# Package Limitation under International Conventions and the Maritime Code of Ethiopia: An Overview

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## 1. Introduction

The commercial transportation of goods from one place to another on board a ship may be effected either through charter party or bill of lading contacts. A charter party generally suits the need for shipping of a large quantity of goods or bulk cargo. On the other hand, bill of lading contracts suit the shipment of goods as general cargo.[170] A charter party regulates the relationship between a ship owner and a charterer while a bill of lading contract binds not only a shipper and ship-owner, that is, the immediate contracting parties, but also the consignee abroad and his assignee, as well as to a certain extent bankers who take up such documents as securities for loans granted to their customers.[171] Since almost all cargo owners invariably insure their cargoes with underwriters, in cases of loss or damage they collect indemnity f4rom the latter and underwriters have the right to subrogate to the rights of the insured. Thus, insurers and reinsurers also have stakes in bills of lading transactions.

The ship has served as the chief means—in prehistory and antiquity—of the carriage of goods and people over great distances and the first Maritime Code—i.e. The Rhodian Law—dates back to 900 B.C.[172] Despite this long history, in the United Kingdom, which is one of the major maritime states with a rich tradition in shipping for example, parliament's first interference with the law relating to sea carriage occurred in the eighteenth century.[173] Since then many laws have been enacted with a view to regulating this branch of business. The Merchant Shipping Act of 1894 and the Carriage of Goods by Sea Act of 1971 of the U.K. and the Harter Act of 1893 and the Act Relating to the Carriage of Goods by Sea of 1936 of the U.S.A. are notable laws enacted in this regard.

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[170] Tomas J. Schoenbaum, Admiralty and Maritime Law, 2nd ed, West Publishing Co., St.Paul, Minn,. (1994), p.,491.

[171] NJJ Gaskell, C. Debattista and R.J. Swatton, Chorley and Giles' Shipping Law, 8th ed., Pitman Publishing, London, (1995), p. 169.

[172] Grant Gilmore and Charles L. Black Jr., The Law of Admiralty. The Foundation Press, Brooklyn, (1957), pp.2 and 3.

[173] Gaskell, et. al., Supra Note 2, p.168.

Given the risky nature of running a ship, i. e. the multitude sea perils that confront a ship under voyage, it is quite common for shipping laws of many countries to accord special privileges to ship-owners. Accordingly, different shipping laws allow a ship owner to limit his liability to persons suffering loss or damage through negligent navigation or management of his ship, usually according to the size of his ship.[174] Furthermore, as a carrier of cargo, the ship and ship-owner are by statute freed from liability for damage to cargo in many situations for which other types of carriers are liable.[175] General average, which is a scheme of risk-sharing, and package limitation, a scheme that entitles a ship-owner to limit his liability to a certain sum of money calculated per package or other units of measurements of goods, are also incorporated in shipping laws of so many countries with a view to encouraging ship-owners engaged in this risky business.

The Maritime Code of Ethiopia, (hereinafter the Code), also accords aqll these benefits to ship-owners. Accordingly, per Articles 80 and the following of the Code, ship-owners are entitled to limit their liability in respect of claims arising from loss of life of, or personal injury to, any person being carrie3d in the ship, and loss of, or damage to, any property on board the ship. The Code also entitles a ship-owner to share sacrifices and expenditures made by way of general average with others, under Article 251 and the following. As far as bill of lading contracts are concerned, ship-owners are exempted from liability for loss or damage to cargo arising or resulting from a number of grounds (Art.197). The type and list of grounds that may lead to the exemption of a ship-owner from liability under the Code are more extensive than those accorded to land or air carriers under the Commercial Code of Ethiopia.[176] Even when a ship-owner cannot be exempted from liability for failure to prove the existence of the different grounds enumerated under Article197, he is entitled to limit his liability for loss of or damage to goods to five hundred Birr per package or other unit normally serving for the calculation of the freight (Article 198). This last legal entitlement is known as "Package Limitation" or according to the Code's naming, "Global Statutory Limitation of Liability."

Package limitation, though an incentive to ship-owners, has failed to serve as a mechanism of a striking a balance between the conflicting interests

[174] Ibid, p. 394.
[175] Gilmore and Black Supra Note 3, p. 663.
[176] Compare Art.197 of the Maritime Code of Ethiopia with Arts. 589-600, (On carriage by land) and Arts. 630-649 (on carriage by air) of the Commercial Code of Ethiopia.

of ship owners on the one hand and cargo-owners, on the other. The major shortcoming of package limitation is its use of a national currency or its substitute, gold, as a basis of limitation. The devaluation of national currencies due to inflation and the introduction of containers as a frequent means of packing cargoes have made the traditional formula of package limitation outdated and disadvantageous to cargo interests. This situation has, therefore, called for the adoption of a new formula with a view to bridging the gap between the two interests. Accordingly, international conventions as well as domestic shipping laws have been amended, time and again, so as to respond to current development. However, the package limitation provided under the Code has not been amended for more than forty years.

This article attempts to shed some light on current international developments in the field and the major shortcomings of the Marine Code in light of these international developments. We shall begin with a brief discussion of the history and development of the law on package limitation in international conventions. This will be followed by a discussion of Ethiopian law and practice on the subject.

## 2. Package Limitation Under International Conventions

### 2.1. The Legislative History of Package Limitation

Sea carriage is by and large international. A ship, though owned by a national of one state, may carry different goods belonging to persons of different nationalities. It may also enter and leave ports of various states for the purpose of loading and unloading cargoes. A contractual relationship based on bills of lading can, therefore, be subject to different laws and thus triggers conflict of laws. As far back as 1882, major shipping nations felt that uniformity of laws may be achieved through multilateral treaties and not through individual or separate acts of states. One of the most contentious issues that demanded uniformity was package limitation.

In addition to conflict of laws issues that may be created as a result of contractual relationships based on bills of lading, there was yet another situation that also called for uniformity of laws internationally. This situation is the imbalance between the bargaining powers of the two parties represented in a given bill of lading. In the words of one author, the situation before uniformity looks as follows:

> The basic contractual liability of the carrier for loss of, or damage to, the goods covered by a bill of lading was substantially eroded during the second half of the nineteenth century. Taking advantage of the current lasissez faire philosophy and favourable market, carriers sought to restrict their liability by the use of exceptions drafted as widely as their bargaining position would allow. So, successful were their efforts in this direction that inevitably they provoked a reaction from shippers, bankers and underwriters who were becoming increasingly dissatisfied with the lack of protection afforded to cargo interests.[177]

The struggle between the interests of the respective parties demanded a mechanism whereby the conflict can be resolved amicably in particular through international agreements. One of the earliest agreements made in this regard was the Liverpool Conference Form Bill of Lading. This form was adopted by the International Law Association at Liverpool in 1882 and promulgated by the New York Produce Exchange, with some amendments, in 1883. One of the Issues settled in the conference was package limitation. Accordingly, the instrument put the limitation of liability at £ 100 per package.[178]

Though the Liverpool Conference Form Bill of Lading was adopted in 1882, it could not bring about the desired uniformity on package limitation. Thus, the quest for uniformity continued and, as a result, the *Comite' Maritime International* (herein after C.M.I), which was originally a Committee of the International Law Association, was formed in 1896 for the purpose of promoting worldwide uniformity of maritime law. The committee's endeavour in search of uniformity as well as the struggle between ship owning and cargo interests eventually culminated in the 1924 Convention for the Unification of Certain Rules Relating to Bills of Lading, otherwise known as, The Hague Rules. This Convention was signed at Brussels on August 25, 1924.

The Convention provided, among others, for: the fixing of package limitation at 100 Pound Sterling per package or unit; non-applicability of the limitation in cases when the nature and value of goods have been declared or

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[177] John F. Wilson, World Shipping Laws, International Conventions, Preface, Carriage by Sea, Oceania Publications Inc., Dobbs Ferry, New York, (1986), P. V.

[178] John C. Moore, The Hamburg Rules, Journal of Maritime Law and commerce, Vol, 9. (1977-1978), p.1.

these have been knowingly mis-stated by the shipper; and the possibility of fixing a greater amount of limitation through the agreement of the parties.[179]

In addition to these, the Convention also provided for the different grounds that may exempt a carrier from liability. Thus, the purposes achieved through the adoption of the Hague Rules are in short, allocation of loss or damage between carriers and shippers, establishing the basic liabilities of the carrier, and prescribing the extent to which this liability could be limited or excluded by private agreement between the parties.[180]

Some writers acclaimed the Convention as successful for being based on commercial practicality. However, through time, it appeared that the convention could not address current problems that cropped up in the 1950s and onwards. The major limitations of this Convention were *inter alia*; the erosion of the value of Pound Sterling and the absence of a clear definition of the term "Package" that reflects the technological development of the time.

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[179] The relevant part of the Convention reads as follows;

Article 4 (5)

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 Pounds Sterling per package or unit or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and interested in the bill of lading.
This declaration if embodied in the bill of lading shall be prima facie evidence but shall be binding or conclusive on the carrier.
By agreement between the carrier, master, or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named. Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-sated by the shipper in the bill of lading.

Article 9
The monetary units mentioned in this convention are to be taken to be gold value.

Those contracting states in which the Pound Sterling is not a monetary unit reserve to themselves the right of translating the sums indicated in this convention in terms of Pound Sterling into terms of their own monetary system in round figures.

The national laws may reserve to the debtor the right of discharging his debt in national currency according to the rate of exchange prevailing on the day of the arrival of the ship at the port of discharge of the goods concerned.

[180] Wilson, Supra Note 8, p.V.

> Over the years, inflation had eroded the value of £ 100 gold, differential rates of inflation had created international disparities, with potential conflict of law problems, and technological developments had increased the size of packages from those, which could be man-handled by two men to the 40-foot container, weighing, with its contents, up to 35 tons. [Thus, consequently raising] the question of what was and what was not a package.[181]

For this and other few reasons, the need to amend the Hague Rules was felt by the business community. Accordingly, the C.M.I. started reviewing the Hague Rules in 1959 at Rijeka, Yugoslavia, and this process culminated in a proposal of amendment. Even though the proposal found acceptance of the plenary conference of the C.M.I. held at Stockholm in June 1963, it was completed at the XII Maritime Diplomatic Conference convened by the Belgian Government in February 1968. The proposal culminated in an act known as "Visby Amendments", after the name of place where it was made in 1963 (i.e. Visby, Gotland).

The Visby Rules, though completed in 1968, came into force in 1977. The Rules have made substantial changes on carrier/shipper relationships in general and package limitation in particular. Accordingly, the £ 100 limitation was substituted by gold that was believed at the time, to be more stable. Moreover, the Rules, among others: expanded the definition of packages so as to include containers: included weight of goods as an alternative method of calculating package limitation; and made clear that the deliberate or reckless act of a carrier that caused damage can be a ground to take away the privilege of invoking package limitation.[182] However, once again, as the dramatic fall of

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[181] Moore, Supra Note 9, p.3

[182] The relevant parts of the Rules wherein major changes were introduced read as follows;

**Article 2.**

Article 4, paragraph 5 shall be deleted and replaced by the following:

a. ...neither the carrier nor the ship shall in any event be liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent Frs. 10,000 per package or unit or Frs. 30 per Kilo of gross weight of the goods lost or damaged, whichever is the higher.

c. Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these package or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.

the value of Pound Sterling made The Hague Rules on package limitation inadequate, so too, the fact that gold lost its monetary functions and no longer had an official price in some countries led to the inadequacy of the Visby Rules.[183] There was thus a consensus among the business community that gold had failed to reflect the actual value of goods and that package limitation should, therefore, be fixed against a new modern unit that is accepted by all.

Apart from the Pound versus gold controversy, a new controversy also started to crop-up in the late 1970s. This controversy focused on, not only the replacement of gold by another unit, but in general on an equitable and balanced relationship between carriers and shippers. The developing countries felt that the Hague Rules unfairly protected the ship-owner, placing too heavy a burden on the shipper.[184] Moreover, the C.M.I. and International Maritime Organization (I.M.O.), which consider themselves as the guardians of the Brussels convention, were seen, in the eyes of the developing countries, sympathetic to traditional maritime states that own the great majority of world ships and therefore, did not suit the former's needs.[185] Thus, a new initiative to revise the old rules was undertaken under the auspices of the United Nations Conferences for Trade and Development (UNCTAD) and the United Nations Commission on International Trade Law (UNCITRAL), which were considered as sympathetic to the needs of developing countries. Accordingly, a new Convention known as the Hamburg Rules was promulgated in 1978, in Hamburg Germany.[186] The new Hamburg Rules have made a substantial and revolutionary, so to say, changes on carrier's liability. One of the major changes introduced by the Hamburg Rules is the replacement of the Franc or

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d. A franc means a unit consisting of 65.5 milligrames of gold of millesimal fineness 900. The date of conversion of the sum awarded into national currencies shall be governed by the law of the court seized of the case.

e. Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

Note. Except for the above, the other relevant provisions of the new legislation are substantially similar to the former.

[183][183] Schoenbaum, Supra Note 1, p. 525.

-The official price of gold was abolished by the Second amendment of the IMF's Article on April 1, 1978.

[184] Gaskell, et al., Supra Note 2, p.321

[185] Schoenbaum, Supra Note 1, p.525

[186] The convention is also known as "United Nations Convention on the Carriage of Goods by Sea, 1978".

gold by other units of account calculated against the SRD (Special Drawing Right) as defined by the IMF (International Monetary Fund).[187]

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[187] The relevant parts of Rules wherein major changes aare introduced read as follows:
**Article 6-Limits of liability**
1.(a) The liability of the carrier for loss resulting from loss of or damage to goods...is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods or damaged, whichever is the higher.

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2. Unit of account means the unit of account mentioned in article 26.

... ... ....

Article 26. Unit of Account

1. The unit of account referred to in article 6 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amount mentioned in article 6 are to be converted into the national currency of a state according to the value of such currency at the date of judgement or the date agreed upon by the parties. The values of a national currency, in terms of Special Drawing Right of a Contracting State which 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, which is not a member of the International Monetary Fund, is to be calculated in a manner determined by that State.

2. Nevertheless, those states which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, or at the ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for this Convention to be applied in their territories shall be fixed as:

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

1. The monetary unit referred to in paragraph 2 of this article corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amounts referred to in paragraph 2 into the national currency is to be made according to the law of the state concerned.
2. The calculation mentioned in the last sentence of paragraph 1 and the conversion mentioned inparagraph 3 of this article is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the real value for the amounts in article 6 as is expressed there in units of account.

Note. Except for these, the relevant provisions of the two Conventions i.e. the Visby amendments and the Hamburg Rules are by and large similar.

Though promulgated in 1978, the Hamburg Rules came into force on November 1, 1992. It was noted above, that the Hamburg Rules were designed to reflect the interests of developing nations. Accordingly, the Convention entered into force by the ratification of 20 states, mostly from Africa. The developed nations, though not interested in being parties to this Convention, did not disregard the need to amend the Hague Visby Rules so as to conform to new developments.[188] Thus, they signed a new treaty known as the Visby Amendments or Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 25 August 1924, as amended by the Protocol of 23 February 1968. The coming into force of the Protocol needed the deposit of five instruments of ratification or accession [Article VII (1)]. The Protocol was signed by ten states on 21 December 1979 and came into force three months after this date. The major purpose of the Protocol was to change the standard of computation of package limitation from gold to another timely and suitable standard, i. e. SRD.[189]

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[188] Note. This observation is made taking into account the respective dates of promulgation of the two conventions, but not the dates of their entry into force.

[189] The relevant provisions of the Protocol wherein major changes were introduced read as follows:

Article II

1. Article 4, paragraph 5, (a) of the Convention is replaced by the following:

a. ...neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is higher.

Note. The other relevant provisions of the two legislation are almost identical. The only major difference is the amount of units to be applied in those countries, which are not members of the IMF and whose laws do not permit the application of the relevant provisions of the Conventions. Accordingly, the counterpart of Article 26 (2) of Hamburg Rules reads in the Protocol as follows:

Nevertheless, a State which is not a member of the International Monetary Fund and whose law

Law does not permit the application of the provisions of the preceding sentences may, at the time

of ratification of the Protocol of 1979 or accession thereto or at any time thereafter, declare that the

limits of liability provided for in this Convention to be applied in its territory shall be fixed as

follows:

i. in respect of the amount of 666.67 units of account mentioned in sub-paragraph (a) of paragraph 5 of this Article, 10,000 monetary units;

ii. in respect of the amount of 2 units of account mentioned is sub-paragraph (a) of paragraph 5 of this Article, 30 monetary units.

### 2.2. Main Features of Package Limitation

Package limitation can be seen from two different vantage points. On the one hand, it is a legally recognized privilege of the carrier, which is designed to save the same, from crippling losses from loss of or damage to goods while in his custody. Thus, had it not been for this legal privilege, a carrier would have been liable for loss of or damage to goods to their full value. On the other hand, package limitation is a restriction on the contractual right of a carrier. Thus, unlike in the old days, a carrier cannot at present insert a clause that reduces his liability below the legal minimum but is at liberty to increase his liability and agree on another maximum liability. Furthermore, this privileges which accord carriers total exemption from liability under specific circumstances. If such specific circumstances are met, carriers need not invoke package limitation for such special privileges make the privilege of package limitation redundant.

Under the Hague Rules, for example, a carrier is exempted from any liability for loss or damage caused due to seventeen specific grounds or perils [Article 4 (2)]. This list of exempted perils is identical to that found in the provisions of Article 197 of the Maritime Code of Ethiopia and the reader is advised to refer to them for a better understanding of the nature of the grounds which entitle such exemptions. Moreover, deviation in saving or attempting to save life and property at sea can exempt a carrier from liability for loss or damage to goods resulting therefrom [Article 4 (4))]. The list of exempted perils is not affected by the amending legislation. Thus, if any one of the grounds listed is proved to be the "proximate" cause of loss or damage, a carrier is totally exempted from liability. A carrier is also not liable where the nature or value of goods has been knowingly mis-stated by the shipper in the bill of lading [Article 4 (5)]. Under these situations, it is of no importance for a carrier to invoke package limitation.

The Hamburg Rules do not contain these excepted perils. Under these Rules, "it is the common understanding that the liability of the carrier...is based on the principle of presumed fault or neglect [and]...as a rule, the burden of proof rests on the carrier..."[190] Thus, if a carrier has taken all measures that

[190] Common understanding adopted by the United Nations Conference on the Carriage of Goods by Sea. According to Article 5 of the Convention the following are the basic liabilities of a carrier:

could reasonably be required to avoid the occurrence and consequence of a loss of or damage to goods, it is totally exempted from liability[191] and it is not required to invoke the privilege of package limitation.

### 2.3. Exceptions to the Privilege of Package Limitation

As indicated earlier, package limitation is a statutory right and can only be exercised upon the conditions and within the limits provided by the law. A carrier may not thus limit its liability under certain circumstances. Major exceptions to the privilege are the following.

Under the Hague Rules, if the nature and value of goods are declared by the shipper before shipment and inserted in the bill of lading, a carrier cannot avail its right to limit its liability [Article 4 (5) and Article 2 (a) of the Hague Visby Rules].[192] In addition to this, a carrier is entitled to waive its right to package limitation. Accordingly, if a carrier agrees with a shipper to increase his liability and to fix another maximum, it is the agreed upon amount that controls, instead of the statutory package limitation [Hague Rules, Article 4 (5) Article 2 (g) of the Hague Visby Rules]. Lastly, a carrier may lose its right to limit its liability if the loss or damage resulting from its act or omission was done with intent to cause damage or recklessly and with knowledge that damage would probably result [Article 2 (e) of the Hague-Visby Rules and Article 8 of the Hamburg Rules].[193]

In relation to bills of lading, the laws of some jurisdictions provide that a carrier may lose his privilege to limit its liability when the shipper has no adequate notice of the limitation by a Clause Paramount in the bill of lading and is not given a fair opportunity to avoid the limitation by declaring excess value and paying extra freight.[194] This is the position in the U.S.A. However, it should be noted that the pertinent law, i. e. COGSA, does not expressly provide for this exception, but this is created by judicial decisions. Moreover,

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

[191] An *a contrario* reading of Article 5.

[192] Similar exceptions are not provided under the Hamburg Rules.

[193] The Hague Rules do not contain exceptions.

[194] Schoenbaum, Supra Note 1, p. 613.

there is a split of opinion on the issue as well as on the methods how a carrier can give this opportunity to a shipper.[195]

### 2.4. Standards of Computation of Package Limitation

#### 2. 4. 1. Units of Account

Under those circumstances wherein a carrier can limit its liability, liability can be limited in the following manner;

a. Under the Hague Rules, the liability of the carrier is limited to 100-Pound Sterling per package or unit or the equivalent of that sum in other currency [Article 4 (5)].
b. Under the Hague-Visby Rules, a carrier's liability is limited to 10,000 Francs per package or unit or 30 Francs per kilo of gross weight of the goods lost or damaged, whichever is the higher. A Franc means a unit consisting of 65.5 milligrammes of gold [Article 2 (a) and (d)].[196]
c. Under the Hamburg Rules, liability is limited to 835 units of account per package or other shipping unit or 2.5 units of account per killogramme of gross weight of the goods lost or damaged, whichever is the higher. The unit of account is the Special Drawing Right (S.D.R.) as defined by the International Monetary Fund (IMF) [Article 6 (a) and 26].
d. Under the 1979 Protocol that amended the Hague-Visby Rules, liability is limited to 666.57 units of account per package or unit or 2 units of account per killogrammes of gross weight of the goods lost or damaged, whichever is higher. The unit of account is SDR, as defined by the IMF [Article 2(a) and (d)].

The legislative history of package limitation shows that the unit of account has passed through many phases. First it was the Pound Sterling, and then came Franc and now it is the SDR. The fact that the SDR is given legal recognition under the two important legal instruments, i. e. the Hamburg Rules and the 1979 Protocol shows that the much-desired uniformity on this

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[195] Ibid. pp. 613and 614. For more details on this particular issue, i. e. "Fair Opportunity", see Michael F. Sturley. The Fair Opportunity Requirement Under COGSA Section 4 (5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act, Journal of Maritime Law and Commerce, Vol. 19, No. 1, January 1988, pp. 1-35, and [part II], Vol. 19 No. 2, April, 1988, pp. 157-206.

[196] The Hague and Hague-Visby Rules on package limitation are no more operative, for they are amended by the 1979 Protocol. See (d), below.

particular issue is achieved at last. Thus, as can be easily understood from the reading of the pertinent provisions of the two instruments, except for the figures, i.e. 835 and 2.5 under the Hamburg Rules and 666.67 and 2 under the 1979 Protocol, one is a verbatim copy of the other. The SDR is, therefore, the single unit of account at present.

SDR is a unit of account determined by the IMF.

> ...The technique since July 1, 1974 has been to relate the value of the SDR to a "basket" of currencies according to which the SDR is equal to a total of fixed
> amount links and arrangements with members, and a computerized set of calculations, the Fund determines the exchange rates of currencies in terms of the SDR for the purpose of its own operations and transactions, and publishes these rates on a daily basis for a growing number of member currencies.[197]

For those states that are members of the IMF, the value of the SDR is equivalent to the rate published by the Fund at the date in question. A non-member state can determine the value of its national currency in terms of the SDR. In this regard "[t]he simplest method that a non-member state may choose is to select the currency of a member of the [IMF] as the reference currency and to value its own currency as published by the Fund."[198] In those non-member states whose laws do not permit the application of the preceding conditions, the unit of account is not SDR but 12,500 monetary units or 10,000 monetary units per package or 37.5 or 30 monetary units per kilogram of gross weight of the goods, whichever is higher. Monetary units mentioned here are of the Hamburg Rules and the 1979 Protocol respectively and a unit corresponds to 65.5 milligrammes of gold. Generally speaking, it can be said that the Hamburg Rules are more shipper friendly than the 1979 Protocol. It should, however, be noted that the business community is well aware of the fact that the SDR, like its predecessors, may fail to reflect the real value of goods in the future. To this effect, the Hamburg Rules provide that in case when there is a significant change in the real value of the SDR and the need to substitute it by another unit arises, a revision conference can be called upon the request of a minimum of one fourth of the contracting states and the pertinent

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[197] Stephen A. Silard, Carriage of the SDR by Sea: The Unit of Account of the Hamburg Rules, Journal of Maritime Law and Commerce, Vol. 9, (1977-1978), p. 18
[198] Ibid, p. 33

provisions can be amended by a two-thirds majority of the participating states (Article 33).

### 3. 4. 2. Package and Other Units of Measurement

When a carrier is liable for the loss of or damage to goods, its liability or the amount of money that it should pay is dependent on the number of packages or units or weight of the goods lost or damaged. In this regard, the Hamburg Rules provide for 835 SDR per package or other shipping unit or 2.5 SDR per kilogram of gross weight of the goods lost or damaged, whichever is higher. The 1979 Protocol, on the other hand, provides for 666.67 SDR per package or unit or 2 SDR per killogramme of gross weight of the goods lost or damaged, whichever is higher. Thus, the liability of a carrier depends on the nature in which the goods were transported, i. e. in packages or otherwise.

The definition of the term "package" is a flexible one. It may be defined as:

> Any preparation of a cargo item for transportation that facilitates handling but does not necessarily conceal or completely enclose the goods. This is broad enough to include a wide variety of methods of consolidation of goods ranging from boxed item to materials tied together or lashed to skids or pallets; it would necessarily exclude certain types of cargoes such as loose liquids, bulk cargo, and fish.[199]

Thus, only cargo that is shipped un-enclosed and fully exposed is not a "package."[200] The other multipliers of the SDR are: "units" or "shipping units" and "weight" of the goods lost or damaged.

For a long time, it has been debatable whether or not a container is a "package" However, at present, this is no more a contentious issue for the two international instruments earlier mentioned have solved it by the inclusion of clear provisions in their texts. Accordingly, where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units and, in the absence of this,

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[199] Schoenbaum, Supra Note 1 above, p. 606.
[200] Ibid, p. 605

such article of transport shall be considered the package or unit (Hague-Visby Rules, Article 2 (c) and Hamburg Rules, Article 6 (2) (a). [201] As far as containerized cargoes are concerned, therefore, what matters is the figure indicated under the column assigned for number of packages. If the figure indicates the number of packages packed in a container or the unit of items (say, for example, 10 packages of radios or two TV sets) the applicable unit of SDR shall be multiplied by the number of packages or units indicated in the bill of lading. Where such figures are not indicated and the figure mentioned is the number of containers (for example, "one or two containers" only) then the unit of SDR shall be multiplied by the number of containers. It should, however, be noted that even when goods are packed in containers or other packages, a carrier can be obliged to pay a sum of the fixed SDR multiplied by the weight of the goods lost or damaged, provided that this is advantageous to the shipper or consignee.

## 3. Package Limitation In Ethiopia

### 3.1. Sources of the Law

The Maritime Code of Ethiopia was drafted either by Professor Jean Escarra of the University of Paris or Professor Jauffret of the University of Aix-Marseilles or most probably by both. Prof. Escarra was originally commissioned to draft the Commercial Code of Ethiopia and Prof. Jauffret took over the task upon his death.

Of the source of the Code, even less is known. The *Minutes* of the Codification Commission entrusted with the task were either not recorded or, even if recorded, were either lost or their whereabouts unknown.[202] To date, the only information we have on the Code as a whole are occasional references to it made, in passing, in the course of the discussions on the draft Commercial Code, and the references as to source found in these are too sketchy to be of any help.[203] Nonetheless, the following general remarks may safely be made.

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[201] See, footnote 13, supra.

[202] In 1954, the then reigning monarch, Emperor Haile Selassie, established a Codification Commission charging it with the task of preparing five Codes, these being: the Penal Code, the Civil Code, the Commercial Code, the Maritime Code, and the Code Judiciare. The Commission comprised of both foreign and local jurists.

[203] For more information, see, Peter Winship, Background Documents of the Ethiopian Commercial Code of 1960, H.S. I.U., Faculty of Law, (Unpublished), (1972), pp. 7,8,84.

The Code deals with many aspects of the shipping business and some of these are: Maritime Liens and Mortgage of a Ship; Limitation of Liability; Maritime Employment; Charter Party Agreement; Contract of Carriage Supported by a Bill of Lading; Maritime Collisions, Assistance and Salvage; General Average and Marine Insurance. A closer look at Title VI of the Code, which deals with Participation in General average, evinces that this part of the Code is by and large taken from the York-Antwerp Rules.[204] Articles 180-209 of the Code, which deal with bill of lading contracts are most probably taken from the Hague Rules, for the provisions of the former are very similar to the latter than any other similar law. Moreover, it helps to note that some articles of the Code and the Rules are identical. A case in point is Article 197 of the Code and Article 2 of the Rules, which deal with grounds of exemption from liability. Another case in point is Article 200 of the Code and 6 of the Rules, which deal with shipment of dangerous goods. Furthermore, as shown above, The Hague Ruels, before being amended by The Hague-Visby Rules in 1968, was the prominent convention in 1960 when the Maritime Code was enacted.

### 3.2. The Provisions on Package Limitation

The pertinent provisions of the Code on package limitation read as follows:

Article 198, Global Statutory Limitation of Liability.

1) In respect of loss or damage to goods, the liability of the carrier shall not exceed one thousand Ethiopian dollars.

2) The statutory limitation shall be determined by package, and in respect of goods loaded in bulk, on the basis of the unit normally srving for the calculation of freight.

3) The statutory limitation may not be setup against the shipper where the nature and value of the goods have been declared by the shipper before shipment, and such declaration has been interested in the bill of lading.[205]

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[204] The first york rules were adopted in 1864. These were revised in 1877 at Antwerp. The York-Antwerp Rules were first adopted by the International Law Association in 1880, then revised in 1924, 1949 and again in 1974. The probable source of the Ethiopian laws of General Average can be the 1949 Revision.

[205] The parallel provisions of the Hamburg Rules read as follows:

It should be noted at the outset that there is a discrepancy between the two versions of the Code, i. e. the Amharic and English, and that the former, as the official language, prevails over the latter. The Amharic version puts the extent of liability at five hundred Ethiopian dollars instead of one thousand Ethiopian dollars as in the English version. Whether or not this is a deliberate act or a slip of the pen is unknown for, as mentioned earlier, background materials are not available. One may, however, add that this particular fact is not included as errata in the Corrigendum section of the English version of the Code.

The provisions of the Hague Rules and the Code, quoted above, are more or less similar except for minor differences. Accordingly, apart from the difference in the amount of package limitation mentioned earlier, the Hague Rules provide that the sum shall be calculated in terms of the number of packages or "units" while the Code provides that the sum fixed should be calculated in terms of packages or "in respect of goods loaded in bulk, on the basis of the unit normally serving for the calculation of freight." Given these differences and in particular the difference in the amount of money provided under the two laws, it appears that Article 198 of the Code is much closer to Carriage of Goods by Sea Act (COGSA) of the USA than the Hague Rules. Section 1304 (5) of COGSA reads as follows:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper and inserted in the bill of lading...(underlines added).

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**Hague Rules-Article 4 (5)**

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 Pound Sterling per package or unit or the equivalent of that sum in other currency, unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading.

The figures mentioned under Article 198 of the Code and the COGSA are identical, i.e. 500[206]. Moreover, the expression used under the Code, i.e. "...in respect of goods loaded in bulk", is similar to "goods not shipped in packages" (COGSA's expression). It can also be maintained that the expression "on the basis of the unit normally serving for the calculation of freight" found in the Code is not different from the expression "customary freight unit" found in COGSA.

### 3.3. Case Reports and Practice on the Subject

The is no law reporting system in Ethiopia and it would thus be difficult to relate the prevailing practice in any one field of study with some certainty. Nonetheless, it is believed that the following three cases rendered by the higher courts of the country at different periods coupled with the practice of the only national carrier of the country, the Ethiopian Shipping Lines, will help shed on the prevailing trends and attitudes on the subject. We shall discuss these in turn.

#### 3.3.1. Cases[207]

**Case One**

In a case litigated at the High Court of Addis Ababa[208], the plaintiff claimed that the contents of five "cartons" of goods that delivered to the carrier for transportation were found missing upon arrival at the port of destination, i.e. Assab (the former port of Ethiopia). Accordingly, he claimed 12,000 Birr, being the cost of items lost during voyage. The defendant argued that it is not liable for the loss as the goods were carried on deck and, alternatively, if found liable for the loss, that its liability is limited to a maximum of 200 Pound Sterling as per the provisions of the bill of lading. The court ruled that loss other than that due to common elements of the sea, such as salty water, cannot exempt a carrier from liability for the loss of goods carried on deck and that the

[206] Note. COGSA has set the limit at 500 USD for the reason that in 1925, the year the United States signed the Hague Rules Convention, 100 Pound Sterling had an average value of 482.89 USD and Art.9 of the Convention permits contracting states to translate Article 4(5)s 100-Pound Sterling into terms of their own monetary system in round figures. Michael, F. Sturley, Supra Note 29. at p. 177, Foot Notes, No. 321 and 322.

[207] The decisions are written in Amharic and only the relevant parts are translated and presented.

[208] Girma Kebede v Ethiopian Shipping Lines Corporation et. al., Civil File No. 689/78, Ginbot 11, 1981 Ethiopian calendar or May, 1989 G.C.

defendant should pay a total of 2,500 Birr being the cost of the missing goods, i.e. 500 Birr for each carton.

**Case Two**

In another case litigated at the Zonal Court of Region 14 (Addis Ababa) Administrative Region[209], the plaintiff claimed the payment of 40,000 Birr, being cost of a car that he delivered to the defendant for transportation and was lost after arrival at the port of destination, i. e. Assab. The defendant, Ethiopian Shipping Lines, argued that it is not liable for the loss as the car had arrived at the port of discharge safely and was handed over to the port authority and that the war situation then prevailing at the port had prevented its final delivery to the plaintiff. It, alternatively, further argued that, if at all liable, its liability is limited to 500 Birr or 100-Pound Sterling. The court ruled that the defendant has failed to discharge its contractual obligation to deliver the car to the plaintiff or, in lieu thereof, to a responsible body customarily employed for safe-keeping and delivery of goods in transit; that it cannot invoke the war situation as a defence as, by his own account, the car was safely unloaded and delivered to the port authorities; and that, accordingly, it is liable to the plaintiff for loss of goods shipped. It fixed the amount of compensation at the statutory limitation of 500 Birr since the plaintiff has not specified the nature and value of the property shipped in the bill of lading. Both parties appealed from this decision and the appellate court confirmed the lower court's ruling on the amount of compensation. It is, however, interesting to note that the appellate court reasoned in passing the Art.198(2) of the Code applies to goods shipped enclosed in "parcels" or "packages" and thus concealed but not to such goods as motor vehicles which are not so consolidated.

**Case Three**

Yet in another case litigated before the Central Arbitration Committee[210], the plaintiff, an insurer, claimed for refund of 3,804.61 Birr that it paid to its clients as a result of loss of goods on voyage. The plaintiff argued that the bills

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[209] Melese Asfaw v Ethiopian Shipping Lines Corporation, Civil File No. 1709/1985, Ginbot 9, 1985, Ethiopian Calendar (E.C.). Appeal-Civil File No. 1772/88, Sene 8, 1992 E.C. or May 2000 G.C.

[210] Ethiopian Insurance Corporation v Ethiopian Shipping Lines Corporation, File No.71/77. The Central Arbitration Committee was a tribunal established to resolve disputes between administrative organs of the state. It is now defunct.

of lading issued for the goods clearly provide that the Hague Rules apply and that liability is determined as follows:

> -If the Hague Rules are applicable in the country of port of shipment, the liability will be determined according to the Rules.
> -If the Hague Rules are not applicable in the country of port of shipment, liability will be determined according to the local laws of the country.
> -If there is no law that governs the situation in the country, the Hague Rules shall apply.

Accordingly, since two of the cargoes were shipped from UK and other from West Germany, and the package limitations under the laws of these countries are 471.69 Pound Sterling and 1250 Duetch mark, respectively plaintiff claimed that the defendant is liable to compensate him to the full amount paid by him to his clients. The defendant contended that both The Hague Rules and the Ethiopian law apply to cases where the amount of liability is not specified in the bill of lading and that, in the present case, the bill of lading issued limits its liability to 100 Pound Sterling per package for which sum alone he can be held liable. The Committee ruled that the provisions in the bills of lading are controlling and accordingly fixed the liability of the defendant to 100-Pound Sterling per package.

### 3.3.1.1 Comments on Cases

#### 3.3.1.1.1 Units of Measurements

Of the three cases summarized above, it is only in the case number *one* where it is expressly mentioned that the lost items were consolidated in package (i.e. cartons). In case number *two*, it is nowhere mentioned that the car was enclosed in a given package. Given the practice, items such as cars are usually shipped outside of packages. In case number *three*, however, though nothing was mentioned about the nature and type of goods, it appears that the parties have agreed that the goods were in packages.

Given these facts, in case number two, the unit of measurement of liability should not have been packages but the alternative provided under Article 198 (2), i. e. "the unit normally serving for the calculation of the freight." In this regard, the alternative unit is no different from "customary freight unit", a phrase frequently found in other laws. As stated by Schoenbaum:

> "Customary freight unit applies for goods that are not shipped in packages. This limit applies to bulk cargo as well as machinery and equipment shipped uncrated or unpackaged. It is settled that the phrase "customary freight unit" means the unit by which the freight was calculated in particular case. The customary freight unit to be applicable need not have any relationship to the value of the article involved. It has been calculated by measures such as weight, cubic feet, and by the piece involved.[211]

Article 12 of the bills of lading issued by the Ethiopian Shipping Lines indicates that freight can be calculated on the basis of weight, measurement and value of goods. Thus, whether or not the alternative method of calculation is advantageous to the shipper, further inquiry should have been made into the basis on which freight was calculated and the amount of liability fixed accordingly.

### 3.3.1.1.2. The Amount of Liability

In case number one, the carrier argued that its liability to Pound Sterling 200. In case number two, the carrier argued that its liability is limited to 500 Birr or Pound Sterling 100 and in case number three 100-Pound Sterling only. The courts ruled that in the first two cases the carrier's liability is limited to 500 Birr per package, and in the third case Pound Sterling 100.

In case number one, it is not clear from the facts whether the carrier was contending that its aggregate liability cannot, in any case irrespective of the number of packages, exceed 200-Pound Sterling or that its liability is limited to 200-Pound Sterling for each package. First, if the carrier was arguing that its aggregate liability could not in any case exceed 200-Pound Sterling, this is not legally tenable for the Code nowhere authorizes a carrier to do so. What is actually provided under Article 198 of the Code is the minimum amount of liability per package or other units. Moreover, the carrier has cited Article 24 of its bill of lading as its authority. However, assuming that the bill of lading issued at the pertinent time contained such a provision,[212] this provision is void for it cannot contradict the minimum limit provided by law. Second, if on the other hand, the carrier was arguing that its liability is limited

[211] Schoenbaum, Supra Note 1, p. 612.

[212] Bills of Lading currently issued by the Ethiopian Shipping Lines do not contain similar provisions.

to Pound Sterling 200 per package, then the plaintiff should have been awarded this sum and not 500 Birr per package as was the case. In this regard Article 206 (1) of the Code provides the following.

> Article 206-Carrier may increase his liability
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> (1) A carrier may surrender in whole or in part all or any of his rights and immunities, or increase any of his responsibilities and liabilities under this Section provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

Moreover, in case number one, although the carrier did not raise this matter in his defence, it is worthy of note that the plaintiff did not allege that all the items packed in the five cartons were lost upon arrival. He claimed that only some items out of the total consignment were lost. The carrier would be liable for the payment of 500 Birr per package only when the whole package is lost but not when only parts of its contents are missing. This will reduce the liability of the carrier proportionately.

In case number two, as the carrier has admitted that its liability is limited to 500 Birr or 100 Pound Sterling, it is not clear why the court opted to award the plaintiff 500 Birr only and not 100-Pound Sterling as admitted. The exchange rate of the Pound Sterling is currently around 16.05[213] Birr to the Pound (£1=16.05 Birr) and, even at the time of suit, the plaintiff would have been entitled to a much higher sum had defendant's liability been determined in Pound Sterling. Similarly, it is not clear why, in the same case, the appellate court affirmed the decision of the lower court as to the amount of liability while at the same time holding that sub-article (2) of Article 198 is not applicable to the case.

### 3.3.2. Shipping Practice

Bills of lading issued by the Ethiopian Shipping Lines contain a set of provisions pertaining to package limitation. These provisions are printed in fine letters and found at the back of each bill.[214] The relevant laws applicable

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[213] The Ethiopian Herald, Vol. LXII. No. 254, July 3, 2006

[214] Pertinent provisions of the Bills read in part as follows:
Article 5. Carriers Responsibility, (a) Port to Port Shipment

to package limitation under these provisions are four. These are: local laws, The Hague Rules, The Visby Amendments, and the Carriage of Goods by Sea Act 1936 of the U.S.A. Given the level of unification attained at present on the issue of package limitation, it may be asked why the bills' provisions cite four different laws. Moreover, given the fact that the Hague Rules are amended by the Visby Protocols, it may again asked why The Hague Rules are repeatedly cited as basis of liability. The only possible explanation that may be offered is that this is probably done to accommodate the interests of those countries that are parties to one or the other of these conventions as well as those which are not parties to any of the conventions. As we saw earlier in relation to case number *three*, under the bills of lading provisions of the Ethiopian Shipping Lines: (a) if the Hague Rules are applicable in the country of port of shipment, liability will be determined according to these rules; (b) if the Hague Rules are not applicable, liability will be determined according to the local laws of the country of port of shipment; (c) if there is no law governing the case in the coutry of shipment, the Hague Rules apply.

**Conclusion**

Package limitation is a legal mechanism that is designed to save ship-owners from crippling losses resulting from loss of or damage to goods that may arise out of the different hazards of the sea. Thus, unlike other instances wherein a

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i.[When goods are lost or damaged while in the actual custody of the carrier, i. e. from loading to discharge], the liability shall be determined in accordance with any national law making the Hague Rules or the Hague Rules as amended by the Protocol signed at Brussels on 23 February 1968 (Hague/Visby Rules) compulsorily applicable or, if there be no such national law in accordance with the Hague Rules contained in the International Convention for the Unification of Certain Rules Relating to Bills of Lading dated 25th August 1924... Where the exemption contained in the previous sentence may not be valid, the carriers liability shall be governed during the periods of the Carrier actual or constructive possession before loading on to and after discharge from the sea going vessel by the provisions of the Carriage of Goods by Sea Act 1936 of the USA which shall be deemed to be incorporated herein and to apply to such periods.

General provisions (applicable to both port to port and combined transport).

v. Ad valorem declaration of Value.

The liability of the carrier, if any shall not exceed the limits prescribed in any national law or international conventions unless the nature and value of the goods has been declared by the merchant before shipment and inserted in the Bill of Lading and extra freight paid on such declared value if required.

vi. Hague Rules Limitation

Subject to (v) above, whenever Hague Rules are applicable, otherwise than by national law, in determining the liability of a carrier, the liability shall no event exceed one hundred Pound Sterling per package or unit.

contracting party can be made liable to the full extent of the loss or damage suffered, a ship-owner is not required to compensate the owner of goods lost or damage to the full extent. A ship-owner is, therefore, entitled to limit his liability to a certain unit of exchange to be multiplied by the number of packages or other units of measurement. The legislative history of the law of package limitation clearly shows that it had been difficult to fix the amount of liability against a certain currency or other unit of exchange. Accordingly, at the international level, the liability had, at different periods, been fixed against Pound Sterling, gold and, currently, the SDR. The major reason behind the shift in the unit of exchange is the failure on the part of the Pound Sterling as well as gold to refer the actual value of goods, which change through time. For the present, at least, the SDR is found to be a convenient unit of exchange.

The package limitation provide under Article 198 of the Code is 500 Birr per package or other units of measurements. The Code as well as the pertinent article, i.e. Article 198, has not been amended for the past forty-two years. However, the Birr has been devalued in the course of the last forty-two years and the amount fixed under Article 198 of the Code is no more realistic. Thus, the devaluation of the currency has favored ship-owners and unduly disfavoured cargo owners. Currently, the exchange rates of Birr against USD, Pound Sterling and SDR are 8.86, 16.05 and 12.86, respectively.[215] Taking the present exchange rate, the amount fixed under Article 198 of the Code is roughly equivalent to, 56.43 USD, 31.15-Pound Sterling or 38.88 SDR. Given the level of uniformity achieved through relevant international conventions, the limit of liability would have been 835 SDR under the Hamburg Rules or 666.67 S DR under the 1979 Protocol.[216] However, since Ethiopia is not a party to any one of the conventions to date, an Ethiopian Shipper/consignee cannot invoke this privilege nor can a carrier be bound by these limits. A shipper would thus only be entitled to a compensation of 4.66% or 5.71% of what he would be entitled to under The Hamburg Rules and the 1979 Protocol limits liability respectively.

[215] Ibid.

[216] Had Ethiopia been a party of the Hamburg Rules or Hague Rules (as amended in 1979), a shipper/consignee would have been entitled to Birr 10,738.10 or 8753.38, respectively, for a package.