

Rotterdam Rules – What to expect
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Joakim Bronder
Senior Manager
Gard AS



Developments – past, present, future

- The Hague Rules 1924
- The Visby Protocol 1968
- The Hamburg Rules 1978
- The UN Convention on Multimodal Transport of Goods 1980
- The UNCITRAL Rotterdam Rules 2009
- EU initiatives – European Commission (DG VII)
 - COM(2007) 606 final: “The EU’s transport agenda: Boosting the efficiency, integration and sustainability of freight transport in Europe”



Background

- Difficulties finalising a new US COGSA
- Growth of containerisation
- Uniformity and to replace the Hague, Hague Visby (HV) and Hamburg Rules
- Hamburg Rules never gained much acceptance, being ratified by only 30 states
- 90 or so Hague/HV ratifications



Background continuing

- Hague/HV Rules apply to the vast majority of disputes under contracts for the carriage of goods by sea
- UNCITRAL would represent a significant change from a regime very familiar to the industry
- UNCITRAL Working Group, included representation from the International Group of P&I Clubs



Overview

- Rotterdam rules are far more sophisticated than Hague-Visby and the Hamburg rules
- Text of the new convention runs to 96 articles (compared to 34 articles in the Hamburg Rules)
- This overview is mainly on application of the convention and the main liability aspects for carriers



Applicable contracts

- Partial derogation for volume contracts
- Applies in liner transportation
- Not to charterparties or contracts for the use of space on a ship (see Articles 6 & 7)
- In non-liner transportation the draft convention would only apply where there is no charterparty or other contract and where a transport document is issued



Contracts continues

- Similar to the HV Rules in that there is no application to a bill of lading in the hands of a charterer
- Volume contracts are permitted to derogate from certain provisions of the draft convention, (see Article 80)
- Third parties may also expressly consent to be bound by derogations



Applicable carriage – extended to places of receipt and delivery

- Expands its application beyond loading and discharge under the HV Rules to places of receipt and delivery (see Article 5)
- Will apply to carriage in which the place of receipt or port of loading or port of discharge or place of delivery are in different states and one of the states is a Contracting State.



Carrier's period of responsibility – beyond tackle-to-tackle

- Starts when goods are received and ends when the goods are delivered (see Article 12)
- Free to define the exact period of responsibility by agreeing times/locations for receipt/delivery, but no later than the beginning of initial loading and before completion of final unloading under the contract of carriage.
- Recognises the concept of through transport contracts (see Articles 1, 5, 12, 26)



Carriage proceeding or subsequent to sea carriage – compulsory regimes prevail

- If loss or damage occurs other than during a sea leg the convention would apply unless some other international convention (eg CMR) applies compulsorily to the particular stage of carriage (see Article 26).



Obligations of the Carrier – continuing obligation of seaworthiness

- Obligations with regard to seaworthiness (only applicable to voyages by sea) and care of the cargo during the period of responsibility, similarly worded to Article III Rule 1 of the HV Rules (see Article 14)
- Obligation to exercise due diligence making the vessel seaworthy prior to and at the beginning of the voyage is extended to a continuing obligation throughout the voyage



Obligations of the Carrier – continuing obligation of seaworthiness

- The draft convention recognises however the concept of FIOS (free in/out stow) shipments allowing the parties to agree that loading, handling, stowage or unloading shall be performed by the shipper or consignee (see Article 13.2)



Liability of the carrier – nautical fault defence removed, liability for delay

- List of exceptions from liability for the carrier quite similar to the HV Rules, but there are significant differences
- Removal of the exception for error in navigation, pilotage or management of the ship (see Article 17)
- Fire exception no longer refers to “actual fault or privity of the carrier”



Liability of the carrier continues

- Exceptions would be subject to the overriding due diligence obligation (17.5 a))
- Departure from the HV Rules towards the Hamburg Rules, the carrier can become liable for loss or damage (including pure economic loss) caused by delay (see Article 21).
- Likely to significantly increase carrier's liability exposure for claims; loss or damage to cargo, but also for cargo's part of salvage and of GA



Burden of proof

- The carrier is liable if the claimant first proves loss, damage or delay arising during the period of responsibility
- Relieved from liability if the carrier then proves the absence of fault and/or reliance on an exception
- Carrier is also liable if the claimant proves that the loss, damage or delay was “probably” caused by unseaworthiness
- Relieved from liability if he can prove the exercise of due diligence
- The word ‘probably’ may well be interpreted differently in different states, and is likely to be tested



Liability for Performing Parties and Maritime Performing Parties

- Introduces some unfamiliar new terminology
- Performing Party is defined as a person other than the carrier that performs or undertakes to perform the carrier's obligations with respect to loading, handling, stowage etc (see Article 1). eg terminals, stevedores, performing sea carriers)
- Article 18, the carrier is made liable for the acts or omissions of a Performing Party
- Article 20, joint and several liability on the carrier and the Maritime Performing Parties. *(More legal proceedings may result from this and the carrier will need to ensure that rights of recourse against performing parties are fully protected not just in a legal sense but also in terms of ability to pay and sound insurance backing)*



Limits of liability - increased

- Follows the HV Rules concept of package and weight limits, but currently adopts the monetary amounts of the Hamburg Rules (see Article 59)
- Limits increased from 666.67 to 875 SDR per package and 2 SDR to 3 SDR per kilo whichever is the higher (see Article 59).
- For pure economic loss there is a sub-limitation of 2.5 times the freight, with an overall cap corresponding to the package/weight limit on a total loss basis (see Article 60)
- The test for losing the right to limit again follows the HV Rules, and is seemingly made stronger by reference to personal conduct (see Article 61)



Deviation

- Deviation – does not deprive carrier of defences or limitation
- Subject to the test for losing the right to limit mentioned above (see Article 25).



Deck carriage

- Carrier deprived of limitation and defences if unauthorised
- Goods may be carried on deck – when required by law, when in containers on specially fitted decks, or when in accordance with the contract or the customs, usages and practice of the trade (see Article 25)
- A third party acquiring a negotiable transport document is bound by the terms of the latter if the contract particulars state that the goods may be carried on deck;
- Carrier is not liable for loss, damage or delay caused by the special risks (not defined) involved in their carriage except when carried in containers. *(A view appears to have been taken therefore that carriage in containers on deck poses no special risk)*



Deck carriage continues

- Goods carried on deck in circumstances other than permitted under the convention, the carrier will not be entitled to rely on defences (in Article 17) for loss or damage exclusively caused by carriage on deck
- Moreover, if goods are carried on deck in breach of an express agreement to carry them under deck the carrier will be deprived of his right to limit liability



Jurisdiction/Arbitration

- Less freedom of contract, greater choice to claimant
- Will apply only where Contracting States have declared that they will be bound by the provisions – “opt-in”
- States will be able to derogate from these particular provisions. This is especially relevant to the European Union States, since they have their own law giving effect to choice of jurisdiction clauses
- Convention affords a wide freedom of choice (with strict exceptions) to the claimant in terms of where he can commence court or arbitration proceedings against the carrier (see Articles 66-78)
- In addition to the carrier, a claimant is permitted to commence court proceedings against a Maritime Performing Party and can choose from the place of his domicile or where activities were performed by that party or the port where goods received/delivered by that party (see Article 68)



Jurisdiction/Arbitration continues

- Unless an exclusive choice of court agreement is binding, there is provision for consolidating actions against a carrier and a Maritime Performing Party arising out of a single occurrence and at the request of the claimant, a carrier and a Maritime Performing Party will be required to withdraw any action seeking a declaration of non-liability or any other action depriving the claimant of a choice of forum once that choice has been made (see Article 71).
- If these jurisdiction and arbitration provisions of the draft convention do end up applying in any particular case, one can expect claimants to take full use of their choice with a view to seizing a forum most advantageous to their claim



Time bar

- Extended to 2 years from the date of delivery (see Article 62)
- Hamburg Rules approach is adopted in preference to the HV Rules
- Not subject to suspension or interruption but may be extended by agreement between the parties



Conclusion

- Uniformity in law is to be applauded especially in an international industry such as shipping
- Hague Visby Rules are 30 years old and with so much more container transport today, by increasingly few/larger carriers, change was perhaps inevitable
- Rotterdam Rules are likely to result in an increased cargo liability exposure for owners and charterers
- Avoiding cargo claims will take on growing importance if this Convention comes into force, not least because carriers would find it increasingly difficult to defend those claims
- New legislation needs to be tested and expect an increase on claims subject to litigation



Conclusions

- Will Rotterdam be a success?
- Gard approves of the Convention, ultimo May 2009
- What if the Rotterdam Rules do not become widely accepted?
 - EU
 - USA
 - China



Where are we today

- IG approves
- So do , ECSA, BIMCO and WSC
- The states signing the convention upon its opening for signature in Rotterdam were: Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, the Netherlands, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo and the US. Joining the initial 16 states were Armenia, Cameroon, Madagascar, Niger and latest Mali on October 26
- Change of Club Rules?



Where are we today

- 21 states have now signed the convention. When the same number of states has formally ratified the convention (i.e. deposited the appropriate instrument with the convention secretariat), it will enter into force one year later
- Will the Rotterdam Rules come into force any earlier than for example The Hamburg rules from 1978, which came into force in 1992?
- It should be mentioned that the “entry into force” article in both of these conventions contains the exact same wording, and that denunciation of older conventions (Hague / HVR or Hamburg) is also a condition for the Rotterdam rules to become effective.



Boosting the process

- Unique situation that so many quickly signed
- Some jurisdictions likely to add a significant momentum to the process
- The current 21 signatories represent over 25% of world trade volume (Lloyds List, Friday 23 October 2009)
- Let's have a look at expected increase in exposure for our Members



UNCITRAL/Rotterdam Rules

Quantitative assessment of the effect of the ratification of a new liability regime

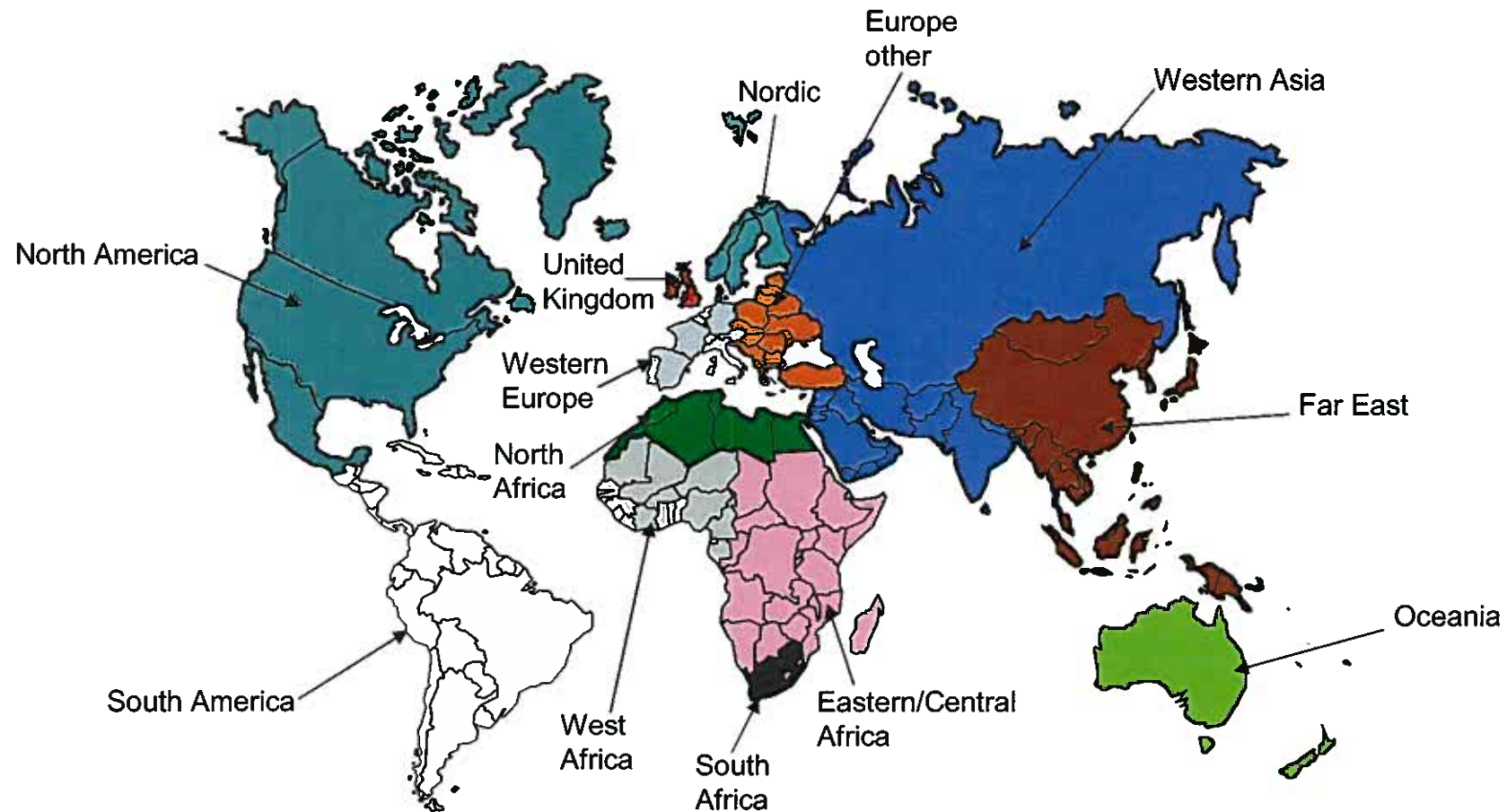


Each change in the rules is linked to a defined set of types of claim

	Description	# of claims Share of incidents	Exposure Avg. per claim
Seaworthiness	Contamination, ventilation, wet damage	16.0%	72,403
Stowage and handling	Lashing, stowage and handling	7.6%	82,080
General average	General average	0.1%	479,860
Fire	Dangerous goods, fire and explosions	0.3%	1,645,398
Delay	Delay	0.2%	86,041
Dangerous goods	Fish meal, chemicals, acids, alcohol, industrial, cement, explosives, cement, sulphur, oils, soda, etc.	8.8%	96,329
Through transport contracts	Through transport contracts	12.8%	33,111
Deck carriage	Carriage on deck	0.3%	251,197
Navigation related	Also a collision claim	0.1%	197,838

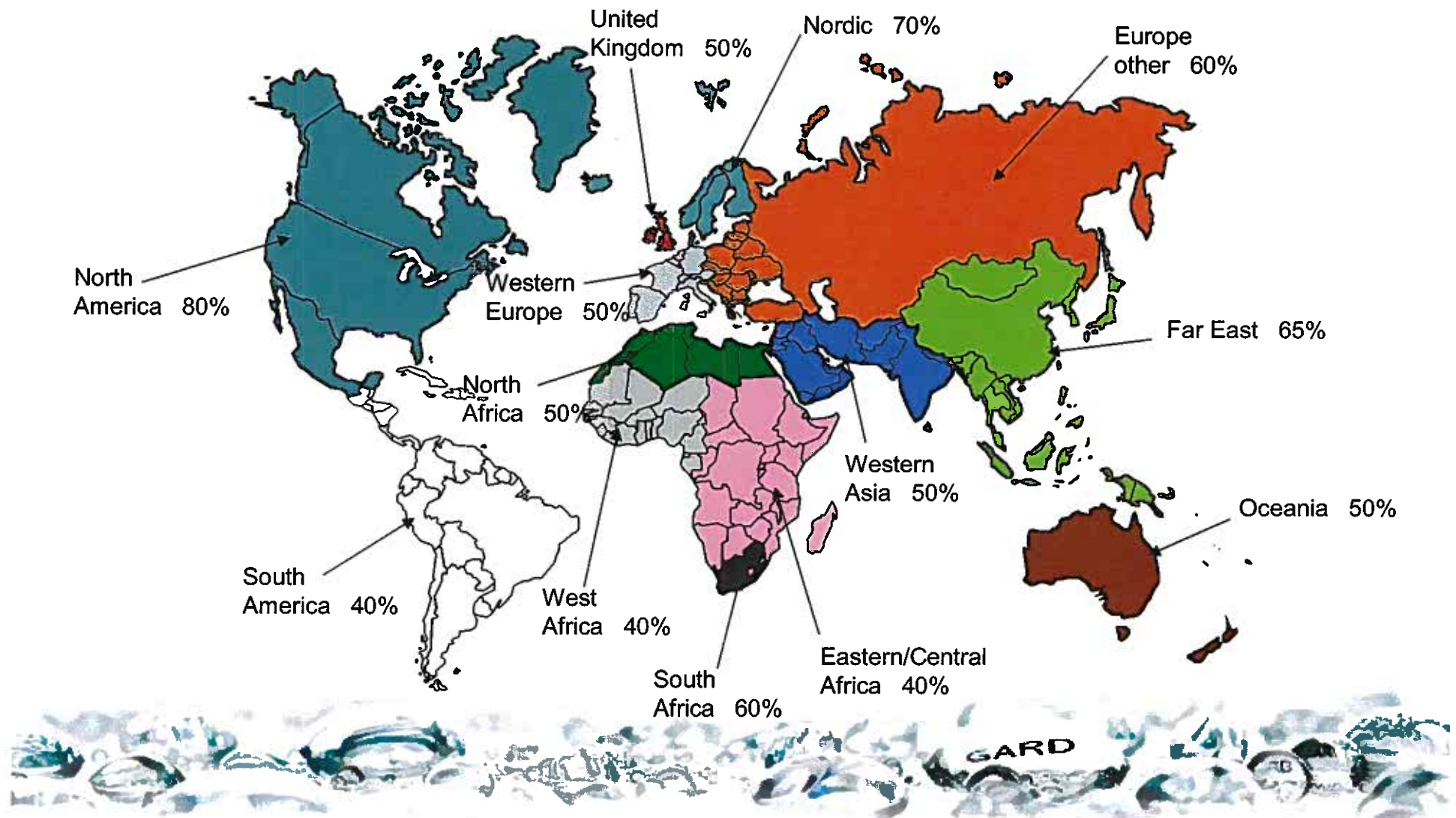


The world has been split into politically homogeneous regions

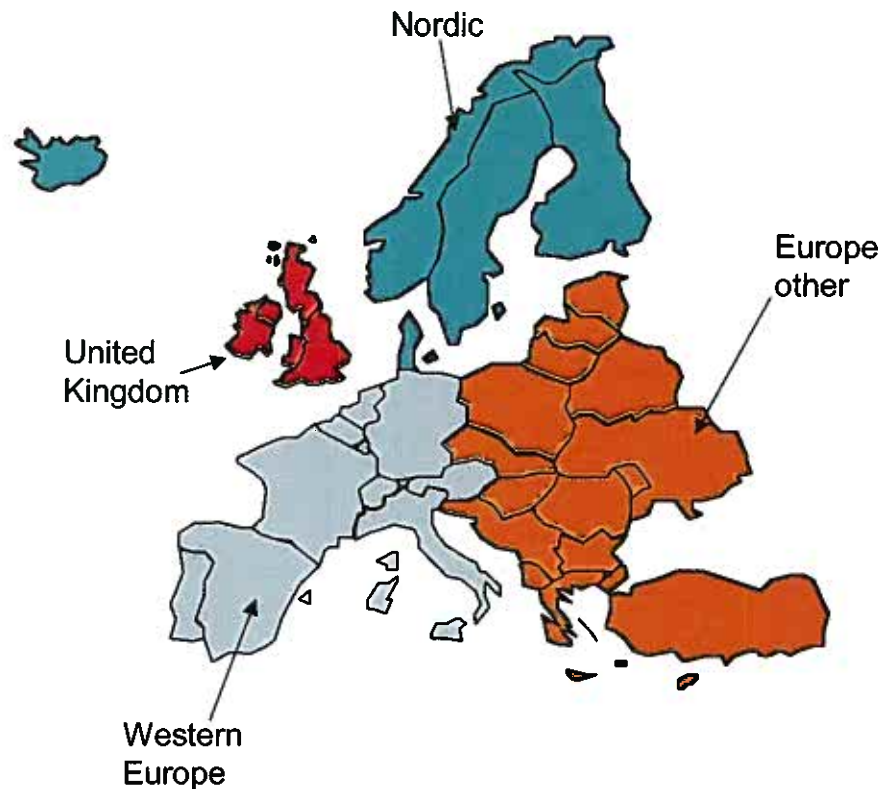


There is currently substantial uncertainty as to which countries will adopt UNCITRAL

Assumed probability of adoption



Europe



- How many claims arise in these jurisdictions each year?
- What is the probability of these jurisdictions adopting UNCITRAL?

	Rules	Date enacted
Albania	Hamburg	01.08.2007
Austria	Hamburg	01.08.1994
Belgium	Hague-Visby	06.12.1978
Bulgaria	Hague	1970
Croatia	Hague-Visby	28.01.1999
Czech Republic	Hamburg	01.07.1996
Denmark	Hague-Visby	23.06.1977
Estonia	Hague	01.03.1992
		21.09.1993
Finland	Hague-Visby	15.07.1994
France	Hague-Visby	23.06.1977
Georgia	Hamburg	01.04.1997
Germany	Hague-Visby	31.07.1986
Greece	Hague-Visby	23.06.1993
Hungary	Hamburg	01.11.1992
Iceland	Hague-Visby	1985
Ireland	Hague-Visby	06.02.1997
Italy	Hague-Visby	22.11.1985
Latvia	Hague-Visby	26.02.2002
Lithuania	Hague-Visby	02.06.2004
Monaco	Hague	15.11.1931
Netherlands	Hague-Visby	26.07.1982
Norway	Hague-Visby	23.06.1977
Poland	Hague-Visby	12.05.1980
Portugal	Hague	02.06.1932
		21.11.1986
Romania	Hamburg	01.11.1992
Russia	Hague-Visby	01.05.1999
Slovenia	Hague	25.06.1991
Spain	Hague-Visby	11.02.1984
Sweden	Hague-Visby	01.10.1994
Switzerland	Hague-Visby	23.06.1977
Ukraine	Hamburg	09.11.1994
United Kingdom	Hague-Visby	23.06.1977



Wider freedom of choice of jurisdiction is the single most significant change

Wider freedom of contract, e.g. jurisdiction

Possibility to require withdrawal of actions seeking non-liability or forum selection

Extended time bar

Increased limits of liability

Expanded scope of application (beyond loading/discharge)

Stricter requirements to seaworthiness

Recognition of electronic documentation

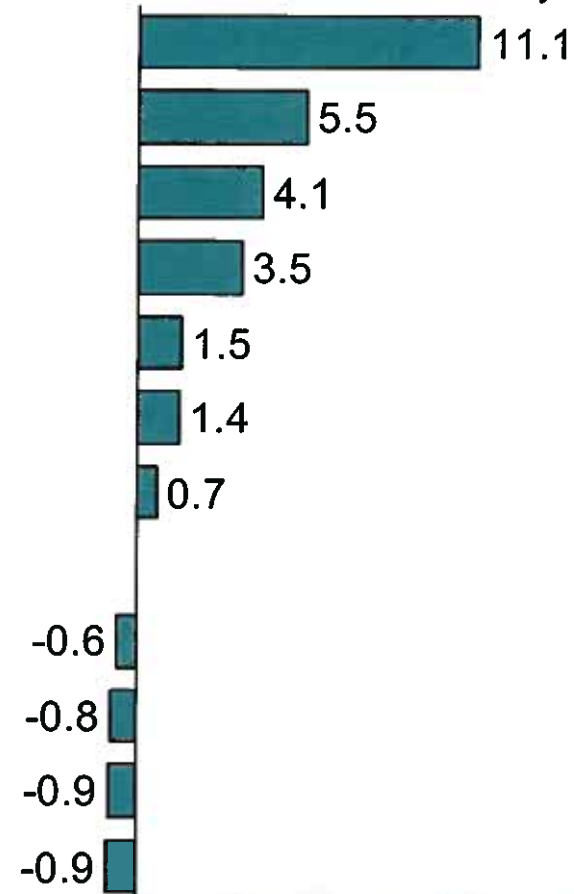
Recognition of free in/out of stow

Increased number of shipper obligation

Freedom in respect of goods that may become a danger

Provisions for dangerous goods

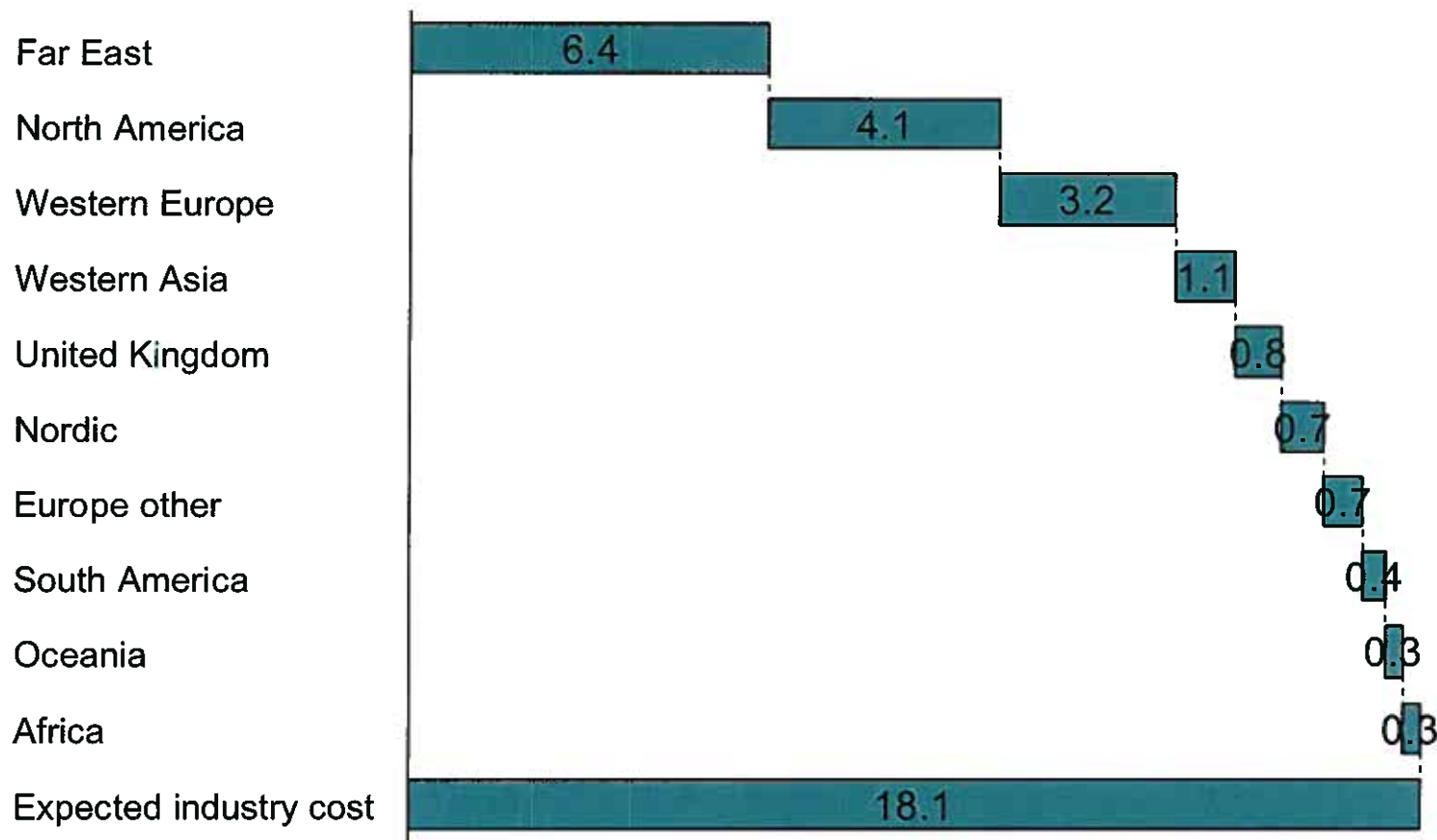
Change in gross claims paid
USD million, inflation adjusted



Note: Changes with an impact below USD 500,000 are not shown

The industry is expected to incur considerable costs

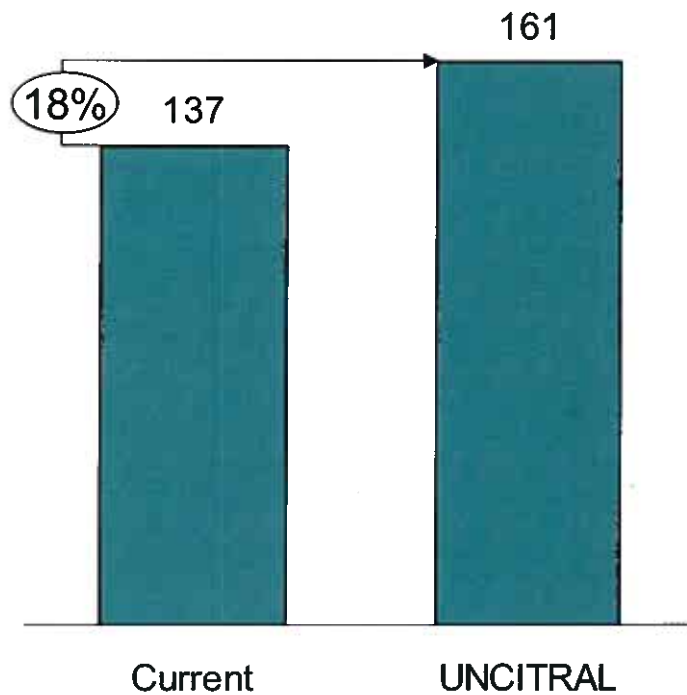
Industry basis, probability weighted change in gross claims paid, percent



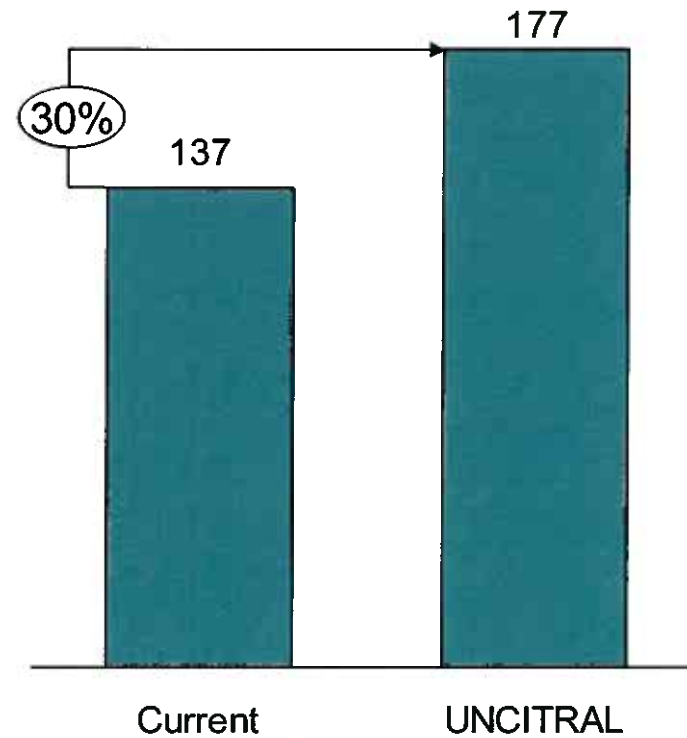
Claims costs under UNCITRAL are expected to increase by 18%

USD million, gross claims paid, adjusted for inflation

Probability weighted*



Not probability weighted



* The probability weighted result reflects the fact that not all countries are likely to adopt UNCITRAL.

Thank you for your attention



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