andrea Doria*'s captain realized that his ship could not be saved and ordered Abandon Ship. Passengers were transferred by lifeboat to *Stockholm* and to other vessels that responded to radio calls for help, notably the French liner *Ile de France*. On the day after the collision, July 26,
Andrea Doria capsized and sank in 600 feet of water where she lies to this day. Spectacular aerial photography of the event electrified this nation and Italy, winning a Pulitzer Prize for photographer Harry A. Trask of the Boston Traveller newspaper.

The following questions are not "fill in the blank" questions. You need to add, to your mathematical calculations, enough narrative or explanation so that the instructor can give you partial credit even if you do not arrive at the correct bottom line.

1. What would be Andrea Doria's owner's limit of liability, in dollars, under the original American law, now 46 App. U.S.C. s. 183(a)?

2. In 1934 the American law was amended by inserting what is now 46 App. U.S.C. s. 183(b) with respect to loss of life or bodily injury. What would be Andrea Doria's owner's limit of liability, in dollars, with respect to loss of life or bodily injury under the American law as amended in 1934, i.e. under 46 App. U.S.C. s. 183(b)? Ignore the adjustment for "space occupied by seamen or apprentices" allowed by 46 App. U.S.C. s. 183(c).

3. What would be Andrea Doria's owner's limits of liability, in today's dollars, with respect to passenger loss of life or bodily injury under the 1976 Convention had Andrea Doria sunk in 2006 instead of 1956?

A note on "units of account." To answer the third question, you need to understand "units of account" under the 1976 Convention. Section 1 of Article 8 of the 1976 Convention says that the "unit of account" is equal to the "Special Drawing Right" defined by the International Monetary Fund ("IMF"). (You can ignore sections 2, 3 and 4 of Article 8 which, in 1976, accommo-
dated the countries of the Soviet bloc). The Special Drawing Right was originally defined by the IMF by the gold value of one U.S. dollar. In 1973, when the U.S. stopped exchanging dollars for gold in international payments, the Special Drawing Right was redefined by reference to a basket of currencies, today the euro, the Japanese yen, the pound sterling and the U.S. dollar. The U.S. dollar value of the Special Drawing Right is posted daily on the IMF's website. Today, one Special Drawing Right is equal to U.S. $0.6320 (i.e. 63.2 cents).

QUESTION THREE
(suggested time: forty-five minutes)

Back when you were in law school you had a classmate named Fergus McSwiney who had a talent for getting into unusual trouble, such as the time he kidnapped Professor Sullivan's dogs. Now he is a lawyer with a talent for representing clients who have gotten into unusual trouble. Yesterday morning you received a telephone call from Fergus.

Fergus tells you that he has been consulted by a man named Sam Swordsman who told Fergus a story that sounded like a teenage boy's daydream. It seems that Sam, recently separated from his wife, met a woman named Nora in July of 2006 at high-end singles bar in Boston. They had a couple of drinks. Sam identified himself as a law professor. Nora said that she was a stockbroker. Sam, not a man of subtlety, told Nora that he sought female companionship on those terms that are abbreviated in the dating websites "NSA." Nora, for her part, told Sam that she needed a companion to cruise on her yacht from Boston to Nantucket.

"No strings attached."
Nora explained that she couldn't sail the boat alone. She needed a strong man to handle the sails and (batting her eyes ever so slightly) to protect her from the perils of the sea. When Sam at first didn't respond, Nora suggested that they should take a cab to the boatyard and look over the boat. Nora paid the cab fare.

When Sam saw the boat, "Knotty Nora," he was awestruck. It was a 42' ketch with a full galley and head, a suggestive queen-size bed in the captain's cabin, and a well-stocked wine locker. Sam said he would cruise with Nora.

The cruise lasted seven days. Sam grilled steaks on the fantail, opened the champagne, played the DVDs and, of course, handled the sails as Nora directed. Each day, on multiple occasions, the couple enjoyed sexual activity in varieties and positions that would challenge the imagination of a pornographer.

When the boat docked at Nantucket a man came aboard whom Nora introduced as her husband, William. William thanked Sam for his services and handed him cab fare to Nantucket airport and an air ticket to Boston.

As Sam flew back to Boston he realized that he hadn't spent even one dollar for this, the most amazing sexual experience of his life. He also realized that he didn't know Nora's last name or her address.

Unfortunately, Fergus tells you, there was a Chapter Two.

About two weeks after returning to Boston, Sam came down with flu-like symptoms. At the same time he noticed small red bumps on his penis. He watched, his alarm daily growing, as the bumps
turned into blisters. The blisters broke, leaving itchy painful sores. Upon visiting a doctor, Sam learned that he had newly-acquired genital herpes.

That's where Fergus the lawyer comes in. Sam wants to sue Nora. Fergus, however, is having a hard time formulating a cause of action. He has considered negligence, battery, fraud, misrepresentation, and false imprisonment. None seems to work. Fergus is calling you because he remembers that you took Admiralty and Maritime Law in law school. Fergus wonders if the maritime location of Sam's harm opens up any possibilities under maritime law. He also wonders if maritime law can help cut with the problem of finding and serving Nora, last name and address unknown.

Fergus offers you a one-third share of the contingent fee if you can help him with maritime law and if you will work with him on the maritime aspects of the case. What can you tell Fergus?

**QUESTION FOUR**
(suggested time: forty-five minutes)

During the early morning hours of July 17, 2006, the tug **Bill Belcher** was pushing two barges en route from Tice, Florida, to Boca Grande, Florida, via the Okeechobee waterway. The tug was owned by Belcher Marine Services, Inc. The barges were owned by Norfolk Southern Railway. Each barge carried a cargo owned by the National Aeronautics and Space Administration ("NASA").

At approximately 3:00 A.M. **Bill Belcher**'s bilge alarm sounded. Responding to this alarm, the crew discovered that the tug was rapidly taking on water. Captain Diamond of **Bill Belcher** notified
the Coast Guard. The Coast Guard notified the commercial salvor Sea Tow.

In the minutes that followed the discovery of the damage, Captain Diamond and the crew of Bill Belcher acted quickly. The tug maneuvered the two barges into shallows at the edge of the channel and wedged each barge among mangrove trees. Having secured the barges, Captain Diamond then intentionally ran the tug aground under full power so as to push it as far up the beach as possible.

Sea Tow's first vessel arrived at approximately 4:15 A.M. In all, three Sea Tow vessels would provide the tug with assistance. When Sea Tow first arrived on the scene, Captain Diamond delayed Sea Tow from starting salvage work by asking how much Sea Tow's services would cost. Sea Tow's representative, Captain Donald Robinson, replied, "We'll worry about it later." Hearing this, Captain Diamond told Sea Tow to do whatever was necessary to save the tug. Sea Tow had previously provided Belcher Marine Services with salvage work charging a flat rate of $10,000 per day, as Captain Diamond knew.

Crewmen from three Sea Tow vessels installed nearly a dozen pumps on Bill Belcher to pump water from the tug's flooded engine room. When the two barges drifted off the beach with the change of tide, Sea Tow's vessels responded in a thirty-minute effort that easily pushed the barges back aground. Captain Robinson dove into the engine room under perilous conditions and managed to place a temporary patch of mattresses and timber over the gash that had breached the tug's hull. When the tug was refloated, Sea Tow,
using divers, placed a more permanent exterior patch over the gash. In addition, Sea Tow deployed precautionary oil booms and stood by to render assistance for several hours after Bill Belcher had been patched. In all, Sea Tow was on the scene for thirty-six hours.

Sea Tow sought a salvage award in federal district court. The district court awarded Sea Tow $125,000 for pure voluntary salvage. Part A and Part B of this question will be weighted equally for grading purposes.

**Part A.**

Belcher Marine Services appealed the district court's award claiming: (1) there was no marine peril, and (2) the district court erred in finding the salvage to be voluntary salvage rather than contract salvage. How should the Court of Appeals decide these issues?

**Part B.**

Assume that Belcher Marine Services loses its appeal and therefore owes Sea Tow $125,000. Can Belcher Marine Services recover anything from Norfolk Southern Railway, from NASA, or from both? If so, how much? In this connection, assume that the values of tug, barges and cargo are as follows:

- tug: $2,500,000;
- barges: $100,000 each;
- cargo: $1,000,000.

**END OF EXAMINATION**