CARRIAGE OF GOODS IN SWISS MARITIME LAW*

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Although landlocked, Switzerland realised early on that having its own flag would be beneficial for the country to secure trade in times of peace and especially in times of war. Besides the fleet, it was important to have its own legislation. Maritime navigation is codified in the Federal Act on Maritime Navigation under the Swiss Flag (MNA). The Act takes over the Hague Rules in a modified form, as the Rules themselves allow, and the Visby Protocol. In a conflict of laws between the Hague Rules and the MNA, the national law has priority. The MNA regulates the flag legislation and the registration of ships, the organisation of the relevant authorities, the operation of maritime shipping, the contracts for the use of a seagoing vessel, and many other issues in this context. It will always apply if Swiss law is applicable under the rules of the Federal Code on Private International Law (CPIL). Swiss federal legislation applies exclusively on Swiss seagoing vessels on the high seas. In territorial waters, it also applies on board Swiss seagoing vessels, unless the coastal State declares its legislation to be mandatory. Insofar as the MNA contains no special provisions, the Swiss Code of Obligations applies to contracts for the use of a seagoing ship. The MNA regulates the charter parties as well. However, this is a sui generis *contract and differs from both the contract of carriage and the contract on mandate. Currently, Swiss authorities are reconsidering the conditions for registering ships. Their endeavours will hopefully lead to the flagging-in into the Swiss registry again, which will expand the influence of Swiss maritime legislation.*

***Keywords**: Swiss flag; carriage of goods by sea; Federal Act on Maritime Navigation under the Swiss Flag (MNA); bill of lading; liability of the sea carrier; applicable law.*

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* The author covered the topic of this article in a similar way in Chapter 7 of the book Polić Foglar, V., *The Carriage of Goods in Swiss Law*, Stämpfli, Bern, 2022, pp. 229-260.

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1. INTRODUCTION

For insiders, it is no surprise that Switzerland, although landlocked, plays a substantial role in world shipping. Or, more precisely, Swiss companies and citizens are present in large numbers in merchant shipping as shipowners or ship operators. However, their ships are registered in foreign, mostly "open registers". But Swiss companies used to have about 30 seagoing vessels flying the Swiss flag and applying Swiss laws. Nowadays, that number has dropped. However, the conditions for the registration of ships are being reconsidered, hoping that the number of Swiss-registered ships will increase again.

Maritime navigation under the Swiss flag is regulated by the Federal Act on Maritime Navigation under the Swiss Flag (MNA) and is governed by Swiss legislation, insofar as this is compatible with the principles of international law. Concerning the contract of carriage of goods by sea, the Act took over the Hague Rules in a modified form, as the Rules themselves allow.

This paper outlines the main features of the provisions on the carriage of goods, as contained in the MNA, such as the rights and duties of the shipper and the carrier, the definition of and the three types of bill of lading and their legal effects, and attitudes concerning letters of guarantee. Special attention is paid to the liability of the sea carrier, to the exoneration and the limitation of its liability, as well as to the loss of the right to limit liability. Questions concerning the assertion of rights are explained, such as burden of proof, reservations and the time-bar. Some differences between the MNA and the Hague Rules are also pointed out.

2. THE IMPORTANCE OF THE MERCHANT MARINE FOR LANDLOCKED SWITZERLAND

Although situated in the centre of Europe and landlocked,[1] Switzerland realised early on that having its own flag would be beneficial for the country to secure trade

[1] Although landlocked, Switzerland has access to the sea via the Rhine River. The stretch of navigable waterway on Swiss territory is rather short – it extends for about 20 km (12 miles) between Rheinfelden and the border with France and Germany at Basel-Kleinhüningen. Cargo traffic to or from the North Sea is of utmost importance to the national economy as over 10 percent of all Swiss foreign trade is transacted via the Rhine. The Swiss Rhine ports handle about seven million tons of goods and about 100,000 containers annually, https://www.bav.admin.ch/bav/de/home/verkehrsmittel/schiff/rheinschifffahrt.html (20 November 2021).

and national supplies, especially in times of war.[2] Having its own merchant fleet promotes the country's economic independence and political stability.

The first attempts to grant Swiss ships the use of the Swiss flag at sea date from 1864. The demands came first from Swiss merchants who increasingly went to the seaports of Europe and conducted lively trade from there. Some of them were shipowners themselves and maintained small merchant fleets. However, these Swiss ships still sailed under the flag of their host state.[3] Another group proposed carrying the increasing number of Swiss emigrants to North America on ships under the Swiss flag and to enable them to make a humane crossing to the emigration destinations with its own passenger fleet.[4] There were also a considerable number of Swiss nationals among the crews of merchant ships of many nations, of which some even managed to attain the status of officer or captain.[5] The Swiss flag would grant Swiss trade almost absolute security, as it is very unlikely for a neutral country to become involved in wars. Foreign ships cannot be relied on as a situation can easily develop where there are almost no neutral ships left and where Swiss trade becomes greatly compromised. The Federal Assembly authorised the Federal Council to grant Swiss ships the use of the Swiss flag on the seas. However, this authorisation failed, mostly due to the resistance of some maritime powers.[6]

World War I brought serious disruptions to national supplies and an immense increase in freight rates, which caused a huge increase in market prices. The lack of its own merchant ships made it clear to Switzerland how strategically important its own maritime fleet would be. Chartering foreign ships could not resolve the situation favourably, also due to the lack of people familiar with maritime matters.[7] Just for Switzerland to have a reasonable guarantee that it would be able to maintain its supplies in the event of international entanglements, it must ensure access to the necessary shipping space under the Swiss flag in peacetime.[8]

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2 *Official Bulletin of the Swiss Federal Assembly*, Dispatch and Draft Bill, 22 February 1952 (BBI I, 253), General Report, 18 September 1952, p. 514. In that year, it showed how the consequences of the German-Danish War had become inconvenient and detrimental to Swiss maritime trade. A series of petitions from Swiss merchants in Trieste, Smyrna and Petersburg bore witness even then to how severely a country without its own maritime fleet could be affected in times of war.

3 Von Ziegler, A., Helvetia und das Meer, *Transportrecht*, 2007, p. 432 and references.

4 *Ibid*.

5 http://www.test.swiss-ships.ch/startmulitiling/startframe_e.html (22 November 2021).

6 *Official Bulletin*, *op. cit.;* von Ziegler, A., Helvetia…, p. 432 and references.

7 *Official Bulletin, op. cit.*

8 *Official Bulletin*, *op. cit.*, p. 515.

Nevertheless, during World War II, Switzerland continued to charter foreign flag ships.[9] But the endeavours to obtain its own flag continued. In order to succeed, two things were necessary. Besides the ship space that had to be procured, a Swiss maritime law had to be passed.[10] From the war to the present day, the Swiss fleet has gone through various periods. In its best days, it had 37 ships. Currently there are 18 seagoing freight vessels registered in Switzerland.[11] There are also numerous shipping companies based in Switzerland which own or manage seagoing vessels flying either the Swiss or a foreign flag.[12]

3. THE FEDERAL ACT ON MARITIME NAVIGATION UNDER THE SWISS FLAG (MNA) AND THE HAGUE-VISBY RULES (HVR)

Swiss legislation on navigation on the sea dates to the time of the Second World War.[13] In just one month, the Federal Decree on Maritime Navigation under the Swiss Flag was drafted and adopted on 9 April 1941.[14] This Law took over the Hague Rules[15] word for word, without change or adjustment.[16]

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[9] They were mostly flying Greek, Spanish, and Portuguese flags, but some also the Yugoslav flag – the "Dubac", with the port of registry of Dubrovnik, "Ivan", registered at Milna, as well as "Jurko Topić" and "Sud" registered at Sušak (Rijeka), http://www.test.swiss-ships.ch/startmulitiling/startframe_e.html (22 November 2021).

[10] *Official Bulletin*, *op. cit.*, p. 515. See also von Ziegler, A., Helvetia…, p. 432 *et seq*.

[11] https://www.bfs.admin.ch/bfs/de/home/statistiken/mobilitaet-verkehr/verkehrsinfrastruktur-fahrzeuge/fahrzeuge/luft-schiene-seilbahnen-schiffe.html (20 November 2021). The Swiss merchant marine is supervised by the Swiss Maritime Navigation Office in Basel (in German: Schweizerisches Seeschifffahrtsamt SSA; in French: Office suisse de la navigation maritime OSNM; in Italian: Ufficio svizzero della navigazione marittima (USNM)), www.eda.admin.ch/smno/de/home.html (20 November 2021).

[12] http://www.test.swiss-ships.ch/startmulitiling/startframe_e.html (20 November 2021).

[13] *Official Bulletin*, *op. cit.*, p. 515. See also von Ziegler, A., Helvetia…, p. 432.

[14] Federal Decree of 9 April 1941 on Maritime Navigation under the Swiss Flag, *Official Bulletin*, *op. cit.*, p. 514.

[15] The International Convention for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules, HR), concluded in Brussels on 25 August 1924. Text in 120 LNTS 155, in Switzerland in German and in French SR 0.747.354.11, www.fedlex.admin.ch/eli/cc/1954/758_776_672/de (24 November 2021). The Rules entered into force on 2 June 1931. The Convention was prepared by the Comité Maritime International. The original text is in French, although it was first drafted in English, so that very often both versions are used for interpretation.

[16] Müller, W., Champ d'application de la Convention Internationale pour l'Unification de Certaines Règles en Matière de Connaissement du 25 août 1924 suivant la législation en Suisse, *Droit Maritime Français*, 1960, p. 634. See also von Ziegler, A., *Haftungsgrundlage*

Maritime navigation under the Swiss flag is currently codified in the Federal Act on Maritime Navigation under the Swiss Flag (MNA)[17] and governed by Swiss legislation, insofar as this is compatible with the principles of international law.[18] Swiss seagoing ships are obliged to fly the Swiss flag, and all others are not allowed to do so.[19] The Swiss maritime law also applies to inland navigation on waters that connect Switzerland with the sea,[20] i.e., for navigation on the River Rhine.

The MNA regulates the flag legislation and the registration of ships,[21] the organisation of the relevant authorities, the operation of maritime shipping, contracts for the use of a seagoing vessel, and many other issues in this context. In the Fourth Section of the Fifth Title, Contract of Carriage by Sea, the Act regulates, among other things, the obligations and liability of the sea carrier and the issue of the bill of lading. The Act takes over the Hague Rules, which are considered complicated and confusing, but not contradictory, in a modified form,[22] as the Rules themselves allow. The Rules differed from their Anglo-American counterparts and were adapted to the continental European legal tradition.[23]

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im internationalen Seefrachtrecht, Schulthess Verlag, Baden-Baden / Zürich, 2002, No. 99, p. 57. The Hague Rules apply to contracts for the carriage of goods by sea. They apply to a large part of today's cross-border maritime transport. For the first time, these Rules have established the mandatory liability of the carrier towards the shipper/consignor.

17 In German: Bundesgesetz über die Seeschifffahrt unter der Schweizer Flagge (SSG); in French: Loi fédérale sur la navigation maritime sous pavillon suisse; in Italian: Legge federale sulla navigazione marittima sotto bandiera svizzera, SR 747.30, AS 1956 1305, adopted on 23 September 1953, entered into force on 1 January 1957. Text at www.fedlex.admin.ch/eli/cc/1956/1305_1395_1407/de (24 November 2021). The Maritime Ordinance (SSV) was adopted on 20 November 1956 and entered into force on 1 January 1957 (SR 747.301).

18 Art. 1 MNA.

19 Art. 3 MNA. Swiss seagoing vessels are those entered in the Register of Swiss Seagoing Vessels, Art. 2 MNA.

20 Art. 125 (1) MNA. Concerning the transport of goods by vessel, three areas in Switzerland should be distinguished: navigation on lakes and navigable inland canals; navigation on the Rhine River; and ocean shipping. The regulation of the carriage of goods is different when it concerns the navigable waters connecting Switzerland to the sea as compared to navigation on domestic rivers, canals, and lakes. Switzerland used to have a reasonably sized river fleet along with industries linked to it, such as the insurance of ships' hulls or special homes and schools for the children of crew members. Currently there are 118 cargo vessels plying Switzerland's lakes, and 50 Rhine cargo ships.

21 The only port of registration for Swiss seagoing vessels is Basel.

22 Müller, W., Champ…, p. 634; von Ziegler, A., *Schadenersatz im Internationalen Seefrachtrecht*, Dissertation, Nomos Verlag Baden-Baden / Zürich, 1989, p. 60.

23 Von Ziegler, A., *Schadenersatz…*, p. 61; von Ziegler, A., *Haftungsgrundlage…*, No. 100, p. 58.

Switzerland also formally acceded to the Hague Rules. They were approved by the Swiss Federal Assembly on 17 March 1954. The Swiss instrument of accession was deposited on 28 May 1954, so that the Rules entered into force for Switzerland on 28 November 1954.

The Protocol of Signature to the Hague Rules provides, among other things, that the High Contracting Parties may give effect to the Convention (the Brussels Convention, as the Hague Rules are officially named) either by giving it the force of law or by including the rules adopted under the Convention in their national legislation in a form appropriate to that legislation. The Swiss Confederation opted for the second of the alternatives, thus depriving the Hague Rules of direct applicability under Swiss law.[24]

Already at the end of 1965, the MNA was revised by incorporating some parts of the draft Visby Protocol of 1968.[25] With the amendment of 1987, the provisions of the Hague-Visby Rules were incorporated into the Act.[26]

The Hague-Visby Rules were ratified by Switzerland on 20 January 1988, and entered into force for Switzerland on 20 April 1988.

The Rules were again amended by the Protocol of 21 December 1979,[27] which replaced the gold franc with special drawing rights as the currency unit.

Switzerland ratified this Protocol on 20 January 1988. It entered into force for Switzerland on 20 April 1988. The Hague Rules and its Protocols apply in cases where the MNA is not applicable.

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[24] Stettler, A., *La responsabilité du transporteur pour perte, avarie et/ou livraison tardive de la marchandise*, Schulthess, Genève / Zurich / Bâle, 2008, No. 326, p. 121 *et seq*. and references. It should not be forgotten, however, that the Hague Rules had already had effect in Swiss maritime law before this date, having become national law in 1941. Von Ziegler, A., *Schadenersatz…*, p. 60, and references.

[25] The Protocol of 23 February 1968 amending the International Convention for the Unification of Certain Rules Relating to Bills of Lading, signed in Brussels on 25 August 1924 (Hague-Visby Rules, HVR). Amendments in force since 1 January 1967. Text in 1412 UNTS 128, in Switzerland in German, French and Italian SR 0.747.354.111, www.fedlex.admin.ch/eli/cc/1988/927_927_927/de (24 November 2021). It entered into force on 23 June 1977. This Protocol was also prepared by the Comité Maritime International. The original languages are French and English. See also von Ziegler, A., *Schadenersatz…*, p. 61.

[26] In force since 1 February 1989. See also von Ziegler, A., *Haftungsgrundlage…*, No. 100, p. 58.

[27] Protocol (SDR Protocol) amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924 (The Hague Rules), as amended by the Protocol of 23 February 1968 (Visby Rules). Text in 1412 UNTS 146. It entered into force on 14 February 1984. In Switzerland SR 0.747.354.112, https://www.fedlex.admin.ch/eli/cc/1988/927_927_927/de (24 November 2021). Liability for damage to goods was limited to 2 SDRs per kilogram or 666 SDRs per package or unit, whichever was the greater. Art. II of the SDR Protocol.

Maritime transport is also covered by the Ordinance on Maritime Navigation,[28] but this only contains one article on the limitation of the carrier's liability.

The provisions on the carriage of goods of the MNA always apply if Swiss law is applicable under the rules of the Federal Code on Private International Law (CPIL).[29] In the absence of a tacit or explicit choice of law, the contract on the carriage of goods is subject to the law of the country with which it is most closely connected. According to the provision of Art. 117 (2) CPIL, the contract is thus governed by the law of the country in which the party who is to perform the characteristic service – in the case of carriage by sea, the ocean carrier – has its habitual residence or establishment.[30]

Swiss federal legislation applies exclusively on board Swiss seagoing vessels on the high seas. In territorial waters, Swiss federal legislation also applies on board Swiss seagoing vessels, unless the coastal State declares its legislation to be mandatory.[31]

Although intended primarily for Swiss vessels, Title V of the Act on the contracts for the use of a seagoing vessel may govern the use of foreign vessels if the rules of private international law of a particular case designate Swiss law as the applicable law.[32]

Insofar as the MNA contains no special provisions, the Code of Obligations applies to contracts for the use of a seagoing ship.[33]

Where neither the MNA nor any international agreement contains a provision, the judge decides in accordance with the generally accepted principles of maritime law and, in the absence thereof, in accordance with the rule which he would establish as legislator, taking into account the legislation and custom, science and jurisprudence of the seafaring States.[34]

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[28] In German: Seeschifffahrtsverordnung; in French: Ordonnance sur la navigation maritime; in Italian: Ordinanza sulla navigazione marittima, SR 747.301.

[29] Decision of the Civil Court of Basel-City dated 30 June 1998, consid. 1.2.3.

[30] Art. 117 (2) CPIL. Hansjörg, P., Internationales Seeprivatrecht, *Schweizerische Juristen-Zeitung*, 3/1991, p. 38; von Ziegler, A., *Schadenersatz…*, p. 62; von Ziegler, A., *Haftungsgrundlage…*, No. 102, pp. 59-60.

[31] Art. 4 (1) MNA.

[32] The legislator wished, on the one hand, to take account of private international law, which may subject such contracts to the law of the place of their conclusion, and, on the other hand, to leave the contracting parties free, subject to the rules of public policy, to refer, by mutual agreement, to the law of their preference. BGE 115 II 108, consid. 3. Stettler, A., *La responsabilité…*, No. 341, p. 128 and references.

[33] Art. 87 (1) MNA.

[34] Art. 7 (1) MNA. The way in which this regulation was applied in the decision of the Federal Supreme Court BGE 115 II 494 has also been met with criticism. Martig, C. P. A.,

The MNA regulates the charter parties as well. However, this is a *sui generis* contract and differs from both the contract of carriage and the contract on mandate.[35]

In a conflict of laws between the Hague Rules and the Federal Maritime Navigation Act, the national law has priority.[36] However, the law requires that in the application and interpretation of the provisions on the carriage of goods by sea, account shall be taken of the Hague Rules and its Protocols.[37]

4. CONTRACT OF CARRIAGE BY SEA

Under the contract of carriage by sea, the carrier undertakes to perform the carriage of goods by sea agreed with the shipper against payment of the freight.[38] Insofar as the MNA does not contain any special provisions, the Code of Obligations, in particular Art. 440 *et seq*., applies to contracts for the use of a seagoing vessel.[39] At the same time, however, in the application and interpretation of the provisions on the contract of carriage, account is taken of the Hague Rules and its Protocols.[40]

Due to this divergence, there are different interpretations of the nature of the contract of carriage of goods by sea under the Swiss law. By reference to the Code of Obligations, the MNA makes the contract of carriage by sea a consensual contract which is not subject to any particular form requirement, even if in

Aspekte der Ermittlung und Anwendung materiellen Rechts im schweizerischen See und Rheinfrachtrecht, in *Internationales Recht auf See und Binnengewässern: Festschrift für Walter Müller*, Schulthess Polygraphischer Verlag, Zürich, 1993, p. 140 *et seq.*

35 Art. 94 *et seq*. MNA. BGE 115 II 108, consid. 4, p. 111.

36 BGE 99 II 99, consid. 2a) at p. 101. As Switzerland has incorporated the provisions agreed in the Hague Rules into its own national legislation, namely into the Federal Maritime Navigation Act (MNA), this law has priority. Müller, W. Champ…, p. 636; von Ziegler, A., *Schadenersatz…*, p. 61; von Ziegler, A., *Haftungsgrundlage…*, No. 101, pp. 58-59 and references.

37 Art. 101 (2) MNA; BGE 99 II 99, consid. 2a) at p. 101. When interpreting and applying the provisions on the contract of carriage by sea (Art. 111-117 MNA), the provisions of the Hague Rules are taken into account.

38 Art. 101 (1) MNA. This definition is in line with the definition of carrier in the CO stating that a carrier is a person who undertakes to transport goods in return for payment (freight charge), Art. 440 (1) CO.

39 Art. 87 (1) MNA. For more details, see Stettler, A., *La responsabilité…*, No. 343, p. 129. The right of retention as provided in Art. 451 CO applies also to the contract of carriage by sea. Müller, W.; Burckhardt, T., Actual Overview of the Swiss Transport Law, in *International Encyclopaedia of Laws: Transport Law*, Volume 1, Wolters Kluwer, Deventer, 1994, No. 250.

40 Art. 101 (2) MNA.

practice a bill of lading is most often issued, on the back of which are the general terms and conditions of the transport.[41] This view is further substantiated by an incidental assertion in a court decision, according to which a contract of carriage is evidenced by a bill of lading.[42]

On the other hand, it is argued that the issuance of a bill of lading in maritime shipping according to Art. 101 (2) MNA, in conjunction with Art. I (b) HR, is a prerequisite for the validity of the contract of carriage, as these special provisions, in accordance with the principle *lex specialis derogat legi generali*, prevail over Art. 440 *et seq*. CO.[43] In other words, in light of the obligation to comply with the provisions of the Hague-Visby Rules, the issuance of a bill of lading in carriage by sea is a condition for the validity of the contract of carriage, and a contract can thus only be concluded in this form.

It is true that the MNA requires the Hague Rules and its Protocols to be taken into account in the application and interpretation of the provisions of the Fourth Section: Contract of Carriage by Sea, of the Fifth Title: Contracts for the Use of a Seagoing Vessel.[44] The Hague-Visby Rules define "contract of carriage" as contracts of carriage covered by a bill of lading or any similar document of title.[45] The MNA, however, defines contract of carriage much more broadly by stipulating that the carrier undertakes to perform the carriage of goods by sea agreed with the shipper against payment of the freight,[46] but omits to require the issuance of any document. The carrier can thus undertake to perform the carriage if no document or if, for example, a sea waybill is issued. The relevant provisions of the MNA, for instance concerning the duty of the sea carrier to exercise due diligence before and at the start of the voyage in order to make the ship seaworthy, properly manned, equipped, etc., apply in any case.[47] Therefore,

41 Marchand, S, in Thévenoz, L.; Werro, F. (eds.), *Commentaire romand, Code des obligations I*, 2e Edition, Helbing & Lichtenhahn, Bâle, 2012, Art. 440, No. 2, pp. 2637-2638. This is the same situation as, for example, in carriage by air according to the Montreal Convention, where it is not indispensable to issue an air waybill, but in practice issuance cannot be avoided.

42 BGE 121 III 38, Facts of the case, p. 39.

43 Furrer, A., *Schweizerisches Fracht-, Speditions- und Lagerrecht*, Stämpfli Verlag, Bern 2016, No. 567, pp. 165-166.

44 Art. 101 (2) MNA.

45 Art. I (b) HVR.

46 Art. 101 (1) MNA.

47 However, there are opinions that contracts of carriage by sea for which no bill of lading is issued are governed by the provisions of the Code of Obligations on the contract of carriage, Art. 87 (1) MNA. See Staehelin, D., Bauer, T.; Lorandi, F., *Basler Kommentar, Bundesgesetz über Schuldbetreibung und Konkurs I, II*, Helbing Lichtenhahn Verlag, Basel, 2021, Art. 443, No. 26, p. 3034.

it is right to conclude that the contract of carriage by sea under the MNA is a consensual contract which is not subject to any particular form requirement. In any case, this difference of opinion has not produced any problems in practice.

The contracts of carriage by sea are genuine contracts for the benefit of third parties, so that only the consignee is entitled to the delivery of the goods.[48]

As already said, insofar as the MNA does not contain any special provisions, the Code of Obligations applies to contracts for the use of a seagoing vessel. However, Arts 447 and 448 CO, for example, are not applicable to contracts of carriage by sea or inland waterways, since the liability of the carrier by sea or inland waterway for loss, destruction, damage, or delay in the delivery of the goods is already regulated in the MNA.[49] On the other hand, in the event, for example, of obstacles to delivery, the provisions of the CO apply.

Contrary to the Hague-Visby Rules, the contract of carriage of goods by sea in the MNA does not merely cover carriage under a bill of lading or any similar document of title,[50] and not merely in the period from when the goods are loaded on board until the time they are discharged from the ship,[51] but the entire contract of carriage from the time of acceptance of the goods by the carrier until delivery.[52] With this structure, the unfortunate splitting of the contract could be avoided.

The MNA only considers the restricted application of the HVR to the sea leg when dealing with the question of compulsory liability as provided in the Rules for a restricted period only. The Act states expressly that deviating agreements on the liability of the carrier are admissible and valid only for the time before loading on board and after discharging from the ship.[53]

The carrier's duties under the MNA are the same as under the Hague-Visby Rules. Before and at the beginning of the voyage, the sea carrier is bound to exercise due diligence to make the ship seaworthy, to man, equip and supply it properly, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception,

48 For example, Basel-City Civil Court, decision dated 25 November 2010, consid. 5.2.

49 Art. 103 - 105 MNA. See Favre Schnyder, R., Haftung für Verspätungsschäden bei Gütertransporten, in Klett, B; Furrer, A. (eds.), *Schaden im Warentransport, Vertragsgestaltung – Versicherung – Schadenersatz*, Schulthess Juristische Medien, 2016, note 3, p. 192. BGE 94 II 197, consid. 11.

50 Art. I (b) HVR. See Müller, W.; Burckhardt, T., Actual…, No. 251.

51 Art. I (e) HVR.

52 Art. 103 (1) MNA.

53 Art. 117 (2) MNA, *in fine*. Müller, W.; Burckhardt, T., Actual…, No. 251.

carriage and preservation.[54] The concept of due diligence under Swiss law also corresponds to the diligence of a *bonus pater familias*.[55]

The carrier must properly and carefully load, stow, carry, store, handle and discharge the goods, unless these operations are to be performed by the shipper or consignee.[56] In other words, the operations of loading, stowing, and discharging can be contractually left to the party interested in the cargo. If this is the case, the sea carrier is relieved of its duty of care for these activities as it owes its due diligence only to the extent actually assumed.[57] In this case too, the standard of care corresponds to that of an ordinary carrier.[58]

Before loading the goods, the shipper must provide the sea carrier in writing with the following: the dimensions, number or weight of the goods to be carried; the marks necessary to distinguish the goods; and the nature and condition of the goods.[59] The shipper is liable to the carrier for damage resulting from his inaccurate information on the goods, even if he is not at fault, and to the other cargo interests if he is at fault in this respect.[60] If the shipper has knowingly made false statements concerning the nature or value of the goods, the sea carrier is not liable for damage to the goods or other consequences resulting from the shipper's incorrect statements.[61]

The MNA contains further provisions on dangerous or prohibited goods,[62] on the loading and unloading of goods,[63] and on the freight and the payment of freight.[64]

The sea carrier receives the goods at the port of loading under the lifting gear of the seagoing vessel and delivers them accordingly to the consignee at the port of discharge unless a different method of delivery has been agreed or is customary in the place.[65]

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54 Art. 102 (1) MNA, Art. III (1) HVR.

55 Von Ziegler, A., *Haftungsgrundlage…*, No. 272, p. 144.

56 Art. 102 (2) MNA, Art. III (2) HVR.

57 Von Ziegler, A., *Haftungsgrundlage…*, No. 309, p. 166.

58 Von Ziegler, A., *Haftungsgrundlage…*, No. 310, p. 166 and references.

59 Art. 106 (1) MNA, Art. III (3) HVR.

60 Art. 106 (2) MNA, Art. III (3) and (5) HVR.

61 Art. 106 (3) MNA, Art. III (3) and (5) HVR.

62 Art. 107 MNA.

63 Art. 108 MNA

64 Art. 109 and 110 MNA.

65 Art. 108 (1) MNA.

Freight is only due if the goods are delivered or made available to the consignee at the port of destination, the provisions of Articles 88 and 89 (impossibility of execution) being reserved.[66] Full freight is also due if the delivery of the goods is not made because of acts or omissions of the shipper or consignee or because of the nature or natural condition of the goods, or if dangerous or prohibited goods have been put ashore, destroyed or thrown overboard.[67] This rule on the payment of freight when the voyage has not been completed seems to express a general rule by which a judge should be guided in order to address this loophole in the Code of Obligations.[68]

The debtor of the freight and of other claims related to the goods is the consignee, i.e. whoever demands delivery of the goods.[69] This person is liable for demurrage – remuneration to the carrier, which he receives for the loss of use of the transport vehicle, which cannot be used elsewhere during the service – and other claims arising in the port of loading only if these are recorded in the bill of lading or if it can be proven to him that he was otherwise aware of these claims.[70]

4.1. Bill of Lading

The Act defines the bill of lading as a document in which the carrier acknowledges having received certain goods on board a seagoing vessel and at the same time undertakes to transport these goods to the agreed destination and to deliver them there to the authorised holder of the document.[71]

The Act mentions three types of bill of lading. As soon as the goods have been taken on board, the shipper may request a bill of lading (on-board bill of lading) to be issued. A bill of lading may also be issued for goods that have been accepted for carriage but not yet taken on board (received bill of lading) as well as for the carriage of goods by several successive carriers by sea and for carriage by sea in combination with carriage by land, inland waterways, or air (through bill of lading).[72] The form and content of the bill of lading are regulated in detail in the MNA.

66 Art. 109 (1) MNA.

67 Art. 109 (2) MNA.

68 Marchand, S. in *Commentaire romand…,* Art. 440, No. 49 *et seq*., p. 2648 *et seq.*

69 Art. 110 (1) MNA.

70 Art. 110 (2) MNA.

71 Art. 112 MNA.

72 Art. 113 MNA.

The bill of lading contains the conditions under which the goods are accepted, transported and delivered.[73] The Act enumerates the data that this document should contain, in particular, as follows: the name and residence of the sea carrier and the shipper; the authorised consignee of the goods, where the bill of lading indicates the name, the expression "to order", or the bearer; the name of the seagoing vessel if the goods have been taken on board, or the designation as a takeover bill of lading or through bill of lading; the port of loading and the place of destination; the nature of the goods taken on board or accepted for carriage, their dimensions, number or weight and their marks as indicated in writing by the shipper before loading commences, as well as the apparent condition and nature of the goods; the destination of the cargo; the place and date of issue; the number of original copies, with as many copies to be issued as the circumstances require.[74] The legitimate holder of the bill of lading (consignee) can thus be determined by his name, by the clause "to order" or the document can be issued in favour of the bearer.[75] Needless to say, further information may be inserted into a bill of lading.

The CO also specifies which information a document of title to goods, issued by a warehouse keeper or carrier as negotiable securities, must bear: the place and date of issue and the signature of the issuer; the name and address of the issuer; the name and address of the depositor or consignor of the goods; an inventory of the stored or dispatched goods by description, volume and identification marks; the fees and remuneration payable or paid in advance; any special agreements between the parties concerning the handling of the goods; the number of copies of the document of title to goods; the persons with power of disposal, with an indication of the names, or "to order", or the bearer.[76]

The sea carrier is not obliged to include the dimensions, number, or weight of the goods in the bill of lading if it has reason to believe that the information provided by the shipper is inaccurate or if it does not have sufficient opportunity to verify such information.[77]

The original copies of the bill of lading must be signed by the master or the sea carrier; at the request of the master, the sea carrier, or the shipper, they should also be countersigned by the shipper.[78]

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[73] Art. 114 (1) MNA.

[74] Art. 114 (2) MNA.

[75] See also Müller, W.; Burckhardt, T., Actual…, No. 270.

[76] Art. 1153 CO.

[77] Art. 114 (3) (b) MNA.

[78] Art. 114 (5) MNA.

4.2. Letter of Guarantee

For the purpose of the acceptability of the bill of lading for documentary credit, carriers are often requested to issue a "clean bill" without reservations regarding the description of the quality and quantity of the goods against a letter of guarantee from the shipper that his declarations are correct and that he will indemnify the carrier in case of incorrectness.[79]

The MNA does not contain any provision concerning the validity of such letters of guarantee. There is no case law on this issue. Some provisions of the Code of Obligations, however, can give an indication of the general principles of Swiss law: a contract is void if its terms are impossible, unlawful, or immoral.[80] No right to restitution exists in respect of anything given with a view to producing an unlawful or immoral outcome.[81]

A distinction must therefore be made between a "fraudulent" and a "non-fraudulent" letter of guarantee. A letter is fraudulent and null and void if it is established in collusion between the shipper and the carrier with the intent of defrauding the consignee and holder of the clean bill to honour a documentary credit against such a document. On the other hand, a letter of guarantee may not be fraudulent and will therefore be valid if, for some usual reasons or difficulties encountered, impossibilities, or lack of time associated with the speed of modern trade, the quality and quantity of the goods could not be properly checked and the bill of lading had to be issued without reservations, provided that the omitted reservations did not affect the essential quality or quantity of the goods.[82]

4.3. Legal Effects of the Bill of Lading

The legal relationship between the sea carrier and the shipper is governed by the provisions of the contract of carriage by sea. The provisions of the bill of lading are accepted as the intent of the contract, unless otherwise agreed in writing.[83]

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79 Müller, W.; Burckhardt, T., Actual…, No. 273.

80 Art. 20 (1) CO.

81 Art. 66 CO.

82 Müller, W.; Burckhardt, T., Actual…, No. 273. This practice is in conformity with the Hamburg Rules which in addition provide that a carrier committing intended fraud will be liable without the benefit of limitation of liability (Hamburg Rules, Art. 17). *Ibid.*

83 Art. 115 (2) MNA.

The original copies of the bill of lading are documents of title to goods and they entitle the holder to take delivery of the goods.[84] The right of disposal of the goods being carried is determined by the document of title to goods, and therefore only the person identified by this document is entitled to give instructions and only from this person can the carrier validly receive instructions.[85]

Delivery of documents of title to goods which have been consigned to a carrier or a warehouse is equivalent to the delivery of the goods themselves. However, where a *bona fide* acquirer of the document of title to goods is in conflict with a *bona fide* acquirer of the goods, the latter has priority.[86]

In order for a title to goods to have the character of a negotiable security (document of title), the paper must contain certain information. Documents of title to goods issued as negotiable securities by a warehouse keeper or carrier must bear: the place and date of issue and the signature of the issuer; the name and address of the issuer; the name and address of the depositor or sender of the goods; an inventory of the stored or dispatched goods by description, volume and identification marks; the fees and remuneration payable or paid in advance; any special agreements between the parties concerning the handling of the goods; the number of duplicates of the document of title to goods; the persons with power of disposal, with an indication of the names, or "to order", or the bearer.[87]

If one of the details is missing, the document of title to goods lacks the character of a negotiable security and becomes a mere receipt or other document of evidence.[88] Only the absence of the indication of special agreements is excluded from this effect. If such agreements are made but not included in the title to goods, they are not part of the negotiable security. All these details are necessary to provide a clear starting point for any liability issues and to facilitate the negotiability of the instrument.[89]

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[84] Art. 116 (1) MNA, referring to Art. 925 CC. The shipper who is no longer in possession of the title loses the right of disposal on the goods for the benefit of the holder. Similarly, the right of disposal passes to the consignee only by the transfer of title. Marchand, S. in *Commentaire romand…,* Art. 443, No. 7, p. 2665.

[85] If documents of title to goods exist, the rules of Art. 443 (1) CO are no longer relevant. The effects of such commercial documents are governed by the rules of Art. 925 of the Swiss Civil Code: ownership and lien are acquired by handing over the document, without any intervention of the carrier being necessary. Staehelin, D. *et al.* in *Basler Kommentar,* Art. 443, No. 18, p. 3033.

[86] Art. 925 CC.

[87] Art. 1153 CO.

[88] Art. 1155 (1) CO. BGE 109 II 144, consid. 2, p. 147.

[89] Staehelin, D. *et al.* in *Basler Kommentar,* Art. 443, No. 19, p. 3033.

Where there are documents of title to goods, the goods may be pledged by pledging the documents. Where a special warrant exists in addition to a document of title to goods, pledging the warrant is sufficient to pledge the goods, provided notice of the pledge including the amount of the debt and the maturity date is entered on the document of title.[90] In this case, the carrier is prohibited from delivering the goods without the consent of the pledgee.[91]

The Act confirms that the bill of lading is decisive for the legal relationship between the sea carrier and the consignee of the goods. The bill, in particular, gives rise to the presumption that the carrier has taken over the goods as described in it. Proof to the contrary is not admissible if the bill of lading has been transferred to a third party acting in good faith.[92]

The sea carrier is entitled to make reservations regarding the description of the goods in the bill of lading, provided that it concerns information which it is not obliged to include in the bill of lading, as well as in two other situations: in the case of marks which are not printed on the goods themselves or, in the case of packaging, on their containers or wrappings, or otherwise affixed in such a way that they remain legible under normal circumstances until the end of the voyage; in cases concerning the dimensions, number or weight of the goods if there is reason to believe that the information provided by the shipper is inaccurate or if it does not have sufficient opportunity to verify such information.[93]

The right of the seller to stop unpaid goods in transit in the event of the bankruptcy of the buyer basically exists but is excluded if the goods have been acquired by a *bona fide* third party on the basis of a bill of lading prior to the public announcement of the bankruptcy.[94]

If a bill of lading has been issued, the goods will only be delivered at the place of destination against restitution of the original copy presented first, whereby the remaining original copies lose their effect. If several original copies are presented simultaneously by different bill of lading holders, the master deposits the goods with the competent authority or with a third party for the attention of the person entitled.[95]

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90 Art. 902 CC.

91 Marchand, S. in *Commentaire romand…,* Art. 443, No. 7, p. 2665.

92 Art. 115 (1) MNA. See also Müller, W., Inland Navigation, in *International Encyclopedia of Comparative Law: Law of Transport*, Volume 12, Chapter 5, Mohr Siebeck, Tübingen, 2002, No. 82.

93 Art. 115 (3) in connection with Art. 114 (3) MNA.

94 Art. 203 (2) of the Federal Law on Debt Collection and Bankruptcy (Bundesgesetz über Schuldbetreibung und Konkurs – SchKG).

95 Art. 116 (2) MNA.

Prior to arrival at the destination, the sea carrier may only restitute the goods to the shipper or deliver them to the consignee if all original copies of the bill of lading are restituted, and it may only comply with a subsequent disposal by the shipper or a bill of lading holder if all original copies are presented. The sea carrier is liable for any damage incurred by the legitimate bill of lading holder as a result of non-compliance with these regulations.[96]

5. LIABILITY OF THE SEA CARRIER

The statutory provisions on the sea carrier's liability for physical damage to the goods are of a mandatory nature. Any agreement in a bill of lading which has the direct or indirect purpose of cancelling or limiting the carrier's statutory liability for loss, destruction, or damage of the goods or of reversing the burden of proof of such liability will be null and void.[97]

There are, however, certain cases in which agreements to the contrary are permissible: one is the case of the carriage of live animals or of cargo actually loaded on deck and recorded as such in the bill of lading, as well as with regard to the carrier's liability for the period prior to the loading of the goods on board and after their discharge.[98] The same is true for transport under a charter contract[99] and contracts of carriage on the River Rhine,[100] as well as to damage caused by delay.[101] Agreements made in the case of general average are also not precluded by the law.[102]

For damages caused by delay, consequentially, the full freedom of contract applies.[103] The law does not prohibit the cancellation or limitation of the liability of the carrier for damage caused by delay or to reverse the burden of proof. This liability is therefore dispositive and may be excluded with a corresponding clause

[96] Art. 116 (3) and (4) MNA.

[97] Art. 117 (1) MNA. This basic provision is in accordance with Art. III (8) HR. See von Ziegler, A., *Schadenersatz…*, p. 63.

[98] Art. 117 (2) MNA. BGE 99 II 99, consid. 3, p. 103. Müller, W.; Burckhardt, T., Actual…, No. 280.

[99] Art. 117 (3) and Art. 95 (3) MNA. Müller, W.; Burckhardt, T., Actual…, No. 281.

[100] Art. 127 (2) MNA, under condition that no Rhine bill of lading has been issued. See von Ziegler, A., *Schadenersatz…*, p. 63; von Ziegler, A., *Haftungsgrundlage…*, No. 103, p. 60.

[101] Art. 117 (1) MNA *argumentum a contrario.* Von Ziegler, A., *Schadenersatz…*, p. 63; von Ziegler, A., *Haftungsgrundlage…*, No. 103, p. 60.

[102] Art. 117 (4) MNA.

[103] Müller, W., *Die Verträge über die Verwendung eines Seeschiffes (Schiffsmiete, Chartervertrag, Seefrachtvertrag)*, SJK 1031 (Seerecht VI), Genf, 1980, p. 17; Stettler, A., *La responsabilité…*, No. 344, p. 130.

in the bill of lading. As a rule, bills of lading contain a clause which excludes or severely limits the liability of the sea carrier for damage caused by delay. The legal provisions are therefore only applied to the extent permitted by the bill of lading.

The sea carrier is liable for the acts of its servants. If it delegates the performance of an obligation or the exercise of a right arising from a contractual obligation to an employee, such as the master and the crew of the ship, it is liable for any loss or damage the employee causes in carrying out such tasks. This liability may be limited or excluded by prior agreement.[104]

5.1. Period of the Carrier's Liability

The period of the carrier's liability according to the MNA spans the entire time from the taking over of the goods until their delivery.[105] However, following the provisions of the HVR, the law expressly makes the carrier's liability mandatory for the time on board the ship, by admitting deviating agreements on the liability of the carrier for the time before loading on board and after discharging from the ship.[106]

However, before and at the beginning of the voyage, the sea carrier is bound to exercise due diligence to make the ship seaworthy, to man, equip and supply it properly, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation.[107] Such a time limitation of due diligence concerning seaworthiness to the period prior to the commencement of carriage is no longer justified in a modern cargo regulation and should be removed in a revision.[108]

On the other hand, the carrier's duty properly and carefully to load, stow, carry, store, handle and discharge the goods exists during the whole carriage insofar as these services are not to be provided by the shipper or consignee.[109]

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104 Art. 101 (1) and (2) CO. Müller, W.; Burckhardt, T., Actual…, No. 191.

105 Art. 103 (1) MNA. Müller, W.; Burckhardt, T., Actual…, No. 251.

106 Art. 117 (2) MNA, *in fine*. See Art. I (e) HVR according to which the "carriage of goods" covers the period from the time when the goods are loaded on the ship to the time they are discharged from the ship. A confusingly similar provision of the MNA concerns only the loading and unloading of the goods: the carrier takes over the goods at the port of loading under the tackles of the ship and delivers them to the consignee at the port of discharge also under the tackles unless a different method of delivery and discharge has been agreed upon or is customary in the place, Art. 108 MNA.

107 Art. 102 (1) MNA.

108 Von Ziegler, A., *Haftungsgrundlage…*, No. 323, p. 173 *et seq.*; Stettler, A., *La responsabilité…*, No. 349, p. 131.

109 Art. 102 (2) MNA. Stettler, A., *La responsabilité…*, No. 349, p. 131.

In a leading court case,[110] the carrier had to deliver different qualities of lubricating oil to the consignee at the port of discharge. Delivery is described as the process by which the carrier gives up the custody of the goods carried on the express or tacit consent of the consignee and enables him to exercise effective control of the goods. It does not require the consignee to take over the goods for delivery, but it is sufficient if the carrier releases the goods from its custody with the consent of the consignee. However, where, as in the present case, different grades of oil are transported in different compartments of the vessel, there can be no question of release from the care of the carrier, covered by the consignee's consent, until the different grades of oil are pumped into the tanks provided for that purpose. This did not occur because the carrier's crew misdirected the lubricating oils "heavy" and "medium". Accordingly, the carrier's associates did not discharge the cargo properly or carefully in the sense of Art. 102 (2) MNA.

5.2. Types of Damage

The MNA, like the Code of Obligations, differentiates between total loss – loss or total destruction of the goods, and partial loss – partial destruction and damage and delay.[111] It is not surprising that the sea carrier has to compensate for total loss with the full value of the goods and for partial destruction and damage with the amount of the depreciation of the goods.[112] However, according to the CO, in the case of partial damage or damage due to delay, the carrier is liable for all damage resulting therefrom. According to the MNA, however, it expressly does not have to pay any further compensation.

Contrary to the HVR where no mention at all is made to damage due to delay, the MNA thus expressly provides that the sea carrier is liable for delay in delivery. This liability is dispositive, and, if not excluded by contract, it exists. If a delay causes damage to the goods – physical damage, loss of value due to spoilage, etc. – the sea carrier has mandatory liability for this damage.[113] If, on the other hand, a delay causes consequential damage, the ocean carrier is only

[110] BGE 115 II 494, consid. 2, p. 496 – concerning inland navigation to which the MNA also applies.

[111] At first glance, Art. 105 (1) MNA corresponds to Art. 447 OR, and Art. 105 (2) MNA to Art. 448 OR.

[112] The value of the goods is determined by the stock exchange value and, in the absence thereof, by the market price or, in the absence thereof, by the fair market value of goods of the same kind and quality at the place and date on which they were or should have been discharged under the contract of carriage, Art. 105 (1) MNA.

[113] Müller, W., *Die Verträge…*, p. 17; Polić Foglar, V., *Haftung für Verspätungsschäden bei Gütertransporten*, Stämpfli Verlag AG, Bern, 2016, No. 711 *et seq.*, p. 190 *et seq.*

liable for this damage if it consists of a depreciation in value without damage to the goods.[114] Thus, the only possible type of damage is a drop in price, e.g. a drop in prices on the stock market or a situation in which the buyer no longer accepts and pays for the goods so that they can only be sold at a lower price.

In the mentioned leading case,[115] the mixing of different oil qualities was not a loss, but a partial damage to the goods within the meaning of Art. 105 (1) of the old MNA. The damage corresponds to the difference between the common commercial value (stock exchange or market price) and the proceeds from the sale of the damaged goods.

5.3. Exoneration from Liability

If damage occurs and a reservation is made, the liability of the sea carrier is presumed. It can free itself from its liability if it proves that the damage is due to a cause for which neither the carrier, the captain, the ship's crew, or other persons in the service of the seagoing vessel, nor any person used by the carrier in the performance of the carriage, are at fault.[116]

The liability of the sea carrier is therefore considered to be a liability based on fault with a reversed burden of proof,[117] a liability for fault or a liability for due diligence with a reversed burden of proof,[118] or a mitigated causal liability with the possibility of exculpation.[119]

When adopting the exemption catalogue of the Hague-Visby Rules,[120] the Swiss legislator separated the q-clause from the catalogue and included it in the basic provision on liability.[121]

The exemptions for error in navigation and fire are also regulated separately: if the loss, destruction or damage of the goods or the delay were caused by the actions, negligence or omissions of the master, pilot or other persons in the

[114] Art. 105 (2) MNA.

[115] BGE 115 II 494, consid. 3, p. 497.

[116] Art. 103 (1) MNA, Art. IV (2) (q) and (3) HVR. This liability is less extensive than that of the carrier under Article 447 of the Code of Obligations. Müller, W., *Die Verträge…*, p. 15.

[117] Müller, W.; Burckhardt, T., Actual…, No. 252.

[118] Von Ziegler, A., *Haftungsgrundlage…*, No. 742, p. 411.

[119] Staehelin, D. *et al.* in *Basler Kommentar*, Art. 447, No. 18, p. 3047; Favre Schnyder, R., Haftung für Verspätungsschäden…, p. 198.

[120] Art. IV (2) HVR.

[121] Art. 103 (1) MNA. The Swiss legislator thus followed the German Commercial Code. Von Ziegler, D., *Haftungsgrundlage…*, No. 595, p. 337.

service of the seagoing vessel in the course of its navigational or technical command or by fire, the carrier is relieved of its liability, provided that it is not at fault.[122] These two exceptions thus greatly favour the sea carrier, since it is only liable for its own fault.[123]

The remaining exemptions, the so-called excepted perils, provide that the sea carrier is neither liable for loss, destruction or damage of the goods or delay if it proves that these consequences are due to one of the following causes: *force majeure*, accident, hazards or accidents at sea or in other navigable waters; acts of war, riot and civil commotion; official measures, such as judicial seizure, quarantine or other restrictions; strikes, lockouts or other work restrictions; rescue or attempt to rescue life or property at sea or any other justified deviation from the voyage route, whereby this does not constitute a breach of the contract of carriage by sea; acts or omissions of the shipper, consignee or owner of the goods, their agents or representatives; shrinkage in volume or weight or other damage due to latent defects in the goods; the special nature or peculiar natural type or condition of the goods; inadequacy of packaging or inadequacy or inaccuracy of marks; hidden defects of the vessel which could not be discovered by applying due care. But the release from liability does not apply if it is proven that the damage was caused by the fault of the sea carrier or its associates.[124]

The catalogue of excepted perils has been taken over from the Hague-Visby Rules.[125] However, according to the MNA, these grounds for exemption are also expressly applicable to liability for damage caused by delay if it is not excluded by contract. Hence, the liability of the sea carrier for physical damage to goods and for damage caused by delay are treated in the same way, even if it concerns its exemption from liability for damage attributable to one of the listed excepted perils.

Thus, in order to exonerate itself from its liability, the carrier must prove that the damage was caused by one of the grounds for exoneration mentioned above. In such cases, however, discharge from liability is not granted if it is proven that the damage was caused by the fault of the carrier or its auxiliaries.

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122 Art. 104 (1) MNA. Measures which are mainly taken in the interest of the cargo are not part of the technical operation of the seagoing vessel, Art. 104 (1) MNA, *in fine*; Art. IV (2) (a) and b).

123 Stettler, A., *La responsabilité…*, No. 357, p. 135. See Favre Schnyder, R., Haftung für Verspätungsschäden…, p. 198 *et seq.*

124 Art. 104 (2) MNA; Art. IV (2) (c) – (p).

125 Art. IV (2) HVR. On the absence of the provisions on liability for damage caused by delay in the Hague and the Hague-Visby Rules, see Polić Foglar, V., *Haftung für Verspätungsschäden…*, No. 716 *et seq.*, p. 192 *et seq.*

If claims for loss, destruction or damage of the goods or for delay are made against the master, the crew or other persons in the service of the seagoing vessel or whose services the carrier uses for the performance of the carriage, such persons may avail themselves of the same exemptions and limitations of liability as the carrier, whatever the legal grounds on which such claims are made, unless it is proven that they have caused damage by an act or omission done with intent to cause damage or recklessly and with the knowledge that damage would probably result.[126]

If the damage resulted from the unseaworthiness of the ship, the carrier is relieved of liability only if it proves that it exercised due diligence to make the ship seaworthy before and at the beginning of the voyage.[127]

5.4. Scope and Limitation of Liability

If the carrier is liable for the loss or total destruction of the goods, it will compensate only the value of the goods at the place and date on which they were or should have been discharged under the contract of carriage. The value of the goods is determined by the stock exchange value and, in the absence of such, by the market price or, in the absence of both, by the fair market value of goods of the same kind and quality.[128]

In the event of partial loss, damage, or delay, it will pay only the amount of the depreciation of the goods without further compensation,[129] and in no case more than in the case of total loss.[130] In other words, the full value of the goods is the maximum liability limit for all types of damage.

The Swiss law has also taken over the additional limits of liability from the Hague-Visby Rules. They are not fixed in the MNA, but, instead, the Federal Council has fixed them in the Ordinance on Maritime Shipping (OMS).[131] Consequently,

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126 Art. 103 (3) and Art. 105a MNA.

127 Art. 103 (2) and Art. 102 (1) MNA, Art. IV (1) HVR.

128 Art. 105 (1) MNA, Art. IV (5) (b) HVR.

129 In this respect, the MNA sets itself apart from the CO, according to which the carrier is liable for any damage resulting from late delivery, damage in transit or the partial destruction of the goods, and not for the depreciation of the goods only, Art. 448 (1) CO. Marchand, S. in *Commentaire romand…,* Art. 448, No. 10, p. 2695; von Ziegler, A., *Schadenersatz…*, p. 111.

130 Art. 105 (2) MNA, consistent with Art. 448 (2) CO.

131 In German: Seeschifffahrtsverordnung; in French: Ordonnance sur la navigation maritime; in Italian: Ordinanza sulla navigazione marittima, dated 20 November 1956, SR 747.301.

the carrier will in no case, and on whatever legal grounds, be liable for amounts exceeding 666.67 units of account per package or other transport unit or 2 units of account per kilogramme of gross weight of the lost or damaged goods, whichever is the higher.[132]

It should be noted that only lost or damaged, but not delayed, goods are expressly mentioned in Art. 105 (3) MNA. These limitation amounts therefore do not apply as liability limits for damage caused by delay, which remains limited by the full value of the goods.[133] Where late delivery results in damage to or destruction of the goods, the person entitled is free to invoke one or the other or both heads of liability.[134] However, their total may not exceed the carrier's maximum liability.

The delivery of goods without restitution of the bill of lading or all bills before arrival at the destination represent for the legitimate holder a total loss of the goods. The indemnity should therefore also be limited to the same amount as in the case of loss of the goods, because the liability of the carrier is limited in any event and "for any loss or damage and on whatever ground" the carrier may be sued.[135]

The aggregate of the amounts recoverable from the carrier, and its auxiliaries (servants and agents), will in no case exceed the limit for which the carrier would be solely liable.[136] The limitation applies also in the case of an action against the carrier founded in tort.[137]

In the case of the contributory negligence of the injured party, the liability of the sea carrier may be reduced,[138] a circumstance which will have to be taken into account in relation to Art. 104 (1) (f) MNA – acts or omissions of the shipper.[139]

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[132] Art. 105 (3) MNA, Art. 44 (1) OMS, Art. IV (5) (a) HVR. On the conceptual description of the physical unit – package or other transport unit – see von Ziegler, A., *Schadenersatz…*, p. 154 *et seq*. On the previous limits of liability and some other connected questions, see *ibid*., p. 168 *et seq*.

[133] Polić Foglar, V., *Haftung für Verspätungsschäden…*, No. 713 *et seq*., p. 191 *et seq*.

[134] Stettler, A., *La responsabilité…*, No. 373, p. 141.

[135] Müller, W.; Burckhardt, T., Actual…, No. 277; Art. 105 (3) MNA, Art. IV (5) (a) and (b) HVR.

[136] Art. 105 (6) and Art. 103 (3) MNA, Art. IVbis (3) HVR.

[137] Müller, W.; Burckhardt, T., Actual…, No. 259.

[138] Art. 44 (1) CO in connection with Art. 99 (3) CO and Art. 87 (1) MNA.

[139] Von Ziegler, A., *Haftungsgrundlage…*, No. 743, p. 412 and references.

In addition, according to the principles of Art. 43 (1) CO, a reduction will have to be made at the discretion of the judge if, in addition to the cause giving rise to liability, events covered by a ground for exemption under Art. 104 MNA are regarded as partial causes of the damage to goods.[140]

The unit of account is the Special Drawing Right of the International Monetary Fund. Conversion into the national currency is made on the date of the judgment or on the date agreed by the Parties.[141]

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 being contained in or on such an article of transport is deemed to be a single piece or unit of transport; in all other cases, the whole article of transport is considered the package or unit.[142]

The carrier may not invoke these limits if the shipper has expressly indicated the nature and the higher value of the goods before their loading and if these particulars, which the carrier is unable to refute, have been entered in the bill of lading, or if higher amounts of liability have been agreed.[143]

5.5. Loss of Right to Limit Liability

Neither the provisions relating to relief from liability nor those relating to limitation of liability apply if the sea carrier or its auxiliaries have caused damage by an act or omission done with intent to cause damage or recklessly and with knowledge that damage would probably result.[144] In other words, if damage is caused in this way, full liability applies. Here, the MNA does not set a condition for the misconduct of auxiliaries to occur in the performance of their duties.

These requirements for unlimited liability deviate in part from the requirements of the Swiss Code of Obligations.[145] The first one, the intention to cause damage or unlawful intention can be regarded as synonyms and interpreted in the same way. The second one, recklessly and in the knowledge that damage is likely to occur or gross negligence do not fully coincide. The same wording as

[140] Von Ziegler, A., *Haftungsgrundlage…*, No. 743, p. 412 and references.

[141] Art. 44 (2) OMS.

[142] Art. 105 (5) MNA, Art. IV (5) (c) HVR.

[143] Art. 105 (4) MNA, Art. IV (5) (a), (f) and (g) HVR. Von Ziegler, A., *Schadenersatz…*, p. 179.

[144] Art. 105a MNA, Art. IVbis (4) HVR.

[145] Art. 100 (1) CO: Any agreement purporting to exclude liability for unlawful intent or gross negligence in advance is void.

in the Federal Maritime Navigation Act can be found in the Hague-Visby Rules for carriage by sea and in the Hague Protocol for carriage by air. As there is no Swiss case law yet on the application and interpretation of this rule on "wilful misconduct" in carriage by sea, the existing leading cases in Swiss air law can be helpful in interpreting this Act.[146] They confirm the opinion that for the loss of the right to limit liability, the consciousness requirement of the probability of damage must be subjective, whereas the mere fact that the probability of damage "should have been recognised" is not enough.[147]

6. ASSERTION OF RIGHTS

6.1. Parties of an Action

Where a transport document which is a title to goods has been issued, such as a bill of lading for carriage by sea, only the holder of the title may claim the loss or damage of the goods.[148] As a rule, the holder is the consignee, but in some cases this can be the shipper of the goods.[149]

If the transport is conducted without a bill of lading, reference can be made to the solutions applicable according to the rules of the Code of Obligations.

The action is brought against the carrier. In the case of substitution, the rules of Art. 449 CO seem to apply, unless otherwise stated in the bill of lading. The same applies in the case of more than one carrier, where Art. 403 CO applies.[150]

6.2. Ascertainment of the Damage

The sea carrier and the consignee may require a joint survey, i.e., that the condition and quantity of the goods be ascertained at delivery in the presence of both parties.[151]

The provisions relating to the ascertainment of damage and a reservation to be made by the consignee to the carrier in the event of damage are, in the

[146] Müller, W.; Burckhardt, T., Actual…, No. 260 and references; Müller, W., *Die Verträge…*, p. 17; von Ziegler, A., *Schadenersatz…*, p. 202 *et seq.*; Stettler, A., *La responsabilité…*, No. 374, p. 141.

[147] BGE 113 II 359 and references.

[148] Marchand, S. in *Commentaire romand…*, Art. 447, No. 21, p. 2687.

[149] Stettler, A., *La responsabilité…*, No. 379, p. 143 and references.

[150] Stettler, A., *La responsabilité…*, No. 380, p. 143.

[151] Art. 111 (1) MNA.

MNA,[152] as in the CO,[153] more suitable to cases of physical damage to the goods. Neither of the two laws regulates how and until when a reservation should be submitted in the case of damage by delay.

6.3. Burden of Proof

Acceptance of the goods without reservation by the consignee is *prima facie* evidence that the carrier has delivered the goods in the same condition and quantity as when they were accepted for carriage.[154]

If a reservation is made, the presumption of the carrier's liability is created as the first step of evidence.[155] The sea carrier will then have to prove either its own diligence[156] or the existence of a special excepted peril as exemption from liability[157] as the second step of proof. If it chooses the route via one of the listed excepted perils, the burden of proof of fault is transferred to the party interested in the cargo.[158] As the third step of proof, this party may choose between proof of unseaworthiness[159] or fault.[160] If the party succeeds in proving that the damage is due to the unseaworthiness of the ship, the sea carrier will finally have to prove, in the fourth step of proof, that it has exercised due diligence.[161]

This system of burden of proof is mandatory, as any agreement in a bill of lading which has the direct or indirect purpose of reversing the burden of proof will be null and void.[162]

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152 Art. 111 MNA.

153 Art. 452 CO.

154 Art. 111 (2) MNA, Art. III (6) HVR.

155 Basel-City Civil Court, decision dated 30 June 1998, MS Sealand Freedom, *Transportrecht*, 1999, p. 405 and especially p. 407 *et seq*. (consid. 4.3). Von Ziegler, A., *Haftungsgrundlage…*, No. 742 and footnote 104, p. 411. See as well Stettler, A., *La responsabilité…*, No. 353 *et seq*., p. 133 *et seq*.

156 Art. 103 (1) MNA.

157 Art. 104 (1) and (2) MNA.

158 Von Ziegler, A., *Haftungsgrundlage…*, No. 742, p. 411 and reference.

159 The shift of the burden of proof of unseaworthiness to the party interested in the cargo flows from the first half-sentence of Art. 103 (2) MNA in connection with the general rules on the burden of proof under Art. 8 CC. Von Ziegler, A., *Haftungsgrundlage…*, No. 742 and footnote 107, p. 411.

160 Art. 104 (2) MNA.

161 Art. 102 (1) and Art. 103 (2) MNA. Von Ziegler, A., *Haftungsgrundlage…*, No. 742, p. 411.

162 Art. 117 (1) MNA. This basic provision is in accordance with Art. 3 (8) HR.

6.4. Reservation

Unless the condition and quantity of the goods delivered have been jointly ascertained, reservations by the consignee must be made in writing, stating the general nature of the damage. In the case of apparent damage and loss, the reservation must be made no later than at the time of delivery, and in the case of damage or loss which is not apparent no later than within three days of delivery to the consignee, failing which the goods will be deemed to have been accepted without reservation.[163]

To make a claim for damages by delay, a reservation is also indispensable. It should include the fact of the delay and the resulting damage. The determination of the date a shipment is delivered should not be difficult since the delivery date should be visible on the bill of lading. The MNA does not set a deadline for the consignee to then inform the sea carrier about the existence of a delay and any resulting damage.

A financial loss that occurs as a result of delay can either be immediately apparent and quantifiable[164] or can appear as such much later. If the analogy to damage to goods is used, the consignee has three days from the delivery time to make the reservation to the sea carrier in the event of immediately nonapparent consequential damage. In any case, it is recommended for the consignee to make the reservation as soon as possible. The damage does not necessarily have to be quantified in detail. It is sufficient for the general nature of the damage to be mentioned.[165]

In the event of damage to goods, the omission of a reservation therefore entails as a consequence the reversal of the burden of proof and not a complete forfeiture of the claim for damages.[166] It is to be assumed that by analogy an omission of the reservation in the case of damage by delay will also have the easier consequence, namely the reversal of the burden of proof. The MNA does not mention cases of the total loss of goods.

6.5. Time-bar

All claims arising from a contract of carriage become time-barred at the end of one year from the day on which the goods are delivered or should have been

[163] Art. 111 (3) MNA.

[164] For example, two fitters have each waited four hours in vain.

[165] More details in Polić Foglar, V., *Haftung für Verspätungsschäden…*, No. 741 *et seq*., p. 198 *et seq*.

[166] This would be a consequence according to Art. 452 (1) CO. See Stettler, A., *La responsabilité…*, No. 381, p. 143.

delivered to the consignee.[167] The one-year prescription period not only applies to claims against the carrier, but to all claims arising out of the contract of carriage, including the claims of the carrier for payment of freight and costs.[168] This provision thus deviates from the provision on the prescription period for the contract of carriage in the CO, which applies only to claims for compensation against the carrier.[169]

The MNA thus expressly states that the one-year limitation period begins to run from the day on which the goods are delivered or should have been delivered to the consignee. By doing so, the MNA makes concrete the basic provision of the CO[170] and adopts its relevant provision concerning carriage of goods[171] and that of the HVR[172] which are identical in content.

In addition to this single MNA provision on time-bar, which in all cases has precedence as a *lex specialis*,[173] the relevant provisions of the Code of Obligations apply. Therefore, this period may be extended if the parties so agree.[174] Since the statutory limitation period concerning the carriage of goods is not included in the General Part of the CO[175] but in Title Sixteen of Division Two, the provision on the immutability of the deadlines does not apply to it.[176] The periods of limitation for claims concerning carriage by sea may therefore be extended or shortened by contractual agreement, unless an applicable international agreement provides otherwise.[177]

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167 Art. 87 (2) MNA, Art. III (6) HVR. In a previous version of Art. 87 (2) MNA, it was provided that in cases of malice and gross negligence on the part of the carrier, the ten-year prescription period applies (Art. 127 CO). This provision was contrary to the Hague-Visby Rules, which want the one-year period to apply in any event (Art. III (6) HVR) so that it was deleted in a revision. Von Ziegler, A., Verjährung und Verwirkung im schweizerischen Seefrachtrecht, in *Internationales Recht auf See und Binnengewässern: Festschrift für Walter Müller*, Schulthess, Zürich, 1993, p. 215.

168 Müller, W.; Burckhardt, T., Actual…, No. 263; von Ziegler, A., Verjährung…, p. 213. This period also applies to other contracts for the use of seagoing vessels – bareboat charter, Art. 90 *et seq*. MNA and charter contract, Art. 94 *et seq*. MNA.

169 Art. 454 (1) CO.

170 Art. 130 (1) CO.

171 Art. 454 (1) CO.

172 Art. III (6) HVR. See von Ziegler, A., Verjährung…, p. 213.

173 Von Ziegler, A., Verjährung…, p. 213-214.

174 Art. 135 CO, Art. III (6) HVR.

175 Art. 134 – 138 CO. These provisions, however, apply to the interruption and suspension of the limitation period.

176 Art. 129 CO. Müller, W., *Die Verträge…*, p. 2.

177 Müller, W., *Die Verträge…*, p. 2 and decision BGE 99 II 188 and 192 quoted there.

After its interruption, the period of limitation for claims arising out of the contract of carriage which are subject to Swiss maritime law begin to run anew, even after the claim has been asserted by way of action. This is the difference between the MNA and the HVR, according to which the timely assertion of the claim makes the claim non-lapsable, even after years of legal proceedings.[178]

The HVR provide that the parties may extend the limitation period after the cause of action has arisen.[179] The MNA does not provide for such a condition, so that the limitation period can be extended even before a cause of action has arisen, e.g., by agreement of the parties to the contract of carriage by sea (bill of lading).[180]

It is not entirely clear whether the limitation period can also be shortened by agreement of the parties under Swiss law.[181]

As previously stated, all claims arising from a contract of carriage become time-barred unless a suit is brought within one year of the delivery of the goods. Debt enforcement under Swiss law cannot be described as a "suit" in terms of the bill of lading. In debt enforcement proceedings, no substantive judgment is passed on a case and the debt enforcement authority is not a judicial body. The introduction of these proceedings does not have the significance of a judicial review, must be clearly distinguished from substantive civil proceedings, and cannot interrupt the limitation period.[182]

6.6. Court Jurisdiction

As regards court jurisdiction, if the sea carrier is domiciled or has its registered office in a State party to the Lugano Convention,[183] the latter applies unless special agreements provide for jurisdiction, recognition, and enforcement in the issue in question.[184]

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178 Von Ziegler, A., Verjährung…, p. 214.

179 Art. III (6) HVR. This extension is not considered to be an interruption of the limitation period so that the reasons for interruption according to the CO continue to apply. Von Ziegler, A., Verjährung..., p. 214.

180 Von Ziegler, A., Verjährung…, p. 216.

181 Von Ziegler, A., Verjährung…, pp. 216-217.

182 Basel-City Civil Court, decision dated 30 June 1998, MS Sealand Freedom, *Transportrecht*, 1999, p. 405 consid. 2.3.

183 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, SR 0.275.12, concluded in Lugano on 30 October 2007. It entered into force for Switzerland on 1 January 2011.

184 Staehelin, D. *et al.* in *Basler Kommentar,* Art. 447, No. 20, p. 3048.

For all civil actions arising from the MNA, the place of jurisdiction is Basel, unless another place of jurisdiction exists in Switzerland.[185] The New York Convention applies to arbitration awards.[186]

In a well-known decision, the Swiss Federal Supreme Court stated that an arbitration agreement on the back of a bill of lading, which had not been signed by the shipper, did not satisfy the formal requirements of the New York Convention, but that in the age of modern telecommunications the importance of documents signed by both parties was dwindling. In such a situation, it is almost a requirement of good faith to infer an implied statement of intent from a certain conduct of a party. In the specific circumstances of this case, the Court approved the arbitration agreement and pronounced recognition of the foreign decision.[187]

6.7. Applicable Law

The law designated in a document of title determines whether such a document represents title to goods.[188] If a bill of lading is issued by a Swiss operator of a seagoing ship, and in particular of a Swiss ship, the original copies of the bill of lading are documents of title to the goods and entitle the holder to receive the goods.[189] This being so, title to the certificate and to the goods is governed by the law applicable to the document of title as an item of movable property.[190]

In the absence of such designation, the law of the State of the place of business of the issuer governs.[191]

If several parties assert an interest in the merchandise, one directly, the others by virtue of a title document, the law applicable to the merchandise itself determines whose right prevails.[192]

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185 Art. 14 (2) MNA.

186 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, SR 0.277.12, concluded in New York on 10 June 1958, entered into force for Switzerland on 30 August 1965. On the effects of arbitration clauses in bills of lading under Swiss law, see Burckhardt, T., Wirkungen von Schiedsklauseln in Konnossementen und Chartherverträgen nach schweizerischem Recht, in *Internationales Recht auf See und Binnengewässern: Festschrift für Walter Müller*, Schulthess, Zürich, 1993, pp. 219-232.

187 BGE 121 III 38. Staehelin, D. *et al.* in *Basler Kommentar*, Art. 447, No. 21, pp. 3048-3049.

188 Art. 106 (1) CPIL.

189 Art. 925 CC. See Müller, W.; Burckhardt, T., Actual…, No. 285.

190 Art. 106 (2) CPIL.

191 Art. 106 (1) CPIL.

192 Art. 106 (3) CPIL.

7. FUTURE PROSPECTS

Nowadays, Switzerland belongs to the top nations when ownership of the merchant fleet is considered. In addition, the number of ships operated by Swiss nationals or under their control is considerable. In total, there are more than 800 ships under Swiss ownership and/or in operation.

However, like other top ship-owning nations, Switzerland does not have a legal relationship with most Swiss-owned or controlled merchant vessels, as these are registered in open registers. The share of ships under the Swiss flag makes up only a very small part and is negligible in its importance for the Swiss economy. The same is true for the importance of Switzerland's status as a flag state in this regard.

Having in mind the disparity between the owned or controlled and registered ships as well as some other relevant factors, Swiss authorities are currently reconsidering the conditions for registering ships. One option is to create a more attractive register and so to attract ships that now fly foreign flags.

This can be achieved by implementing an all-encompassing and competitive fiscal and regulatory approach that would appeal to shipowners. New criteria for the eligibility of vessels should be introduced, such as the year of construction, efficiency standards, or classification, which would filter out high-risk ships and ensure the quality of the flag, especially by attracting young high-quality and environmentally friendly ships.

8. CONCLUSION

It can be concluded that Swiss legislation concerning the carriage of goods by sea, as well as other issues pertaining to the field of maritime navigation, is adequate and contemporary.

It is hoped that the endeavours to make the Swiss registry attractive to Swiss-owned and Swiss-operated ships will end by strengthening the Swiss flag, leading to the renewed flagging-in of ships into the Swiss registry. If this happens, Swiss maritime legislation will also expand its influence and gain in importance.

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Sažetak:

PRIJEVOZ ROBE U ŠVICARSKOM POMORSKOM PRAVU

Iako nema izlaz na more, Švicarska je rano shvatila da bi vlastita zastava pogodovala trgovini u vrijeme mira, a posebno u vrijeme rata. No, osim brodova bilo je potrebno imati i vlastito zakonodavstvo. Pomorska plovidba kodificirana je u Saveznom zakonu o pomorskoj plovidbi pod švicarskom zastavom. Zakon preuzima Haaška pravila u izmijenjenom obliku, kako to Pravila dopuštaju, i Visbyjski protokol. U slučaju sukoba između Haaških pravila i Zakona, nacionalni zakon ima prednost. Zakon donosi pravila o zastavi i upisu brodova, organizaciji nadležnih tijela, poslovanju pomorskog brodarstva, ugovorima o korištenju pomorskih brodova i o mnogim drugim pitanjima u tom području. Uvijek će se primjenjivati ako se švicarsko pravo primjenjuje prema Saveznom zakonu o međunarodnom privatnom pravu. Švicarsko savezno zakonodavstvo isključivo se primjenjuje na švicarske pomorske brodove na otvorenom moru. U teritorijalnom moru također se primjenjuje na švicarske pomorske brodove, osim ako obalna država svoje zakonodavstvo proglasi obveznim. U mjeri u kojoj Zakon ne sadrži posebne odredbe, na ugovore o korištenju pomorskog broda primjenjuje se švicarski Zakonik o obveznim odnosima. Zakon regulira i brodarske ugovore, a oni se smatraju ugovorima sui generis *koji se razlikuju i od ugovora o prijevozu i od ugovora o mandatu. Trenutačno švicarske vlasti preispituju uvjete za upis brodova. Nadamo se kako će njihova nastojanja dovesti do ponovnog većeg upisa u švicarski upisnik, što će proširiti utjecaj švicarskog pomorskog zakonodavstva.*

Ključne riječi*: švicarska zastava; prijevoz robe morem; Savezni zakon o pomorskoj plovidbi pod švicarskom zastavom; teretnica; odgovornost pomorskog prijevoznika; mjerodavno pravo.*