

CARRIAGE OF GOODS BY SEA – FROM HAGUE TO ROTTERDAM: SAFER WATERS

By

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DECLARATION

I, Metuge Denning Ngomele, student number S210113375, In accordance with Rule G4.6.3, hereby declare that CARRIAGE OF GOODS BY SEA – FROM HAGUE TO ROTTERDAM: SAFER WATERS is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University or for another qualification.

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SUMMARY

The back bone of international trade has always been international transport. Without good transport networks, the movement of goods and services from one frontier to another would be an uphill task, and would greatly hinder development in international trade. The impact of such poor transport networks would reflect negatively on economies that rely on international trade for the growth of their nations. Nevertheless, perfect transport networks would be useless if the performance of the business of carriage was not regulated by a law developed to meet the standards established by time, and that would regulate the relationship of the parties under contracts of carriage, mainly the carrier, consignor and consignee, so as to ensure certainty and equality in the allocation of risks between the parties thereunder.

This research focuses on the carriage of goods by sea. Like most other modes of transport, one of the major issues that arises in the business of carriage of goods by sea is the conflict between the carrier, consignor and consignee, with regards to the allocation of risk in the carriage. Over the years, early rules that were developed to regulate the relationship of the parties under contracts of carriage of goods by sea placed the carrier in a dominant position over the consignor. The carrier issued a standard bill of lading which exempted him from almost all liability for damage or loss of the goods in his care.

The consignors and bona fide third parties, not satisfied with the terms of carriage contracts brought a lot of pressure to bear on their governments to enact legislation protecting their interests in the transaction. The United States of America were the first to pass such national law revising the position of the parties under contracts of carriage. In 1893 the United States of America passed the Harter Act. This Act aimed at imposing limits of liability on the carrier to which no derogation could be brought. However, this was a dangerous precedence which was going to hinder international trade rather than improve on it, as different nations developing local legislation on carriage meant conflict of laws.

In order to avoid the extensive nationalisation of carriage laws, the international maritime community set to develop rules that would regulate carriage by sea. Over the years convention has succeeded convention such that today four international regimes (The Hague Rules, Hague-Visby Rules, Hamburg Rules and Rotterdam Rules), exist regulating carriage of goods by sea. This research takes an in-depth look at these regimes that were developed to regulate carriage by sea, and the author aims to identify a particular regime that meets the standards of modern day practice of carriage of goods, and advocate for the ratification of this regime, to the exclusion of all others so as to foster uniformity, certainty and equality in the business of carriage of goods by sea.

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND

For centuries carriage of goods by sea has been a common practice employed by merchants. International transport is the pivot around which international trade revolves; it provides the material platform without which international trade would be impracticable. More often than not, the first thing that comes to mind when mention is made of international transactions is the relationship between the buyer and the seller. However, the key player in this transaction is the carrier. Study of the carrier is important to international trade as it is not only the physical link between the consignor and consignee but also the legal link between both of them.¹

The first rules that governed carriage by sea were a creation of the international merchant.² Merchants, in order to ease the nature of their trade, entrusted their goods to carriers under mutual agreements. It was not long before these mutual agreements became standardized and accepted as the basis of customary regulation in the practice of carriage of goods, and were eventually incorporated into common law rules.³ The carriers' liability under English common law⁴ was strict; it was liable for loss or damage to cargo in its possession even if it took all measures to avoid such loss or damage, unless it could prove that the loss or damage was caused by one of the following four excepted perils; loss or injury caused by an act of God, or by the Queen's enemies; the consequence of an inherent vice in the thing carried; or as a result of the consignor's own fault.⁵ More so, the carrier would not escape liability even if the loss or damage was caused by one of the four excepted perils if the consignor could prove that the loss or damage resulted from either the carrier's negligence or that of its agents.⁶

In order to nip in the bud a growing trend by the carrier to exempt itself from liability by agreement under contract, the British courts introduced a new doctrine which imposed on the carrier the duty to provide a seaworthy vessel for the carriage. Where the consignor could prove that the carrier failed to render his vessel seaworthy, the carrier was liable for

¹ Booyesen H *Principles of International Trade Law As A Monistic System* (2003) 616.

² *Supra* 617.

³ Zamora S "Carrier Liability for Damage or Loss to Cargo in International Transport" 1975 (23) *American Journal of Comparative Law* 396 <http://www.jstor.org/stable/839373>(Accessed: 26/07/2011).

⁴ Future references to the common law in the course of this research shall be the English common law, unless otherwise specified.

⁵ Zamora *American Journal of Comparative Law* 397 <http://www.jstor.org/stable/839373>.

⁶ Gilmore G and Black CL *The Law of Admiralty* (1957) 119 in Zamora S "Carrier Liability for Damage or Loss to Cargo in International Transport" 1975 (23) *American Journal of Comparative Law* 398 <http://www.jstor.org/stable/839373>.

loss or damage to the cargo even if the loss or damage was caused by one of the four excepted perils or by a contractually excepted cause.⁷

In the 19th century, development of efficient steam power caused shipping companies and railroads to expand rapidly in size and economic strength. Due to a lack of competition in land and sea transport, the carriers' commercial position with regards to the consignors was greatly strengthened. The liberty awarded by law to the carrier and consignor to determine the terms of the contract of carriage resulted in sea carriers' introducing a series of exclusionary clauses in the bills of lading. The carriers used their freedom of contract to exclude themselves, by agreement with the consignors, from the strict liability imposed on them under common law for loss or damage to the goods in its custody. These exclusionary terms were not only extensive (by 1921, the date the Hague Rules were conceived, there were 55 such exclusionary clauses),⁸ but became commonly recognised in international transport to the disadvantage of the consignor. As a matter of fact, the exclusionary terms were so absurd and endless that it was believed that the carrier had no obligation but the collection of freight.⁹

The resulting imbalance in the relationship between the carrier and the consignor, coupled with the abusive tendencies of the carrier, led to states developing national legislation to protect the consignor by limiting the carriers endless list of exceptions to liability. The United States of America spear-headed this campaign by the passing of the Harter Act in 1893. It was not long before other developed nations followed suit. The Harter Act was followed by the Australian Sea Carriage of Goods Act of 1904 and the Canadian Carriage of Goods by Water Act of 1910.¹⁰ Unfortunately these initiatives had the effect of making the bill of lading valid in one area but not in another due to the difference in national laws and their application in different territories. This was a major problem as international trade by its very nature relates to trade that transcends international borders. It hence goes without saying that there was a need for uniformity in international laws regulating liability under contracts for the carriage of goods by sea.¹¹

The first attempt at international uniformity resulted in the adoption of the Hague Rules in 1921.¹² The Hague Rules were aimed at establishing a minimum mandatory liability on the carrier to which no exclusions could be made. Adherence to the Hague Rules was however elective, and accordingly, it failed to produce the desired redress to the problem

⁷ Zamora *American Journal of Comparative Law* 398 <http://www.jstor.org/stable/839373>.

⁸ Knauth AW *The American Law of Ocean Bills of Lading* 4th ed (1953) 120, in Zamora S "Carrier Liability for Damage or Loss to Cargo in International Transport" 1975 (23) *American Journal of Comparative Law* 401 <http://www.jstor.org/stable/839373>.

⁹ James FC "The Carriage of Goods by Sea. The Hague Rules" 1926 (74) *University of Pennsylvania Law Review and American Law Register* 672 674-675 <http://www.jstor.org/stable/3313985>. (Accessed: 05/10/2010).

¹⁰ Wanigasekera A "Comparison of Hague-Visby and Hamburg Rules" 1 <http://www.scribd.com/doc/59734937/Comparison-of-Hague-and-Hamburg-AW> (Accessed: 13/08/2011).

¹¹ Booyesen H *International Transactions and the International Law Merchant* (1995) 248 herein after referred to as Booyesen (a).

¹² Booyesen *Principles of International Trade Law* 621.

faced by consignors as carriers did not adopt it. In this light, and with the support of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading,¹³ a diplomatic conference was held at Brussels, in 1924 which adopted the convention as international law, thus rendering the provisions of the convention binding on the carriers of the states that ratify it. The 1924 Hague Rules were readily ratified by the English in the Carriage of Goods by Sea Act 1924, and later on the by French and the United States in 1936. A great number of the world's shipping nations have adhered to the provisions of the Hague Rules ever since. However, the defenses and limitation to carriers' liability prescribed under the Hague Rules were seen as too pro-carrier, and did not extend to loss or damage caused by agents of the carrier, thereby straining the litigation process. More so, the provisions were deemed inconsistent with developments in the shipping industry such as the use of containers in transport, thus making the amendments to the Hague Rules necessary.¹⁴

The provisions of the Hague Rules were revised in Brussels by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading in 1968, which was called the Visby Protocol. This Protocol and the Hague Rules were, from 1968, to be read together as one single instrument known as the Hague-Visby Rules. The provisions of the Hague-Visby Rules were incorporated into South African Law by virtue of the Carriage of Goods by Sea Act 1 of 1986.¹⁵

The Hague-Visby Rules continue to accommodate the excessive exclusionary terms present under the Hague Rules.¹⁶ More so, in drafting the Hague-Visby Rules, the African nations and some developed nations were not consulted, which led to a feeling amongst them that the new rules were designed to favour the industrialised nations and their ship owners.¹⁷ Thus, the United Nations Conference on the Carriage of Goods at Sea was held at Hamburg in 1978, and adopted the United Nations Convention on the Carriage of Goods by Sea 1978. This convention is known today as the Hamburg Rules, and has the aim of replacing the Hague-Visby Rules in the regulation of carriage by sea. Unfortunately, scepticism towards the ratification of the Hamburg Rules by major shipping nations led to its 'failure', and the adoption of a new regime today known as the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules).

¹³ A UN convention aimed at revising the provisions regulating the relationship of parties under the bill of lading.

¹⁴ Zamora *American Journal of Comparative Law* 405-419 <http://www.jstor.org/stable/839373>.

¹⁵ Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2nd (2009) 324-325.

¹⁶ Pravin SVR "The Lawyer's World: The Hamburg Rules, Failure or Success?" 2011 <http://pravinrathinam.blogspot.com/2011/06/hamburg-rules-failure-or-success-review.html> (Accessed: 13/08/2011).

¹⁷ Sinha B "Introduction: Origins of the 1978 Hamburg Rules" 1979 (27) *American Journal of Comparative Law* Unification of International Trade Law: UNCITRAL's First Decade 353-354 <http://www.jstor.org/stable/840038> (Accessed: 26/07/2011).

International Trade involves the flow of goods and services across national frontiers.¹⁸ The economics of international trade play a crucial role in the shipping industry. A flourishing nation will produce surplus goods for export, and secures foreign exchange with which to buy imports. Should the economy of any nation suffer, this drop will reflect in the volume of cargo carried on their ships serving foreign ports. This transaction does not only affect the economics of shipping but the legal domain as well.¹⁹ Many parties have a role to play in such a transaction in order for it come to a favourable end, thus this work will look at the major laws regulating carriage of goods by sea with main interest on how the carriers' limitation of liability has developed (under English common law, Hague/Hague-Visby Rules, Hamburg Rules and recently, the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, commonly referred to as the Rotterdam Rules) to establish equality in the allocation of risks and strike a balance between the consignor and the carrier. In another connection, given that the first international instruments that were developed to regulate carriage by sea were based on the bill of lading, the author will briefly discuss the bill of lading, as the multiplicity of its role in the contract of carriage makes it a cardinal document for carriage of goods by sea.²⁰ Through trade usage, the bill of lading is not only seen as evidence of a contract of carriage by sea, but it is deemed to be the contract itself.²¹

The author reaffirms that development of laws regulating carriers' liability under contracts of carriage by sea is vital to the development of international trade, as in maritime judicial practice most cases involve disputes concerning liability for loss of, or damage to goods in the carriers' care.²²

1.2 DEFINITION OF THE PROBLEM

The major problem that has emerged over the years, and which has plagued international maritime activity, has been the resolution of disputes and the equitable allocation of risks amongst the carrier, consignor, consignee/other third parties interests. This is an issue that cannot be overlooked because predictability, certainty and stability are the foundations of international trade and maritime commerce.²³ The necessity for the development of international rules of uniform application has been recognised by both civil and common law lawyers. Plinio Manca, a civil law lawyer stated that:

¹⁸ Booyson *Principles of International Trade Law* 616.

¹⁹ Hare *Shipping Law & Admiralty Jurisdiction* 570.

²⁰ *Supra* 688.

²¹ Chuah JT *Law of International Trade* 3rd ed (2005) 211.

²² Selvig E "The Hamburg Rules, the Hague and Maritime Insurance Practice" 1981 (12) *Journal of Maritime Law and Commerce* 299-325 323 Sabinet (Accessed: 24/10/2011).

²³ Makins B "Uniformity of the law of the carriage of goods by sea in the 1990s: The Hamburg Rules -a casualty" 1991 (8) *MLAANZ* 34-35
https://maritimejournal.murdoch.edu.au/archive/vol_8/1991vol8part1makins.pdf (Accessed: 15/ 08/2011).

“maritime trade having an international character, the logical corollary flowing from this truth is that the ideal legal system to govern it be a uniform one that is identical in every State. . .”²⁴

In the same vein Lord Diplock, a common law lawyer, in his Summation delivered at the conclusion of the Colloquium on the Hamburg Rules held by the Comité Maritime International (CMI)²⁵ in Vienna in 1979, referred to the initiatives undertaken by the CMI since its foundation almost 100 years ago to promote uniformity in maritime law. In his words:²⁶

“not uniformity for its own sake, but uniformity which will facilitate international trade, reduce the costs of sea transport and what is equally important if trade is to be carried on successfully, will bring as much certainty into it as possible so that those taking part in it know where they stand, what obligations they have to fulfil and what risks they run. We are concerned with uniformity of application as far as possible throughout the trading world and that means that the same facts ought to give rise to the same consequences in all the different jurisdictions in which the matter may fall to be decided by the courts.”²⁷

Tremendous efforts have been put in by the CMI, and the United Nations Commission on International Trade Law,²⁸ to develop international laws on sea carriage that would provide uniformity in application and establish equality between the carrier, consignor and consignee. Unfortunately, in as much as these laws have attempted to resolve the imbalance in bargaining power and establish certainty in the nature of the transaction, they have culminated in greater conflict as today four regimes²⁹ regulate sea transport. The Hamburg Rules, predecessor to the Rotterdam Rules, which were expected to be the panacea of these maritime crises, so far seem to have failed to achieve the aims of UNCITRAL. Instead of replacing the Hague/Hague-Visby regimes, all regimes now exist parallel to one another. It is opined that The Hamburg Rules, although highly favourable to the consignor and consignee, have created greater disparity in the application of the law as only 6% of the world’s shipping nations have ratified them,³⁰ and none of these nations include the major shipping countries. As such, instead of two conventions as obtained

²⁴ Makins 1991 *MLAANZ* 35.

²⁵ The CMI was formally established in 1897, and is the oldest international organization in the maritime field. The Comité was the first international organization concerned exclusively with maritime law and related commercial practices.

²⁶ Makins 1991 *MLAANZ* 35-36.

²⁷ This statement is a reference to the argument advanced by some proponents of the Hamburg Rules that those Rules are to be preferred because they assimilate the rules of carriage of goods by sea to the rules of international conventions relating to carriage by other modes of transport.

²⁸ Hereinafter referred to as UNCITRAL. UNCITRAL is the core legal body of the United Nations system in the field of international trade law. It is a legal body with universal membership specializing in commercial law reform worldwide for over 40 years. UNCITRAL's business is the modernization and harmonization of rules on international business.

²⁹ The Hague, Hague-Visby, Hamburg Rules and Rotterdam Rules.

³⁰ Pravin 2011 <http://pravinrathinam.blogspot.com/2011/06/hamburg-rules-failure-or-success-review.html>.

before 1978, international merchants have to deal with three conventions, which go a long way to create greater antagonism towards the Hamburg Rules, as their opponents contend that their adoption will increase uncertainty in the transaction and also more litigation than before. This greatly influenced the adoption of the new regime, the Rotterdam Rules.

The author asserts that, in order to sustain global economic growth and development, it is essential that the parties in international transport transactions be awarded adequate protection with respect to their stakes in any transaction. Not only does the consignor need protection as he has legal and financial interest in the goods as his property, but also the consignee/buyer who pays for the property in such goods to be passed to him.³¹ In a nutshell, from an analysis of the provisions of the Hague/Hague-Visby regimes, the author purports that, the possibility that the carrier could exempt himself by agreement from liability for loss or damage to the cargo, coupled with the lack of uniformity in the interpretation of these exclusionary clauses in different jurisdictions worldwide, suggests a lack of necessary incentive on the part of the carrier to handle the cargo with utmost care. More so, there is not enough certainty in the likely outcome of any litigation against the carrier.

Be that as it may, aware of the eminent failure of the Hamburg Rules merely four years after its coming into force, UNCITRAL, in its pursuit of developing rules of law that would promote uniformity and certainty in the business of international trade, and carriage of goods by sea in particular,³² started working on a draft instrument on carriage of goods wholly or partly by sea that could meet the desired outcome.³³ The author thus recommends the ratification of an international regime that will ensure certainty and equitability in the application of the rules governing carriage by sea; The Rotterdam Rules.

The Rotterdam Rules are the result of Ten years of intense work by UNCITRAL. It is designed to apply to all contracts of carriage with an international carriage by sea leg involved. Nevertheless, although highly anticipated to promote certainty and predictability in the transport sector, the Rotterdam Rules have not come to existence without fears expressed that an increase in the limits carrier liability may yield similar results as the Hamburg Rules-failure.³⁴

Although parties to a contract of carriage are at liberty to choose the law they wish to bind them, this does not imply a solution to the problem. The consignor, who more often than not is commercially inferior, is handed a standard-form contract issued by the carrier.

³¹ Section 20 of the UK Sale of Goods Act 1979.

³² Honnold J "The United Nations Commission on International Trade Law: Mission and Methods" 1979 (27) *American Journal of Comparative Law* 201-211 <http://www.jstor.org/stable/840026> (Accessed: 29/08/2011 05:50).

³³ Pallarés LS "A Brief Approach to The Rotterdam Rules: Between Hope and Disappointment" 2011 (42) *Journal of Maritime Law & Commerce* 453-463 455 <http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=66465323&site=ehost-live> (Accessed: 17/11/2011).

³⁴ Pallarés 2011 *Journal of Maritime Law & Commerce* 453 <http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=66465323&site=ehost-live>.

The consignor may have limited or no knowledge of the elected rule binding it in contract, but yet be compelled to proceed with the agreement due to other considerations.³⁵ In this situation, should the consignor suffer any prejudice such as loss or damage to cargo, where the elected law governing the contract enables the carrier to include an inexhaustible list of exceptions to its liability under the contract of carriage, the consignor is likely not be able to claim adequate compensation from the carrier for loss or damage to the cargo.

1.3 RESEARCH QUESTION

To what extent have international regimes (such as the English common law, Hague, Hague-Visby, Hamburg Rules and Rotterdam Rules) developed so as to impose minimum standards of liability on the carrier and regulate the relationship between the carrier, consignor and consignee, or any bona fide third party with a claim, in order to establish uniformity and certainty in the application of rules governing carriage of goods by sea?

1.4 AIM AND OBJECTIVES

It has been suggested that the continued application of the Hamburg Rules by minority shipping nations does not favour the international community. This argument is based on grounds such as, that it creates greater disparity in the application of rules governing sea carriage, and will result in greater uncertainty than before, and will also cause a considerable increase in maritime litigation thus hindering global economic development. The author's position is that the Hamburg Rules, from a practical point of view, provide a major improvement to carriage by sea, in terms of certainty and equitable allocation of risks over the Hague regime. However, the author sees a champion of maritime law in the recent Rotterdam Rules, and concurs with other authors that the adoption of the Rotterdam Rules by the maritime community is clear indication that their aim to develop a maritime regime geared primarily at establishing a balance in the allocation of obligations and liability between the parties involved in carriage transactions has been achieved.³⁶ Hence, this research will establish an evolutionary map of the laws that were developed over the years to regulate carriage by sea; show the impact of these laws on the relationship between the carrier, consignor, consignee and any bona fide third party; advance reasons for the failure of the Hamburg Rules, and conclude by advocating for the ratification of the Rotterdam Rules as the most effective tool developed so far to regulate carriage by sea.

³⁵ 'Gbenga B "Transnational Law, Unification and Harmonization of International Commercial Law in Africa" *Journal of African Law* (38)1994 125 129 <http://www.jstor.org/stable/745391> (Accessed: 13/08/2010 05:39).

³⁶ Mukherjee PK & Bal AB "A Legal and Economic Analysis of the Volume Contract Concept under the Rotterdam Rules: Selected Issues in Perspective" 2009 (40) *Journal of Maritime Law & Commerce* 579-607 605 <http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=47882772&site=ehost-live>.

1.5 RESEARCH METHODOLOGY

This study will make use of sources with relevant information to the development laws regulating carrier's liability. This will be obtained from a documentary analysis of books describing the nature and performance of the contract of carriage, articles relating to contracts of carriage of goods and conflicts in the relationship between the parties thereto. In addition, the author will look at the English common law and international conventions relating to contracts for the carriage of goods and its performance such as the Hague-Visby Rules; the Hamburg Rules, and the Rotterdam Rules, in order to outline the scope of the carriers' liability under contracts of carriage, and how the application of these rules contribute to establish certainty and equality between the carrier, consignor and consignee. The researcher has easy access to relevant literature which is readily available nationally from libraries at universities in South Africa which are rich not only in text books on international trade law, but also journals and articles on carrier liability, not forgetting the available online databases such as EBSCOHOST, LEXIS NEXIS ACADEMIC, SABINET and the World Wide Web, from which a lot of international journals and articles addressing limitation of carriers' liability can be obtained with ease.

This work is divided into 6 chapters. The first chapter sets a background to the study, with a summary of the rules that were developed over time to regulate carriage of goods by sea and identifies a crucial problem that affects the performance of the contract of carriage. This chapter discusses sales contracts, as well as a contract for the carriage of goods by sea and the role of the bill of lading. It describes the nature of the contract of sale, especially CIF and FOB contracts, and how these affect the relationship between the consignor, consignee and the carrier, and the incidents of liability under the contract of carriage of goods by sea. This chapter further identifies the types of contracts of carriage by sea, and bills of lading to which the various rules apply, and describes the performance of a contract of carriage by sea and the terms under which remuneration for the carriage of good by sea is earned. Chapter Two focuses on the liability of the carrier under English Common law, the presumption of liability imposed on the carrier, the defences to such liability provided under the Common law, and the exceptions incorporated into the contract of carriage by the carrier in a bid to limit its liability. Chapter Three introduces the Hague/Hague-Visby regimes, identifies the numerous defences awarded to the carrier under these regimes and the limits of liability there under. In chapter Four the author presents the Hamburg Rules, the main provisions of the Hague/Hague-Visby regimes it sort to redress, and also outlines the major developments brought about by the Hamburg Rules in the transport industry. This chapter also introduces the Rotterdam Rules. Chapter Five follows with an outline of changes introduced by the Rotterdam Rules in the business of maritime carriage. The author concludes this study in chapter Six with a brief discussion on the development of law on transport by sea, and arguments in favour of the ratification of the Rotterdam Rules.

1.6 CONTRACTS OF SALE AND THE INCIDENCE OF CARRIER LIABILITY UNDER CONTRACTS OF CARRIAGE BY SEA

1.6.1 NATURE OF THE CONTRACT OF SALE

The United Nations Convention on Contracts for the International Sale of Goods (CISG),³⁷ does not define a contract of sale but however, it provides that contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the material necessary for their manufacture or production (Article 3).³⁸ Several attempts have been made by the judiciary to define the term CIF contract, but the most prominent definition in modern times is that of Lord Atkinson in *Johnson v Taylor Bros*,³⁹ who described a CIF contract as follows:

“... when a vendor and purchaser of goods... enter into CIF contract...the vendor in the absence of any special provision to the contrary is bound by his contract to do [the following]. First, to make out an invoice of the goods sold. Secondly, to ship at the port of shipment goods of the description contained in the contract. Thirdly, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract. Fourthly, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer. Fifthly, with all reasonable despatch to send forward and tender to the buyer these shipping documents, namely, the invoice, bill of lading and policy of assurance, delivery of which to the buyer is symbolic delivery of the goods purchased, placing the same at the buyer’s risk and entitling the seller to payment of their price... if no place be named in the CIF contract for the tender of the shipping documents they must *prima facie* be tendered at the residence or the place of business of the buyer [at p 155].”⁴⁰

More often than not, the likely outcome of an international sales agreement is the physical transfer of property from a seller to an overseas buyer.⁴¹ Hence the completion of the transaction cannot be met without the services of a carrier.⁴² Depending on the nature of the sales contract between the seller and buyer (C.I.F or F.O.B below) the carriage of

³⁷ The CISG was adopted in Vienna in 1980 under the auspices of UNCITRAL to regulate international sale of goods.

³⁸ Booyesen *Principles of International Trade Law* 577.

³⁹ [1920] 122 LT 130.

⁴⁰ Carr I *International Trade Law* 3rd ed (2005) 7-8.

⁴¹ Murray C Holloway D & Timson-Hunt D *Schmitthoff's Export Trade: The Law and Practice of International Trade* 11th ed (2007) 2.

⁴² Booyesen *Principles of International Trade Law* 618.

goods, determination of the point of delivery, procurement of transport documents and other documents relevant to the contract may be arranged by either one of them.

1.6.2 C.I.F CONTRACTS

Despite the numerous documents that comprise an international business transaction, it is the contract of sale that determines whether liability for goods during carriage is to lie on the buyer or the seller. Per Lord Wright in *Ross T Smyth and Co Ltd v TD Bailey Son and Co*,⁴³ Cost, Insurance and Freight (C.I.F), is the most frequently used form of contract for the purpose of seaborne transportation.⁴⁴ It indicates that the total cost of the goods includes its insurance and freight. Mind blowing sums resulting from an inexhaustible number of transactions are performed every year under C.I.F contracts.⁴⁵

C.I.F contracts are concluded through the transfer of documents relating to the contract. As a result of this transfer of documents from the seller to the buyer, a direct legal relationship is established between the buyer on the one hand, and the carrier and the insurer on the other. This relationship enables the buyer to claim directly from these parties in the event of loss or damage to the goods, despite the fact that the contracts of carriage and insurance were not concluded by the buyer but the seller.

Under C.I.F contracts the seller has to ship, or acquire after the shipment, the contracted goods. After shipment the carrier must obtain proper bills of lading and proper policies of insurance. The carrier fulfils its contract by transferring the bills of lading and policies to the buyer. The general rule is that the carrier does so only against the payment of the price agreed between the buyer and himself.⁴⁶ These documents are accompanied by an invoice which shows the price and a deduction of the freight which the buyer pays before delivery at the port of discharge.⁴⁷

Scrutton J in *Arnold Karberg & Co v Blythe, Green Jourdain & Co*,⁴⁸ emphasised that it must be borne in mind that C.I.F is not a contract that the goods shall arrive, but rather a contract to ship goods complying with the contract of sale, to obtain, unless otherwise stated in the contract, the ordinary contract of carriage to the place of destination, and the ordinary contract of insurance of goods on the voyage, and to tender these documents against payment of the contracted price.⁴⁹

Under C.I.F the seller (consignor) is under an obligation to accommodate the buyer (consignee), by paying for the cost and freight for the carriage and also insurance cover for

⁴³ [1940] 3 ALL ER 60.

⁴⁴ *Carr International Trade Law* 6.

⁴⁵ Murray et al *Schmitthoff's Export Trade* 34; Chuah *Law of International Trade* 125.

⁴⁶ *Smyth & Co Ltd v Bailey Son & Co Ltd*.

⁴⁷ Chuah *Law of International Trade* 126.

⁴⁸ [1915] 2K.B 379 388.

⁴⁹ Murray et al *Schmitthoff's Export Trade* 35.

the cargo.⁵⁰ The seller's objective is to pass over his right to dispose of the goods only against receipt of the purchase price, and be exempted from liability for loss or damage to the goods in the course of the voyage. The buyer and seller both meet their objectives when the buyer or nominated banker- as the case may be- performs payment under terms provided in their contract, against delivery of the documents relating to the goods. In a business sense, the delivery of the shipping documents is the equivalent of the goods.⁵¹ This is of great importance should the goods be lost during the voyage, as the buyer will be compensated by the insurers for any loss covered, or claims against the ship for breach of the contract of carriage.

1.6.3 F.O.B CONTRACTS

F.O.B generally stands for "free on board", and refers to the kind of sales agreement wherein the seller undertakes to place the goods on board a ship that has been named to him by the buyer and that is berthed at the agreed port of shipment. Under F.O.B contracts the seller bears all the expenses until the goods are delivered to the carrier, while the buyer on the other hand has to pay subsequent charges such as freight and marine insurance, as well as unloading charges, import duties, consular fees and all other charges due on arrival of the goods at the port of destination.⁵² The buyer may also have to pay for stowage of goods in or on board the ship; in cases where the F.O.B contract did not include the seller taking care of stowage, in which case it would have been "F.O.B stowed"⁵³

In another connection, unlike C.I.F. contracts there is no standard definition F.O.B.⁵⁴ however, some light was shed as to its meaning by Lord Brougham in the case of *Cowasjee v Thompson*:⁵⁵

"it is proved beyond all doubt, indeed it is not denied that when goods are sold in London 'free on board'. The cost of shipping then falls on the seller but the buyer is considered the consignor."⁵⁶

More so, F.O.B contracts are not standard. Over the years the courts have recognised the flexibility of the terms of F.O.B contracts, for example; the buyer may undertake to make arrangements for the loading of the goods on board and the seller on the other hand may carry out the insurance of the goods for the buyer. In *Pyrene Co Ltd v*

⁵⁰ Booyesen *Principles of International Trade Law* 602.

⁵¹ Murray et al *Schmitthoff's Export Trade* 35.

⁵² *Stock v Ingis* (1884) 12 QBD.573.

⁵³ Murray et al *Schmitthoff's Export Trade* 18.

⁵⁴ Carr *International Trade Law* 37.

⁵⁵ (1845) 5 Moore PC 165.

⁵⁶ Chuah *Law of International Trade* 112.

Scindia Navigation Co Ltd, Devlin J. stated that,⁵⁷ “F.O.B contracts have become a flexible instrument...”⁵⁸

1.6.4 TYPES OF CARRIAGE CONTRACTS

As there exists different forms under which a contract of sale may be concluded, so too are there different forms under which a contract of carriage may come to exist. There are two main types of contracts of carriage; those evidenced by a Bill of Lading, and by charter parties.⁵⁹ The party who undertakes to ship the goods is known as the consignor or the charterer. He may decide to use an entire ship for this purpose, in which case the transaction is known as a charter party.⁶⁰ Should this be the case, the consignor is referred to as the charterer, and the ship owner the carrier. Hence, the contract is between the charterer and the ship owner.

There are three types of charter parties;

- Voyage Charter; the ship is hired for carriage from a named port of loading to a named port of discharge, the charterer pays freight to the ship owner, and a specified time for loading and discharge will be provided.
- Time Charter; the charterer may use the ship for a stipulated period of time for voyages and purposes agreed in the contract. The freight is paid on hire basis, which is most often pre-paid, and will run from the time the vessel is delivered to the charterer and will cease when it is returned to its owner. The Charter takes into account times when the vessel may not be in service such as time of repairs and maintenance in the course of the charter party. During such times known as off-hire, the hire will be suspended until the vessel is back on track.
- Bareboat Charter or Charter by Demise; allows the charterer full control and liability over the vessel and its crew and master, unlike the time or voyage charter parties where liability for the crew and master remain with the ship owner, in a nutshell, the charterer assumes the position of the ship owner for the duration of the charter.⁶¹

In some other cases the consignor may elect not to use an entire ship but rather just necessary space for his cargo on a general ship such as a liner plying a regular route or a tramp that sails from port to port looking for cargo, and hence approaches the ship owner or charterer with shipping space on his charter, [or any individual whom for the time being, as an agent of the ship owner has the right to enter into a contract of carriage on the ship].⁶² In the event where the ship owner or agent accepts the carry to shipper’s goods,

⁵⁷ [1954] 2 QB 402; *NV Handel Ny J. Smits Import-Export v English Exporters (London) Ltd* [1957] Lloyd’s Rep 517.

⁵⁸ Chuah *Law of International Trade* 114.

⁵⁹ Murray et al *Schmitthoff’s Export Trade* 288.

⁶⁰ Carr *International Trade Law* 163.

⁶¹ Chuah *Law of International Trade* 229-230.

⁶² Murray et al *Schmitthoff’s Export Trade* 283.

that will be referred to as a contract for the carriage of the goods by sea.⁶³ The ship owner or charterer who accepts to ship the goods assumes the position of the carrier, and the remuneration due to him is referred to as freight. The carrier will hence be liable to the consignor for loss or damage to the goods. This liability may be to the buyer/consignee in other cases where the shipper elects to transfer his property in the goods to the third party buyer, and relieve himself from the contract. Therefore, such third party may sue in his own rights for loss or damage to the goods.⁶⁴

Where the consignor prefers to obtain shipping space on board part of a vessel, he is issued a bill of lading which contains the terms of the contract of carriage.⁶⁵ Bills of lading are not mandatory in charter parties, but where they are issued in charter parties they do not serve in their normal capacity as evidence of the contract of carriage of goods, but merely transport documents that evidence the receipt of goods by the carrier.⁶⁶ The contract between the shipper and the carrier remains evidenced by the charter party and remains outside the purview of the Hague Visby Rules because it is stipulated in Article 1(b) of the Hague-Visby Rules that should the bill of lading not define the relationship between the carrier and its holder, the Rules shall have no impact on their contractual arrangements.⁶⁷

1.6.5 WHY INTERNATIONAL REGULATION?

The Hague-Visby Rules apply to contracts which require the issue of a bill of lading or any similar document of title, where such documents or bill of lading relate to the terms of the contract of carriage of goods between ports in two different states provided:

- a. The bill of lading is issued in a contracting state; or
- b. The carriage is from a port in a contracting state; or
- c. The contract contained in or evidenced by the bill of lading provides that the Hague-Visby Rules or legislation of any state giving effect of them are to govern the contract.⁶⁸

Where statutory law does not govern the contract of carriage, recourse must be made to Common law Rules to ascertain the liabilities of the parties to the contract of carriage.⁶⁹ The Common Law position was that the parties were on equal footing and hence the maxim *caveat emptor* was frequently employed, and hence the parties were at total liberty to draw up their rules of engagement. Be that as it may, due to the vulnerability of the consignor who more often than not has lesser bargaining power and knowledge of the transport world than the actual carrier, and coupled with the need for international uniformity and

⁶³ Or contract of affreightment.

⁶⁴ *Infra* paragraphs 3.2 and 4.2.

⁶⁵ Murray et al *Schmitthoff's Export Trade* 284.

⁶⁶ Article 6 (a) and (b)(i)(ii) South African Sea Transport Document Act 2000.

⁶⁷ Chuah *Law of International Trade* 231.

⁶⁸ Carr *International Trade Law* 279.

⁶⁹ Chuah *Law of International Trade* 231.

certainty, International conventions, such as the Hague/Hague-Visby Rules, the Hamburg Rules and Rotterdam Rules were introduced to establish equality amongst the carrier, consignor and consignee.⁷⁰ These conventions sought to check the liberties of the carriers in relation to the contract of carriage and foster uniformity in the application of the law across nations, so that the carrier does not act to the detriment of the consignor or consignee, or unjustly limit or exclude himself from liability for loss or damage caused, except in accordance with the relevant rules. Some of these conventions however provide for the exclusion of certain types of contracts from their scope of application. The Hague Visby Rules for example restricts its application to certain contracts; the Hague Visby Rules shall not apply to the carriage of live animals, or the carriage of deck cargo, or Inland waterway carriage,⁷¹ and should the parties to the contract of carriage elect to apply the Hague-Visby Rules to a contract that fall out of its scope, the Rules will operate as a contractual term and not as law.⁷²

In spite of the reforms in transport rules, the Common Law remains more than relevant to understanding carrier liability, as it provides a background against which the operations of the present day statutes may apply, and more so remain applicable to those instances or contracts that fall out of the scope of statute.⁷³

1.7 THE BILL OF LADING AND PERFORMANCE OF THE CONTRACT OF CARRIAGE

A brief overview of the nature of the bill of lading is relevant to this study as most of the international conventions that have governed carriage by sea over the years were based on the bill of lading. More so, even following a call for the reform of the Hague regime, the focus of UNCITRAL was on the bill of lading because goods were not only carried under a bill of lading, but the bill of lading affected the interests of the parties to the contract.⁷⁴

The bill of lading is a creation of mercantile practice which has developed so much that it stands today as the core of effective international trade.⁷⁵ The courts have held that:

“a bill of lading is a document of dignity, and courts should do everything in their power to preserve its integrity in international trade for there, especially, confidence is of the essence.”⁷⁶

⁷⁰ *Supra* 231.

⁷¹ *Supra* 231; Carr *International Trade Law* 315.

⁷² Chuah *Law of International Trade* 231.

⁷³ Chauh *Law of International Trade* 232.

⁷⁴ Pravin 2011 <http://pravinrathinam.blogspot.com/2011/06/hamburg-rules-failure-or-success-review.html>.

⁷⁵ Hare *Shipping Law & Admiralty Jurisdiction* 688.

⁷⁶ *The Carso* 1930 AMC 1743 1758.

No definition of the term 'bill of lading' has been provided either at Common Law or under any other legislation affecting it.⁷⁷ However, it is presumed by law that any document that is referred to and treated as a bill of lading should be able to serve as a receipt for goods shipped; evidence of the contract of carriage; and a document of title.⁷⁸ The first recognition by the courts as to the character of the bill of lading was in 1794,⁷⁹ in *Lickbarrow v Masin*.⁸⁰ The courts acknowledged that trade usage recognises the bill of lading as a document of title to the goods to be delivered to the consignee.⁸¹

The bill of lading is printed in standard-form and issued in three copies, usually stated as sets, and amongst others, bears information with regards to the state of the goods carried, relevant dates, the names of the consignor of goods, the name and address of the consignee or other person entitled to take delivery of the goods, a description of the goods with regard to their quantity and condition made by the consignor, the name of the vessel to perform the voyage, the port and time of departure and port of discharge, details pertaining to the payment of freight and other terms of the carriage.⁸² Once one of the bills of lading has been activated to demand delivery, the rest stand void.⁸³

The main functions of the bill of lading shall be looked at briefly below:

1.7.1 BILL OF LADING AS RECEIPTS

Before any other thing, the bill of lading signed by the carrier or any of his agents is evidence of the receipt of the goods by the carrier for shipment.⁸⁴ Statements in the bill of lading are regarded as *prima facie* evidence of the receipt of the goods as described under Article III(4) of the Hague-Visby Rules, and the carrier is estopped from rebutting this presumption once the bill of lading has been handed to a bona fide third party.⁸⁵ In its capacity as a receipt, the bill of lading is evidence of the quantity, condition and quality of the goods received.⁸⁶ This is a quality enforced under the Hague Visby Rules by Article III(3), as it imposes an obligation on the carrier to issue a bill of lading that contains: leading marks necessary for identification of the goods, number of packages or pieces; the quantity or weight of the goods; and the apparent order and condition of the goods.⁸⁷

⁷⁷ Carr *International Trade Law* 178.

⁷⁸ Chuah *Law of International Trade* 193.

⁷⁹ Murray et al *Schmitthoff's Export Trade* 299.

⁸⁰ [1794] 5TR 683.

⁸¹ Chuah *Law of International Trade* 193.

⁸² Van Niekerk JP & Schulze WG *The South African Law of International Trade: Selected Topics* 1 ed (2000) 110.

⁸³ Chuah *Law of International Trade* 193.

⁸⁴ Van Niekerk and Schulze *The South African Law of International Trade* 111.

⁸⁵ Carr *International Trade Law* 178.

⁸⁶ Hare *Shipping Law & Admiralty Jurisdiction* 691.

⁸⁷ Chuah *Law of International Trade* 203.

In the hands of the consignor or consignee, the bill of lading is *prima facie* evidence that the goods have been shipped in good order and condition.⁸⁸ It was held in *Smith v Bedouin Steam Navigation Co*,⁸⁹ that the carrier bears the burden of proving that the goods, as specified in the bill of lading have not been shipped, and not merely that they could have not been shipped.⁹⁰ However, the carrier is free from liability where he establishes that the goods as stated in the bill of lading were not shipped and such evidence will avail him even against a bona fide third party,⁹¹ as seen in *Grant v Norway*.⁹²

1.7.2 THE BILL OF LADING AS EVIDENCE OF THE CONTRACT OF CARRIAGE

The bill of lading is usually issued to the consignor only after his goods have been loaded on the vessel, and such loading is done in pursuance of an already existing contract between the parties for the carriage of the goods.⁹³ It was on these grounds that the courts in *The Ardenes*,⁹⁴ held that the bill of lading is not the contract, but mere evidence of the contract of carriage between the consignor and the carrier. In the same vein, in *Leduc v Ward*,⁹⁵ it was held that as between the carrier and the consignee, or a bona fide third party transferee, the terms of the contract of carriage as evidenced by the bill of lading are conclusive, and the carrier shall be estopped from providing any evidence to rebut the terms thereof.⁹⁶

1.7.3 THE BILL OF LADING AS DOCUMENT OF TITLE

An important feature of the bill of lading is its transferability as a document of title to the goods described therein, thus entitling its holder to take possession of the goods from the carrier at delivery.⁹⁷ As afore mentioned, international sales transactions require the transfer of goods across international frontiers. This transaction is not a swift one as carriage by sea takes a considerable amount of time before the consignee receives the goods. Because of this, custom was developed to enable the consignor to transfer property in the goods should it be his intention,⁹⁸ by simply endorsing the bill of lading to another party,⁹⁹ without which it is symbolic of delivery of the goods to the buyer (consignee).¹⁰⁰

⁸⁸ Hare *Shipping Law & Admiralty Jurisdiction* 691.

⁸⁹ [1896] AC 70.

⁹⁰ Carr *International Trade Law* 179.

⁹¹ *Supra* 179.

⁹² [1851] 10 CB 665.

⁹³ Van Niekerk & Schulze *The South African Law of International Trade* 133.

⁹⁴ [1951] 1 KB 55.

⁹⁵ [1888] 20 QBD 457; see Chuah *Law of International Trade* 212 for facts of the case.

⁹⁶ Murray et al *Schmitthoff's Export Trade* 325.

⁹⁷ Van Niekerk and Schulze *The South African Law of International Trade* 133.

⁹⁸ Murray et al *Schmitthoff's Export Trade* 325.

⁹⁹ Chuah *Law of International Trade* 219.

¹⁰⁰ Carr *International Trade Law* 185.

Hence, the transferability of the bill of lading enables the consignee, or its holder to trade the goods to which the bill of lading relates while they are still in transit.¹⁰¹

The courts have helped to provide clarity to the nature of the bill of lading as a document of title through the decision in *Sanders Bros v MacLean*:¹⁰²

“the law as to the endorsement of the bills of lading is as clear as in my opinion the practice of all European merchants is thoroughly understood. A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the endorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such endorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods.”¹⁰³

It thus goes without saying that the holder of the bill of lading can sell the cargo while it is in transit to a third party by endorsing the bill of lading and passing it to the third party.¹⁰⁴ It should however be borne in mind that for the bill of lading to be transferrable as a document of title, it must be evident on first look that it is negotiable.¹⁰⁵ Thus it must be set out as an ‘order bill’, which means that it is made out to a named consignee or his “order or assigns”. Hence the named consignee could transfer or assign the bill of lading by simple endorsement. On the other hand, where the bill is simply made to a named consignee, it is a “straight bill”, which is non-transferable once it has been delivered to the “notify party”¹⁰⁶

1.7.4 PERFORMANCE OF THE CONTRACT OF CARRIAGE

Under a contract of carriage by sea, the carrier undertakes to convey specific goods in a particular way (by sea) from a named port to another, following an undertaking by the owner of the goods to pay a determined or determinable freight for such carriage. An agreement for gratuitous carriage will not qualify as a contract of carriage.¹⁰⁷

At Common Law, in the absence of any special agreement or custom, the consignor has to deliver the goods alongside the ship or within the reach of her tackle at his own expense.¹⁰⁸ Per Devlin J in *Pyrene Co Ltd v Scindia Steam Navigation*,¹⁰⁹ the contract of

¹⁰¹ Hare *Shipping Law & Admiralty Jurisdiction* 688.

¹⁰² [1883] 11 QBD 327.

¹⁰³ Chuah *Law of International Trade* 219.

¹⁰⁴ Carr *International Trade Law* 185.

¹⁰⁵ Chuah *Law of International Trade* 219.

¹⁰⁶ *Supra* 219.

¹⁰⁷ Van Niekerk and Schulze *The South African Law of International Trade* 95.

¹⁰⁸ Murray et al *Schmitthoff's Export Trade* 285.

¹⁰⁹ [1954] 1 Lloyd's Rep 321 164.

carriage starts with a booking note issued by the carrier to confirm that space is available and will be allocated to the contracted cargo for the journey envisaged.¹¹⁰

Where the exporter undertakes to secure the carriage of the goods to the buyer, the exporter as the seller will become the **consignor** of the goods. In his capacity as the consignor, he must secure space upon a vessel that will load and carry the cargo. The consignor may do this personally or procure the services of a forwarding agent with expert knowledge of the particulars of the transaction. The forwarding agent thus approaches a booking agent who represents the ship owner whose vessel the exporter wishes to use, and the booking agent in turn issues the forwarding agent a booking note confirming that space has been secured on board the vessel that is to load and carry the cargo.¹¹¹

On the other hand, the ship owner, or charterer who agrees to convey the goods is the **carrier**.¹¹² In return for the carrier's services he is given remuneration known as freight. The freight may be paid or payable at destination depending upon the terms of the contract. Freight is payable only upon the safe carriage and delivery of the goods. In *Kirchner v Venus*,¹¹³ the courts decided that, if the cargo is lost on the voyage, nothing is payable.¹¹⁴ Unless the norms particular to the port of loading provide otherwise, when the goods are delivered to the carrier, the consignor receives a mate's receipt.¹¹⁵

In *Harris & Son Ltd v China Mutual Steam Navigation Co Ltd*,¹¹⁶ the courts held that while the goods are at the docks, they are to be inspected by a tally clerk who takes down a record of their particulars such as date of loading, weight, identification marks, individual package, numbers, any defect or comment on the state in which the goods are received.¹¹⁷ When loading is completed the carrier's agent in charge of the loading signs the mate's receipt which is based on the notes supplied by the tally clerk and contains all comments and attributes in respect of the state in which the goods were received. If the mate's receipt carries a negative qualification for the goods it is termed a claused receipt, as was the case in *Cremer v General Carriers SA*.¹¹⁸ If the mate's receipt does not contain any negative qualifications it is a clean receipt. The qualifications on the mate's receipt are incorporated into the bill of the lading and qualify the bill of lading accordingly.¹¹⁹

The mate's receipt serves two purposes:

¹¹⁰ Hare *Shipping Law & Admiralty Jurisdiction* 574.

¹¹¹ Hare *Shipping Law & Admiralty Jurisdiction* 574.

¹¹² *Supra* 575.

¹¹³ (1859) 12 Moore PC 361 at 390.

¹¹⁴ Murray et al *Schmitthoff's Export Trade* 290.

¹¹⁵ *Supra* 285.

¹¹⁶ [1959] 2 Lloyd's Rep 500 at 501; *Naviera Mogor SA v Societe Metallurgique de Normandie: The Nogar Marin* [1988] 1 Lloyd's Rep 412 420 CA.

¹¹⁷ Murray et al *Schmitthoff's Export Trade* 290.

¹¹⁸ [1973] 2 Lloyd's Rep 366 284.

¹¹⁹ Murray et al *Schmitthoff's Export Trade* 286.

- i) Acknowledgement by the carrier that he has received the goods in the condition therein, that there are in his possession and that he has charge over them,
- ii) They are prima facie evidence of ownership; the carrier may safely assume, unless he has evidence of the contrary, that the holder of the mate's receipt or person named therein is the owner of the goods and person entitled to receive the bill of lading in exchange for the mate's receipt.¹²⁰ Unlike the bill of lading however, the mate's receipt is not a document of title, hence, property in the goods does not pass with its subsequent transfer to the holder,¹²¹ as was seen in *NYK v Rambijan and Serowgee*.¹²²

The records of the tally clerk are usually compared with the draft bill of lading sent by the consignor for any discrepancies, and are eventually incorporated into the final bill of lading so that the carrier is not expected to deliver at the port of destination, cargo in any condition other than as mentioned in the final bill of lading.¹²³ The consignor usually prepares a set of two or three original bills of lading in respect of the cargo, and when the particulars of the bill of lading and tally clerk's records reconcile one another, the carrier or loading broker signs them and they are handed over to the consignor. (in practice the bill of lading is sometimes handed to the consignor only when the ship leaves port, but where the bill of lading is issued under the Carriage of Goods by Sea Act 1971, as is the case in British ports, the Hague Visby Rules appended to the Act provide in Article III, r.3 that the consignor can demand the issue of the bill of lading after the carrier has received the goods into his charge).¹²⁴ The issued bills of lading are all of the same tenor and date. If the carrier stamps one of the bills of lading as accomplished, the others stand void. The accomplished bill entitles the holder to the delivery of the goods to his charge.¹²⁵

The various bills of lading are forwarded to the consignee by subsequent airmail to ensure their timely and safe arrival. The consignee needs to be in the possession of at least one part of the set of bills of lading before his goods arrive because the carrier is not bound to deliver the goods unless a bill of lading is delivered to him. Upon receipt of the bill of lading by the carrier he then issues a delivery order which the consignee will present to the ship's officer in charge of unloading and claim his goods.¹²⁶

Where the transaction was concluded under a letter of credit, the consignor is supposed to hand the bill of lading alongside any other relevant documents to the advising bank, and that bank then forwards the documents by air mail to the issuing bank.¹²⁷

¹²⁰ Article III Rule 3 of the Hague Visby Rules, the consignor is entitled to be issued a bill of lading upon shipment of its goods on board as evidenced by a mate's receipt.

¹²¹ Hare *Shipping Law & Admiralty Jurisdiction* 575.

¹²² [1938] AC 429.

¹²³ Hare *Shipping Law & Admiralty Jurisdiction* 575.

¹²⁴ Murray et al *Schmitthoff's Export Trade* 286.

¹²⁵ *Supra* 287.

¹²⁶ *Supra* 287

¹²⁷ *Supra* 288.

Should two or more people be in possession of a bill of lading, the carrier may hand the cargo over to the first person who presents the bill, “provided he has no knowledge of other claims to the goods or knowledge of any other circumstances that raise reasonable suspicion as to the claimant’s entitlement to the goods...The carrier may not deliver the goods to a consignee named in the bill of lading, and does so at his own peril if such a consignee is not in fact entitled to the goods.”¹²⁸

Upon delivery of the goods in accordance with the terms evidenced by the bill of lading, the carrier is discharged from his obligations in relation to the contract of carriage.¹²⁹

1.8 FREIGHT

The reward the carrier receives for his service is referred to as freight. Freight is payable only upon the **safe delivery** of the goods. In *Kirchner v Venus*,¹³⁰ it was held that should the carrier lose the goods he forfeits the freight.¹³¹ It was held in *The Argos (Cargo ex), Gaudet v Brown*,¹³² that the carriers’ obligation is readiness to deliver and not delivery per se.¹³³ Also, ‘safe’ in this context does not refer to the state of the goods on delivery. In *Dakin v Oxley*,¹³⁴ it was held that; “freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant...”¹³⁵ Mores so, in *Asfar v Blundell*,¹³⁶ The carrier will be entitled to his freight even if the goods are damaged unless the damage is such that the goods can no longer be qualified as merchantable.¹³⁷

In another connection, although the carrier is not entitled to claim freight before the cargo has reached destination and is ready for delivery, the parties to the contract are at liberty to alter the terms of their engagement and make provisions for prepaid freight. Although such alterations are not sanctioned by the English Carriage of Goods by Sea Act 1971, in *Oriental Steamship Co Ltd v Taylor*,¹³⁸ it was held that such alterations bind the parties thereto and the carrier may sue on it should due prepaid freight not be paid.¹³⁹ However, the carrier forfeits his right to freight if:

¹²⁸ Scrutton TE *Charterparties and Bills of Lading* 20 ed (1996) 292 in Murray, Holloway & Timson-Hunt *Schmitthoff’s Export Trade: The Law and Practice of International Trade* 11 ed (2007) 288.

¹²⁹ Murray et al *Schmitthoff’s Export Trade* 288.

¹³⁰ (1859) 12 Moore PC 361 390.

¹³¹ Murray et al *Schmitthoff’s Export Trade* 290.

¹³² (1873) LR 5 PC 134.

¹³³ Murray et al *Schmitthoff’s Export Trade* 290.

¹³⁴ (1864) 15 CBNS 646.

¹³⁵ Murray et al *Schmitthoff’s Export Trade* 291.

¹³⁶ [1896] 1 QB 123.

¹³⁷ Murray et al *Schmitthoff’s Export Trade* 291.

¹³⁸ [1893] 2 QB 518.

¹³⁹ Murray et al *Schmitthoff’s Export Trade* 292.

- 1) The ship never earned freight and never began to earn freight e.g. because she did not sail.¹⁴⁰
- 2) The goods are lost before the advance freight becomes due.¹⁴¹
- 3) The goods are lost by an event other than the expected peril.¹⁴²

¹⁴⁰ Jame CJ in *Exp Nyholm, rechild* (1873) 43 LJ BK 21 24; Murray et al *Schmitthoff's Export Trade* 293.

¹⁴¹ *Compania Naviera General SA v Keramental Ltd*; Murray et al *Schmitthoff's Export Trade* 293.

¹⁴² *Dufourcet v Bishop* (1886) 18 QBD 373; Murray et al *Schmitthoff's Export Trade* 293.

CHAPTER TWO

CARRIERS' LIABILITY UNDER ENGLISH COMMON LAW

2.1 INTRODUCTION

Carrier liability at common law attaches to the individual termed as the “common carrier”. Common carriers are persons who hold themselves out as being prepared to carry and convey goods on behalf of some other person for a fee. The fact that these common carriers represented themselves as trustworthy men makes them subject to special duties.¹⁴³

The carriers' duties under a contract of carriage of goods by sea are implied both at Common Law and under statute. At common law, the carriers' liability is absolute;¹⁴⁴ hence in *Davis v Lockstone*,¹⁴⁵ it was held that the carrier need not have been at fault or acted negligently for liability for loss or damage to lie against him.¹⁴⁶ Lord Mansfield further describes the obligations of the common carrier as he states that:

“...there is a further degree of responsibility (other than negligence or wilfulness) by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies.”¹⁴⁷

There has been much confusion nevertheless in determining who the common carrier is. Should the carrier not be a common carrier but a bailee without reward for example, the duties imposed on him shall be less strict. It was held in *Levinson v Patent Steam Cleaning*,¹⁴⁸ that such a bailee is only required to ensure to the best of his abilities that the cargo is not damaged or lost, and on him lays the onus to prove that he had not been negligent in handling the cargo.¹⁴⁹ It was also held in *Ace-High Dresses Inc v J. C. Trucking Co*,¹⁵⁰ that a common carrier is one “engaged in the business of carrying goods for others as a public employment and holds himself out as ready to engage in the transportation of goods for persons generally, as a business.”¹⁵¹

¹⁴³ Chuah *Law of International Trade* 232.

¹⁴⁴ Zamora *American Journal of Comparative Law* 397 <http://www.jstor.org/stable/839373>.

¹⁴⁵ (1921) AD 153.

¹⁴⁶ Van Niekerk & Schulze *The South African Law of International Trade* 96.

¹⁴⁷ Chuah *Law of International Trade* 232.

¹⁴⁸ [1978] QB 69.

¹⁴⁹ Chuah *Law of International Trade* 232.

¹⁵⁰ 191 A 536 (1937).

¹⁵¹ Marcus LP “Distinction between Common Carriers and Contract Carriers” *Michigan Law Review* (36) (5) 1938 802-810 802 <http://www.jstor.org/stable/1281673> (Accessed: 05/10/2010 07:10).

At Common law, where the terms of the contract between the parties does not expressly outline the duties of the carrier, the law expects the carrier to deliver the goods at the agreed destination in the condition in which he received them unless prevented to do so by circumstances beyond his control such as an act of God or an inherent vice in the goods.¹⁵²

2.2 DUTIES OF THE CARRIER AT COMMON LAW

The implied duties of the carrier of goods at common law have been summarised as follows:¹⁵³

2.2.1 DUTY TO PROVIDE A SEA-WORTHY SHIP

At common law the carrier is deemed to be under the implied obligation to provide a ship that is fit for the purpose for which it contracts.¹⁵⁴ This undertaking is a strict one; in *Steel v State line*,¹⁵⁵ Lord Blackburn stated that the carrier has to show that the ship is seaworthy as a matter of fact, and will not escape liability only by showing that he took every precaution to render the ship seaworthy.¹⁵⁶ In the words of Field J in *Kopitoff v Wilson*,¹⁵⁷ the term seaworthiness can be construed such that:

“the ship owner is, by the nature of the contract, impliedly and necessarily held to warrant that the ship is good, and is in condition to perform the voyage about to be undertaken, or in ordinary language, is seaworthy, that is, fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage...”¹⁵⁸

The common law requirement of a seaworthy ship is absolute. The test for seaworthiness was established in the case of *Virginia Carolina Chemical Co v Norfolk and North American Steam shipping Co*,¹⁵⁹ as the standard of fitness which any ordinary and careful ship owner is required to have before the beginning of any voyage, bearing in mind the likely circumstances resulting from the nature of the journey.¹⁶⁰

¹⁵² *Infra* paragraph 3.2.

¹⁵³ Chauh *Law of International Trade* 233-234; Carr *International Trade Law* 166.

¹⁵⁴ Zamora *American Journal of Comparative Law* 398 <http://www.jstor.org/stable/839373>.

¹⁵⁵ [1877] 3 AC 72.

¹⁵⁶ Carr *International Trade Law* 212.

¹⁵⁷ (1876) 1 QBD 377.

¹⁵⁸ Chauh *Law of International Trade* 234; *Stanton v Richardson* (1874) LRTCP 421.

¹⁵⁹ [1912] 1 KB 229.

¹⁶⁰ Chauh *Law of International Trade* 234.

Seaworthiness for the purpose of establishing carriers' liability is twofold; firstly, it refers to the physical condition of the ship. In *Stanton v Richardson*,¹⁶¹ the pumping equipment in the ship could not adequately deal with the surplus of water from a cargo of wet sugar and this rendered the ship unseaworthy. It thus goes without saying that the ship must be fit in both design and structure and must be suitably equipped to face the usual perils of the sea that are likely to occur on the particular route to her destination at that time of the year.¹⁶²

Secondly, in *Rathbone v Maclver*,¹⁶³ it was held that a ship's seaworthiness refers to its fitness to carry the contractual cargo, that is, its cargo worthiness.¹⁶⁴ For example, should the contract of carriage be for the carriage of frozen goods, in order for the ship to satisfy the requirement of being cargo-worthy, it must have the necessary refrigeration to carry the goods safely on the agreed voyage. It was held in *Owners of Cargo on Ship "Maori Kings" v Hughes*,¹⁶⁵ that defective refrigerators will be a breach of the seaworthiness warranty.¹⁶⁶

More so, in *Moore v Lunn*,¹⁶⁷ the courts held that, for the ship to satisfy the requirement of seaworthiness it must also be manned by an efficient and qualified crew. Hence where the captain or members of his crew are not sober at the beginning of the voyage, the ship will be deemed unseaworthy.¹⁶⁸ Lord Atkinson in *Standard Oil v Clan line* stated that:¹⁶⁹

"it is not disputed, I think, that a ship may be rendered unseaworthy by the inefficiency of the master who commands her. Does not that principle apply where the master's inefficiency consists, whatever his general efficiency may be, in his ignorance as how his ship may, owing to the peculiarities of her structure, behave in circumstances likely to be met with on an ordinary ocean voyage. There cannot be any difference in principle, I think, between disabling want of skill and disabling want of knowledge. Each equally renders the master unfit and unqualified to command, and therefore makes the ship he commands unseaworthy [at p120]."¹⁷⁰

More so, the *Stanton v Richardson* case established that, for the undertaking of seaworthiness to be deemed as satisfied, the carrier must show that the ship was seaworthy at the beginning of the journey.¹⁷¹ Should the vessel suffer any default after departure or even as soon as it leaves the harbour, the carrier's undertaking of seaworthiness would still

¹⁶¹ (1875)LR 9 CP 390.

¹⁶² Chuah *Law of International Trade* 235.

¹⁶³ [1903] 2KB 378.

¹⁶⁴ Carr *International Trade Law* 212.

¹⁶⁵ [1895] 2 QB 550.

¹⁶⁶ Chuah *law of International Trade* 236.

¹⁶⁷ (1923) 38 TLR 649; *The Rio Tinto* (1884) 9 App Cas 356.

¹⁶⁸ Carr *International Trade Law* 212; *Hare Shipping Law & Admiralty Jurisdiction* 641.

¹⁶⁹ [1924] AC 100.

¹⁷⁰ Carr *International Trade Law* 212.

¹⁷¹ Carr *International Trade Law* 213.

have been satisfied. It was held in *The Rona*,¹⁷² that the vessel must be deemed to have left the harbour when the vessel has left the moorings without any intention of returning thereto.

Be that as it may, should the vessel go missing immediately after the commencement of the voyage, there is a presumption that lies in favour of the consignor with claims against the carrier. In *Levy v Calf and others*,¹⁷³ the courts held that where such a carrier fails to provide reasonable argument as to the disappearance of the vessel, the courts will presume that the vessel was not seaworthy at the beginning of the voyage.¹⁷⁴ More so, in *Cargo per Maori King v Hughes*,¹⁷⁵ it was held that should the cargo be lost or damaged because the vessel was not cargo worthy, the carrier will be in breach of the implied warranty of seaworthiness.¹⁷⁶

Worthy of note is the fact that there must be a causal link between the damage or loss suffered and the vessel's unseaworthiness for an action to lie against the carrier for breach of the implied warranty of seaworthiness. Thus, it will not suffice to prove that the vessel was not seaworthy at the commencement of the voyage, it must be established by evidence that the loss suffered was a result of the vessel's unseaworthiness. Per Lord Esher MR in *Baumwoll v Gilchrist*:¹⁷⁷

"it is not sufficient breach of a bill of lading that the ship went to sea in an unseaworthy condition; but it must be shown that the unseaworthiness was the cause of the loss."¹⁷⁸

The carrier has to show that his vessel is seaworthy as a matter of fact. It was held in *Steel v State Line SS Co*,¹⁷⁹ that it will not suffice that the carrier took all reasonable measures to render the vessel seaworthy. If at the beginning of the voyage the vessel was not seaworthy and as a direct result of this the cargo was lost or damaged, the carrier is liable.¹⁸⁰ The same will apply even if the voyage were to be performed in stages. In *The Vortigern*,¹⁸¹ it was held that the carrier will have to ensure that the vessel is seaworthy at the beginning of each stage.¹⁸²

In as much as the common law provides the parties to a contract of carriage liberty to establish their rules of engagement, should there be any clause in their agreement exempting the carrier from his liability of providing a seaworthy ship, the courts will

¹⁷² (1884) 51 LT 28 213.

¹⁷³ (1857) W 1 4; *Fiumana Societa de Navigazione v Bunge* [1930] 2 KB 47.

¹⁷⁴ *Hare Shipping Law & Admiralty Jurisdiction* 641.

¹⁷⁵ [1895] 2 QB 550.

¹⁷⁶ *Carr International Trade Law* 213.

¹⁷⁷ [1983] 1 QB 253.

¹⁷⁸ *Hare Shipping Law & Admiralty Jurisdiction* 640.

¹⁷⁹ (1877) 3 App Cas 72 HL.

¹⁸⁰ *Hare Shipping Law & Admiralty Jurisdiction* 641.

¹⁸¹ [1899] 140.

¹⁸² *Hare Shipping Law & Admiralty Jurisdiction* 641.

interpret any ambiguity in their terms against the party likely to benefit from the clause. As seen in *Owners of Cargo Onboard SS Waikato v New Zealand Shipping Co.*¹⁸³

“it is clear law that exceptions do not apply to protect the ship owner who furnishes an unseaworthy ship where the unseaworthiness causes damage, unless the exceptions are so worded as clearly to exclude or vary the implied warranty of seaworthiness.”¹⁸⁴

Nevertheless, in *The Cargo ex Laertes*,¹⁸⁵ it was held that where the exclusionary terms are so clear as to remove all doubt as to whether the parties agreed thereto, the courts will give effect to the terms as they appear.¹⁸⁶

2.2.2 DUTY TO PROCEED WITH DUE DISPATCH

When the terms of the contract of carriage are silent with regard to the time of commencement of the voyage, the common law implies that the ship will undertake the voyage and load and discharge the goods within a reasonable time. In *Hick v Raymond*,¹⁸⁷ the courts held that this duty calls on the carrier to commence and terminate the voyage within a reasonable or contracted time frame.¹⁸⁸ In *Freeman v Taylor*,¹⁸⁹ it was held that should the carrier fail in this respect, the consignor will be at liberty to consider that the contract has been repudiated by the carrier’s delay.¹⁹⁰

2.2.3 DUTY NOT TO DEVIATE

The carrier is obliged to ensure that the vessel undertakes the voyage on the usual route and manner, or that provided in the contract of carriage. The carrier may not voluntarily deviate from his route unless such deviation is necessary to save life. It was stated in *Scaramanga & Co v Stamp* that:¹⁹¹

“... deviation for the purpose of communicating with a ship in distress is allowable, inasmuch as the state of the vessel in distress may involve danger to life. On the other hand, deviation for the sole purpose of saving property is not thus privileged, but entails all the usual consequences of deviation. If, therefore, the lives of the persons on board a disabled ship can be saved without saving the ship, as by taking them off, deviation for the purpose of saving them will carry with it all the

¹⁸³ [1899] 1 QB 56; *Mitsubishi Corp v Eastwind Transport Ltd and Ors* [2004] EWHC 2924.

¹⁸⁴ Chuah *Law of International Trade* 234; 257.

¹⁸⁵ 12 PD 187.

¹⁸⁶ Chuah *Law of International Trade* 234.

¹⁸⁷ [1893] AC 22.

¹⁸⁸ Carr *International Trade Law* 217.

¹⁸⁹ (1831) 8 Bing 124; *Kawasaki Kisen Kaisha Ltd v Whistler International Ltd* [2000] 3 WLR 1954.

¹⁹⁰ Chuah *Law of International Trade* 241.

¹⁹¹ (1880) 5 CPD 295.

consequences of an unauthorised deviation. But where the preservation of life can only be effected through the concurrent saving of property, and the *bona fide* purpose of saving life forms part of the motive which leads to the deviation, the privilege will not be lost by reason of the purpose of saving property having formed a second motive for deviation [at p 304],”¹⁹² or, as stated in *Kish v Taylor*,¹⁹³ in situations in factual danger in the interest of the voyage as a whole.¹⁹⁴

Where the parties have failed to define a voyage route under their contract, the courts will presume that the proper route to follow is that which is the direct geographical route between the port of departure and the port of delivery, but however remaining open to evidence and persuasive argument as to what should be the customary route. In this case the customary route may be the route usually taken by the shipping company in that particular trade or the route frequently employed by the carrier in particular.¹⁹⁵ More so, in *Reardon Smith Line Ltd v Black Sea and Baltic Insurance Co*,¹⁹⁶ it was held that should the carrier allege that there exists a customary route, the burden of proof that the custom is both universal and uniform rests on his shoulders.¹⁹⁷ In the same vein, it was held in *Rio Tinto Co Ltd v Seed Shipping Co*,¹⁹⁸ that, should the vessel be moved off its course by circumstances beyond the ship master’s control, this will not amount to deviation.¹⁹⁹

Given the parties freedom of contract at common law, the carrier could introduce a clause in the contract that enables him to deviate from the elected course of the voyage without jeopardising the entire contract. Such a clause however must not defeat the object of the contract of carriage. Per Lord Wright in *Foreman v Federal SN Co*,²⁰⁰ “every deviation clause must be construed with reference to the contemplated adventure.”²⁰¹ The courts however, where such a clause covers only the carrier’s interests, apply a restricted interpretation to the clause.²⁰²

2.2.4 DUTY TO TAKE REASONABLE CARE OF THE GOODS

The implied obligation of the carrier to take reasonable care of the goods in his charge was stated by Channel J in *McFadden v Blue Star Line*:²⁰³

¹⁹² Carr *Law of International Trade* 217-218.

¹⁹³ [1912] App Cas (HL).

¹⁹⁴ Hare *Shipping Law & Admiralty Jurisdiction* 644.

¹⁹⁵ Chuah *Law of International Trade* 245.

¹⁹⁶ [1939] AC 562.

¹⁹⁷ Chuah *Law of International Trade* 245.

¹⁹⁸ (1926) 134 LT 764.

¹⁹⁹ Chuah *Law of International Trade* 245.

²⁰⁰ [1928] 2KB 424 431.

²⁰¹ Carr *International Trade Law* 219.

²⁰² *Glynn v Margetson* [1893] AC 351.

²⁰³ [1905] 1 KB 697.

“If anything happens whereby the goods are damaged during the voyage, the ship owner is liable because he is an insurer except in the event of the damage happening from some cause in respect of which he is protected by exceptions in his contract.”²⁰⁴

Per Lord McNaghten in *The Xantho*,²⁰⁵ all contracts of carriage have an implied obligation that the carrier will “use due care and skill in navigating the vessel and carrying the goods.”²⁰⁶

More so, Willes J,²⁰⁷ also contended that there is a duty imposed on the master acting on behalf of the ship owner:

“to take reasonable care of the goods entrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check and arrest their loss, destruction or deterioration, by reason of accidents.”²⁰⁸

However, in *Transocean Liners Reederei GmbH v Euxine Shipping Co Ltd (The Imvros)*,²⁰⁹ it was established that should the terms of the contract stipulate that the consignor is responsible for the care of the cargo, the carrier is relieved from this implied duty at common law.²¹⁰

2.2.5 DUTY TO DELIVER GOODS TO A NAMED OR IDENTIFIABLE PERSON

The courts in *Bourne v Gatliffe*,²¹¹ held that in order to be discharged of his duty the carrier must deliver the goods to the person named either in the bill of lading, mate’s receipt or charterparty at the point of discharge.²¹² The carrier is expected to wait for a reasonable period of time for the consignee to take over the goods at the port of discharge. Where the consignee fails to take possession of his cargo within a reasonable amount of time, the carrier must leave them in a warehouse at the consignee’s expense, in accordance with sections 492 to 498 of the Merchant Shipping Act 1894.²¹³

At common law where the carrier delivers goods only upon presentation of the bill of lading or charterparty or other relevant document of title to the goods, he will be protected from any action for misdelivery or tort.²¹⁴ This position was upheld in *MB Pyramid*

²⁰⁴ Chuah *Law of International Trade* 252.

²⁰⁵ [1887] 12 AC 503.

²⁰⁶ Carr *International Trade Law* 221.

²⁰⁷ *Notara v Henderson* (1872) LR 7 QB 225.

²⁰⁸ Carr *International Trade Law* 221.

²⁰⁹ [1991] 1 Lloyd’s Rep 848.

²¹⁰ Chuah *Law of International Trade* 252.

²¹¹ (1841) 133 ER 1298.

²¹² Chauh *Law of International Trade* 252.

²¹³ *Supra* 253.

²¹⁴ *Supra* 253.

Sound NV v Briesse-Schiffahrts GmbH (The Sina) (The Ines),²¹⁵ and is in line with the rule established in *Barclays Bank Ltd v Commissioners of Customs and Excise* that:²¹⁶

“It is clear law that where a bill of lading or order is issued in respect of a contract of carriage by sea, the ship owner is not bound to surrender possession of the goods to any person whether named as consignee or not, except on production of the bill of lading.”²¹⁷

Where no bill of lading was issued for the voyage, the cargo is deliverable to the consignor whose name is stated on the non-negotiable receipt issued by the ship’s master, when he takes charge of the goods at the port of shipment, who in this situation is also the consignee.²¹⁸

In another connection, it was held in *Merit Shipping Co Inc v TK Boesen A/S (The Goodpal)*,²¹⁹ that the carrier is only entitled to deliver the exact quantity of the merchandise stated in the contract at the named port of delivery. Should the carrier deliver more than is stated in the bill of lading or charterparty, no matter the circumstance, he does so at his own risk.²²⁰

2.3 COMMON LAW EXCEPTIONS FROM LIABILITY

In as much as a breach of the above mentioned obligations of the carrier will impose liability on him, the common law also awards a number of exceptions to the carriers’ liability in the event of loss or damage to the goods. These exceptions include the following:

2.3.1 ACTS OF GOD

For the cause of loss or damage to be attributed to an act of God, the courts in *Nugent v Smith*,²²¹ held, “the damage or loss in question must have been caused directly and exclusively by such direct and violent and sudden and irreversible act of nature as the defendant could not, by any amount of ability, foresee would happen or, if (they) could not by any amount of care and skill resist, so as to prevent its effects.”²²²

²¹⁵ [1995] 2 Lloyd’s Rep 144; *The Houda* [1994] 2 Lloyd’s Rep 541.

²¹⁶ [1963] 1 Lloyd’s Rep 81.

²¹⁷ *Chuah Law of International Trade* 253.

²¹⁸ *Supra* 253.

²¹⁹ [2000] 1 Lloyd’s Rep 638.

²²⁰ *Chuah Law of International Trade* 254.

²²¹ (1876) 1 CPD 423.

²²² *Chuah Law of International Trade* 256.

2.3.2 ACT OF THE QUEEN'S ENEMIES

The carrier would be exempted from liability should he suffer an attack by enemies of the state. In *Russell v Niemann*,²²³ it was held that where the carrier is robbed by armed forces with intent to rob him of the goods, his liability stands. This is so as to protect consignors from carriers who would connive with robbers.²²⁴ Per Lord Mansfield in *Forward v Pittard*:²²⁵

“If an armed force comes to rob the carrier of the goods, he is liable: and a reason is given in the books, which is a bad one, viz. that he ought to have sufficient force to repel it: but that would be impossible in some cases, as for instance in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil.”²²⁶

2.3.3 INHERENT VICE

For the carrier to exempt himself from liability based on this defence, he must establish that the loss or damage resulted from the nature of the cargo that was not within his control, and which no degree of care could have prevented. In *The Carcore*,²²⁷ the term inherent vice has been defined as the inability of the goods to withstand the ordinary nature of the voyage despite the exercise of care required by the carrier.²²⁸ Be that as it may, it was held in *Hudson v Baxedale*,²²⁹ that for the carrier to exempt himself from liability based on a claim of inherent vice in the goods, he must prove that he himself had not been at fault.²³⁰

2.3.4 FAULT OR FRAUD OF CONSIGNOR

The courts have established in *Bradley v Waterhouse*,²³¹ that the carrier exempts himself from liability if he establishes that the loss or damages were caused by an intentional act or omission of the consignor.²³²

²²³ (1864) 17 CB (NS) 163.

²²⁴ Carr *International Trade Law* 223.

²²⁵ (1785) 1 TR 27.

²²⁶ Chuah *Law of International Trade* 256.

²²⁷ [1896] 65 LJ Ad 97.

²²⁸ Carr *International Trade Law* 223.

²²⁹ (1857) 2 H&N 575.

²³⁰ Chuah *Law of International Trade* 256.

²³¹ (1828) 3 COP 318; *Gould v South Eastern and Chatham Railway Co* [1920] 2 KB 186.

²³² Chuah *Law of International Trade* 257.

2.4 LIMITATION OF CARRIER LIABILITY AT COMMON LAW

The strict liability imposed on carriers under contracts of carriage has been a preoccupying factor to carriers; hence the carriers take advantage of their liberty at common law to determine the terms of their engagement to introduce exclusionary clauses that limit their liability under contract as much as possible. Be that as it may, in *Mitsubishi Corp v Eastwind Transport Ltd and Ors*,²³³ it was held that should the wordings of such exclusionary terms be ambiguous, the courts would construe its meaning in *contra proferentem*.²³⁴

Given the endless nature of the exclusionary terms often introduced by the carriers in their contracts, it wouldn't be practical to go into each of them. However some of the most commonly introduced exclusionary clauses will include the following:

2.4.1 PERILS OF THE SEA

In *Canada Rice Mills v Union Marine*,²³⁵ it was held that where the carrier exempts himself from liability under contract for loss or damage as a result of perils of the sea this clause will be construed as to mean damage or loss caused by storms, sea water, collision or any other peril likely to be caused by the sea or to affect a ship at sea.²³⁶ However, in *The Xantho*,²³⁷ the courts held that the words 'perils of the sea' will not cover loss or damage caused by the inevitable action of the wind and waves that lead to wear and tear.²³⁸

More so, in *Thames and Mersey Marine Insurance Co v Hamilton, Fraser & Co*,²³⁹ it was held that giving a too broad interpretation to this clause will not be in the best interest of all parties under the contract of carriage, as the carrier may tend to attribute every incident on the voyage to perils of the sea. Hence the carrier should not be exempted in situations such as where damage is caused by poor management of the vessel.²⁴⁰ In a bid to determine the scope of this exclusionary clause, Lord Wright in the *Canada Rice Mills Ltd v Marine and General Insurance Co. Ltd* case stated that:²⁴¹

“Where there is an accidental incursion of seawater into a vessel at a part of the vessel and in a manner, where seawater is not expected to enter in the ordinary course of things, and there is consequent damage... there is *prima facie* a loss by

²³³ [2004] EWHC 2924 (comm).

²³⁴ Chuah *Law of International Trade* 257.

²³⁵ [1941] AC 55.

²³⁶ Carr *International Trade Law* 224.

²³⁷ (1887) 12 App Cas 503.

²³⁸ Chuah *Law of International Trade* 258.

²³⁹ (1887) 12 App Cas 484.

²⁴⁰ Chuah *Law of International Trade* 259.

²⁴¹ [1941] AC 55.

perils of the sea. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that sea water is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without stress of weather, by the vessel heeling over owing to some accident, or by the breaking of hatches or other coverings. These are merely a few amongst many possible instances in which there may be a fortuitous incursion of seawater. It is the fortuitous entry of seawater which is the peril of the sea in such cases.”²⁴²

2.4.2 ARREST OR RESTRAINT OF PRINCES

This exclusionary clause has been construed to apply to a number of situations. For instance, in *Geipel v Smith*,²⁴³ it could be invoked where a carrier was stopped from making delivery as provided in the contract of carriage due to a situation wherein the government of another country prevented him from doing so, by taking possession of the goods through embargo, arrests, blockades or quarantines.²⁴⁴ However, in *Rickards v Forrester*,²⁴⁵ the courts held that for the carrier to succeed under this claim he must show that the threat of the arrest or restraint of princes by a foreign power is a matter of fact and not a mere apprehension.²⁴⁶ Lord Loreburn describes a situation that will qualify as a restraint of princes as follows:

“... if the situation had been so menacing that a man of sound judgement would think it foolhardiness to proceed with the voyage, I should have regarded that as in fact a restraint of princes. It is true that mere apprehension will not suffice, but on the other hand it has never been held that a ship must continue her voyage till physical force is actually exercised.”²⁴⁷

More so, in *Nesbitt v Lushington*,²⁴⁸ it was held that restrictions on sea routes for safety purposes or due to political unrest will not be covered by this clause.²⁴⁹ Also, in *Rowlatt J, Ciampa v British India Steam Navigation Co Ltd*,²⁵⁰ it was held that where the threat of restraint of princes exists at the time the vessel begins the voyage, the carrier would be estopped from pleading the limitation clause.²⁵¹

²⁴² Chuah *Law of International Trade* 259.

²⁴³ (1872) 1r7 QB 404.

²⁴⁴ Carr *International Trade Law* 224.

²⁴⁵ [1942] AC 50; *Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] AC 227.

²⁴⁶ Chuah *Law of International Trade* 260.

²⁴⁷ *Supra* 261.

²⁴⁸ (1792) 4 TR 783.

²⁴⁹ Carr *International Trade Law* 224.

²⁵⁰ [1915] 2 KB 774.

²⁵¹ Chuah *Law of International Trade* 261.

2.4.3 STRIKES

The carrier of goods would often want to exempt himself from any liability that arises as a result of a strike action by his crew or other agents whose services are required at some point in the performance of the contract of carriage. The word 'strikes' was initially construed in *King and Ors v Parker*,²⁵² to mean "a concerted effort by workmen either to obtain an increase in wages or to resist an attempt by employers to reduce their wages."²⁵³ It was later on held that there need not be a grievance against employers for the workers to strike as there could also hold sympathetic strikes. In the words of McNair J in *The Laga*:²⁵⁴

"...since... one has had the great development of sympathetic strikes, when one has had, at any rate in this country, and, indeed, elsewhere, the general strike in which many of those out on strike had no grievance at all against an employer. And, in my judgment, it would be extremely difficult to say in a charter-party such as this that a sympathetic strike or a general strike which had the effect of causing the loss of time was not a strike within the meaning of the charter-party."²⁵⁵

Lord Denning MR,²⁵⁶ also held that where workers stopped performing their obligations towards their employer in a view of improving their working conditions, though not in breach of the contract, this amounted to a strike.²⁵⁷ For the carrier to exempt himself from liability he must establish that the loss or damage suffered was a result of the strike. In *Leonis v Rank (No.2)*,²⁵⁸ it was held that this exception clause covers not only direct loss or damage but also loss or damage caused as a result of the aftermath of the strike.²⁵⁹

2.4.4 FIRE

It is common that carriers include a clause to exempt themselves from loss or damage to the cargo caused by fire. They would usually do so because of the limited protection awarded under section 186 of the Merchant Shipping Act 1995.²⁶⁰ Loss or damage due to fire as defined by the courts in insurance cases refers to:²⁶¹

"... any loss resulting from an apparently necessary and bona fide effort to put out a fire, whether it be by spoiling the goods by water, or throwing the articles of furniture out of the window, or even the destroying of a neighbouring house by an explosion for the purpose of checking the progress of the flames, in a word, every

²⁵² (1876) 34 LT 887.

²⁵³ Chuah *Law of International Trade* 261.

²⁵⁴ [1966] 1 Lloyd's Rep 582.

²⁵⁵ Chuah *Law of international Trade* 262.

²⁵⁶ *New Horizon* [1975] 2 Lloyd's Rep 314.

²⁵⁷ Chuah *Law of international Trade* 262.

²⁵⁸ (1908) 13 Com Cas 295.

²⁵⁹ Chuah *Law of international Trade* 262.

²⁶⁰ *Supra* 264.

²⁶¹ Kelly CB in *Stanley v Western Insurance Co* (1868) LR 3 Ex 71.

loss that clearly and proximately results, whether directly or indirectly, from the fire, is within the policy.”²⁶²

However, in *Maxine Footwear Co Ltd v Canadian Merchant Marine*,²⁶³ it was established that this defence will not be awarded to the carrier if the fire started because of the carrier’s lack of due diligence to render the vessel seaworthy.²⁶⁴

2.4.5 NEGLIGENCE AND NAVIGATIONAL ERRORS

Including a clause in the bill of lading that exempts the carrier from liability for any loss or damage as a result navigational errors was common practice amongst carriers. Nevertheless the courts have also advocated for careful interpretation of such clauses, especially where the words therein are ambiguous. In the words of Bowen LJ in *Burton & Co v English*:²⁶⁵

“There is... another rule of construction which one would bring to bear upon this charterparty, and that is, that one must see if this stipulation which we have got to construe is introduced by way of exception or in favour of one of the parties to the contract, and if so, we must take care not to give it an extension beyond what is fairly necessary, because those who wish to introduce words in a contract in order to shield themselves ought to do so in clear words.”²⁶⁶

Thus the defendant carrier will avail himself under such an exclusionary clause only if it is so worded as to erase any ambiguity relating to its meaning and scope. Per Lord Bingham J in *The Emmanuel C*:²⁶⁷

“In the shipping commercial world it is not unusual to see exemption clauses which clearly expressly exclude liability for negligence so that, in general, there is no, and never has been any, reluctance to use appropriate language to make it abundantly clear that negligence is being excepted.”²⁶⁸

2.5 CONCLUSION

The relationship between the carrier and the cosignor was likened to that of a bailee of goods. In *Morris v Martin*,²⁶⁹ the carriers were regarded as bailees for rewards whose

²⁶² Chuah *Law of International Trade* 264.

²⁶³ [1959] 2 Lloyd’s Rep 105.

²⁶⁴ Murray et al *Schmitthoff’s Export Trade* 332.

²⁶⁵ (1883) 12 QBD 218.

²⁶⁶ Chuah *Law of International Trade* 263.

²⁶⁷ [1983] 1 Lloyd’s Rep 310.

²⁶⁸ Chuah *Law of International Trade* 263.

²⁶⁹ [1966] 1 QB 716.

obligations were borne independently of the contract. The foundation of any bailment is the voluntary taking of another's property from which the law assumes a consequent and similarly voluntary undertaking of duties towards the owner of such property.²⁷⁰ At Common law, the bailee was imposed a strict duty to take reasonable care to keep the property in his possession safe [as per Lord Denning MR 726]:²⁷¹

“If the goods are lost or damaged, whilst they are in [the bailee's] possession, he is liable unless he can show—and the burden is on him to show—that the loss or damage occurred without any neglect or default or misconduct of himself or of any of the servants to whom he delegated his duty.”²⁷²

It goes thus that the carrier's liability at Common law is a strict one unless he can prove lack of neglect, default or misconduct. The effect of this strict liability on the common carrier is such that he cannot escape liability for loss or damage to goods in his care unless such loss or damage was caused by one of the excepted perils as shown above.²⁷³

With developments in ship building during the 19th century, the strict liability regime of the Common law was considerably modified to the advantage of the carrier. The Common law principle of freedom of contract allowed the carriers to modify the terms in the bill of lading to their advantage, as they reduced their liability under contract by increasing the range of excepted perils to cover losses such as ones caused due to negligence in navigation or management.²⁷⁴ Be that as it may, the courts recognized that the starting point of the liability regime at common was bailment, and hence in interpreting the clauses included in the bill of lading by carriers, the courts held that there are fundamental obligations out of which the carrier could contract only by the clearest words, and breach of which might prevent the application of contractual excepted perils.²⁷⁵ Lord Wright observed in *Paterson Steamships Ltd v Canadian Co-Operative Wheat Producers Ltd*:²⁷⁶

“At common law, [the sea carrier] was called an insurer, that is he was absolutely responsible for delivering in like order and condition at the destination the goods bailed to him for carriage. He could avoid liability for loss or damage only by showing that the loss was due to the act of God or the King's enemies. But it became the practice for the carrier to stipulate that for loss due to various specified contingencies or perils he should not be liable: the list of these specific excepted perils grew as time went on. That practice, however, brought into view two separate aspects of the sea carrier's duty which it had not been material to consider when his obligation to deliver was treated as absolute. It was recognized that his overriding

²⁷⁰ Todd *Cases and Materials on International Trade Law* (2003) 494.

²⁷¹ *Supra Morris v C W Martin & sons*.

²⁷² Todd *Cases and Materials on International Trade* 494.

²⁷³ Zamora 1975 *American Journal of Comparative Law* 397 <http://www.jstor.org/stable/839373>.

²⁷⁴ Zamora 1975 *American Journal of Comparative Law* 400-401 <http://www.jstor.org/stable/839373>.

²⁷⁵ Todd *Cases and Materials on International Trade* 495.

²⁷⁶ [1934] AC 544-545 PC.

obligations might be analyzed into a special duty to exercise due care and skill in relation to the carriage of goods and a special duty to furnish a ship that was fit for the adventure at its inception. These have been described as fundamental undertakings, or implied obligations. If then goods were lost (say) by perils of the seas, there could still remain the inquiry whether or not the loss was also due to negligence or unseaworthiness. If it was, the bare exception did not avail the carrier.”²⁷⁷

In the light of the foregoing, it is clear that implied duties were imposed on the carrier at common law. In accordance with these implied duties, the carrier was *prima facie* liable if the goods in his possession were not delivered to their destination in the same condition in which he received them. Apart from his duty to render his vessel seaworthy for the voyage there is also an implied obligation that he will make due dispatch and will not deviate unless such deviation is to save a life *not* property.

In principle, the carrier at common law may contract out of his contractual duties. However, such clauses that give the carrier the right to deviate are subject to the principle of *contra proferentem* in their interpretation and application, and will not avail him unless the terms thereof are clearly spelled out without any ambiguity that will suggest that adhering to them will defeat the purpose and object of the contract, as was held in *Glynn v Margetson & Co*,²⁷⁸ to which Lord Halsbury opined that:

“... it seems to me that in construing this document, which is a contract of carriage between the parties, one must in the first instance look at the whole of the instrument and not at one part of it only. Looking at the whole of the instrument, and seeing what one must regard, for a reason which I will give in a moment, as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract. The main purpose of the contract was to take on board at one port and to deliver at another port a perishable cargo...

Now if one applies the principle...to the present case, in which the parties have in writing expressed the intention that there should be a delivery of goods (and the particular class of goods is not to be omitted from consideration—they were perishable goods taken from one port to another) it seems to me that to apply these general printed words (which might in a particular case receive complete fulfillment) as regards each of these stipulations, to the particular contract as between carrier and customer would manifestly defeat the very object which both the parties had in view.

My Lords, I also concur with my noble and learned friend on the woolsack that the particular words which give the liberty are to be construed to refer to a liberty to

²⁷⁷ *Todd Cases and Materials* 495; *Smith, Hogg v Black Sea and Baltic General Insurance* [1940] AC 997 1004.

²⁷⁸ [1893] AC 351.

deliver in the course of a voyage which has been agreed upon between the parties.”²⁷⁹

The consignor is not free of obligations under the contract as seen above, however his most obvious duty is to pay freight.

From the foregone points it is clear that the common law implied undertakings are not mandatory and can always be contracted out in the right circumstances. Thus despite the strict liability the common law imposes on the carrier, the consignor and the consignee, in some cases may still have to bear the burden brought about by the exclusionary clauses introduced in the contract by the carrier.

²⁷⁹ Todd *Cases and Materials* 497.

CHAPTER THREE

CARRIERS' LIABILITY UNDER THE HAGUE/HAGUE VISBY REGIMES

3.1 INTRODUCTION

As seen in the preceding chapter, the liability imposed on the carrier of goods at common law was a strict one. Nevertheless, taking advantage of the freedom of contract awarded to parties under the common law, and with the use of suitable clauses introduced in the contract of carriage, the carrier could exempt himself from his strict liability. This tendency of the carrier to exempt himself from liability through agreement in the contract was further boosted in the 19th century with major developments in the ship building industry which led to an increase in ocean traffic.²⁸⁰

The nature of the exclusionary clauses included in the bills of lading was such that they not only favored the carriers, but all risks of transporting the cargo were shifted to the consignor and consignee who were expected to ship their goods on the terms imposed by the carrier or not ship at all.²⁸¹ In *Australasian United Steam Navigation Co Ltd v Hiskens*,²⁸² Justice Isaacs' position with regard to these exclusionary clauses was that:

“Common law relations based on reasonableness and fairness were in practice destroyed at the will of the (carrier), and as fast as courts pointed out loopholes in their conditions, so fast did they fill them up, until at last the position of owners of goods became intolerable.”²⁸³

This state of affairs definitely did not please the merchants around the world as they started mounting pressure on their local authorities to introduce measures in legislature that would check the carrier's monopoly over the carriage of goods by sea. It is in the light of such uproar that the United States passed the Harter Act in 1893 which was aimed at limiting the carrier's freedom of contract and award better protection to the consignor and

²⁸⁰ Carr *International Trade Law* 233 (for an interesting overview of shipping policies from the 15th-20th centuries, see Sweeney, 'From Columbus to cooperation-trade and shipping policies from 1492 to 1992' [1986/1990] 12 *Fordham International LJ* 481).

²⁸¹ *Supra* Wanigasekera, "Comparison of Hague-Visby and Hamburg Rules" <http://www.scribd.com/doc/59734937/Comparison-of-Hague-and-Hamburg-AW>.

²⁸² (1914) 18 CLR 646 671.

²⁸³ *Todd Cases and Materials* 504.

consignee. It was not long after the adoption of the Harter Act in the United States of America that calls for an international regime to protect the interest of parties under a contract of carriage by sea was sought. This resulted in the enactment of the Hague Rules in 1924.²⁸⁴ The Hague Rules were designed on the provisions of the Harter Act, and imposed minimum liability on the carriers from which no deviation could be brought.²⁸⁵

However, the provisions under the Hague Rules did not have 'the force of law',²⁸⁶ and were held in *Vita Food Products Inc v Unus Shipping Co Ltd*,²⁸⁷ to have effect more by agreement than law in the absence of a paramount clause,²⁸⁸ and still permitted exceptions from liability that favored the carriers when sued under the contract of carriage.²⁸⁹ Also, litigations,²⁹⁰ and the provisions with regard to package limitations were considered commercially unrealistic,²⁹¹ due to inflation and developments in the sea transport industry such as the use of containers in carriage, which rendered the provisions of the Hague Rules inconsistent with the realities of the transaction. The provisions of the Hague Rules did not cover acts by servants or agents of the carrier amongst other short comings, thus leading to the enactment of the Hague-Visby Rules in 1968,²⁹² to correct the flaws of the Hague Rules.²⁹³

The Rules are silent with regards to their interpretation. However, English courts, as was seen in *Stag Line Ltd v Foscola, Mango and Co*,²⁹⁴ have advocated that in the interpretation of the provisions of the statute, the convention should be given a broad interpretation that will be in line with norms of general acceptance.²⁹⁵

The provisions of the Rules have been implemented in the United Kingdom by virtue of the Carriage of Goods by Sea Act 1971,²⁹⁶ (to which much reference shall be made in the course of this work). Section 1(2) of the COGSA 1971 provides that the Rules shall have the

²⁸⁴ For more detail on the origin of the Hague Rules, see James *University of Pennsylvania Law Review and American Law Register* <http://www.jstor.org/stable/3313985>.

²⁸⁵ *Carr International Trade Law* 234.

²⁸⁶ *The Morviken* [1982] 1 Lloyd's Rep 325 328, where Lord Denning MR explained the meaning of "the force of law":

"In my opinion it means that, in all Courts of the United Kingdom, the provisions of the rules are to be given the coercive force of law. So much so that, in every case properly brought before the Courts of the United Kingdom, the rules are to be given supremacy over every other provision of the bill of lading. If there is anything elsewhere in the bill of lading which is inconsistent with the rules or which derogates from the effect of them, it is to be rejected. There is to be no contracting-out of the rules." In Tetley "The Hague Visby Rules commentary" *McGill University* 9 <http://tetley.law.mcgill.ca/>.

²⁸⁷ [1939] AC 277.

²⁸⁸ *Todd Cases and Materials* 516.

²⁸⁹ Lord Goff "Commercial Contracts and the Commercial Court" 1984 LMCLQ 382 396 in *Todd Cases and Materials* 501.

²⁹⁰ *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co (The Muncaster Castle)* [1962] AC 446 in *Todd Cases and Materials* 521.

²⁹¹ Pravin 2011 <http://pravinrathinam.blogspot.com/2011/06/hamburg-rules-failure-or-success-review.html>.

²⁹² Hereinafter referred to as the Rules.

²⁹³ *Supra* paragraph 1.1.

²⁹⁴ [1923] AC 328.

²⁹⁵ *Carr International Trade Law* 235.

²⁹⁶ Hereinafter referred to as COGSA 1971.

force of law, hence they shall be applied as directly enacted statute in the area where they are acceded to.²⁹⁷

Article 1 provides that the Rules will only apply to contracts of carriage covered by a bill of lading or similar document of title, provided the bill of lading or such document of title regulates the relationship between the carrier and the consignor.²⁹⁸ Also, the Rules deal with the problem of inclusion of a clause paramount in the contract to give effect to its provisions. Article X provides for direct application of the Rules, as it states that the provisions of the Rules shall apply to the carriage of goods between ports in two different states if:²⁹⁹

- a) The bill of lading is issued in a contracting state, or
- b) The carriage is from a port in a contracting state, or
- c) The contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any state giving effect to them are to govern the contract, whatever may be the nationality of the ship, the carrier, the consignor, the consignee or any other interested person.

Additionally, s.1(6)(b) provides that the Rules shall have the force of law with regard to “any receipt which is a non-negotiable document marked as such if the contract contained in or evidenced by it is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading.”³⁰⁰ Thus, as was upheld in *The Hollandia*,³⁰¹ no derogation could be brought to the provisions of the Rules.³⁰²

In another connection, although the relationship between a consignor and a carrier under a charterparty is not covered by a bill of lading, the Rules shall however apply between a carrier and a consignor who holds a bill of lading issued by the original ship owner because that bill of lading covers the contract between both of them. Per Art V of the Act:

“...The provisions of these Rules shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of these Rules...”³⁰³

Nevertheless, difficulty in determining who the carrier is under the Rules has been subject of much litigation.³⁰⁴ A case in point is *The Venezuela*.³⁰⁵

²⁹⁷ Carr *International Trade Law* 235.

²⁹⁸ Chuah *Law of International Trade* 301.

²⁹⁹ Todd *Cases and Materials* 526.

³⁰⁰ Chuah *Law of International Trade* 306.

³⁰¹ [1983] 1 AC 565.

³⁰² Todd *Cases and Materials* 526.

³⁰³ Chuah *Law of International Trade* 302.

Article 1(e) provides that the 'carriage of goods' covers the period from the time when the goods are loaded to the time of delivery, leaving to think that the carrier is free from liability for any loss or damage caused before the loading of the cargo, or after they have been discharge. The courts in *Pyrene Co Ltd v Scindia Navigation Co Ltd*,³⁰⁶ however, have advised that a strict interpretation of this provision would be fallacious. Per Devlin J:

"... the cause of the fallacy perhaps [lie] in the supposition inherent in it that the rights and liabilities under the rules attach to a period of time. I think they attach to a contract or part of a contract. I say 'part of a contract' because a single contract may cover both inland and sea transport; and in that case the only part of it that falls within the rules is that which, to use the words in the definition of 'contract of carriage' in article 1(b), 'relates to the carriage of goods by sea'. Even if 'carriage of goods by sea' were given by definition the most restricted meaning possible, for example, the period of the voyage, the loading of the goods (by which I mean the whole operation of loading in both its stages and whichever side of the ship's rail) would still *relate* to the carriage on the voyage and so be within the 'contract of carriage'."³⁰⁷

In as much as these international conventions improve on the state of maritime transactions they do not render the common law provisions redundant, as should the parties to the contract agree to, recourse will be made to common law principles of sea carriage where the conventions in force do not cover the particular kind of carriage. For instance, the Rules excludes the following type of cargo from their application:

- a) The carriage of live animals per Article I(c)
- b) Cargo which by the contract of carriage is stated as being carried on deck and is so carried (Article I(c))
- c) The carriage of "particular goods" so long as the contractual terms are incorporated into a non-negotiable receipt and no bill of lading has been or will be issued (Article VI)

With regard to Dangerous goods, Article IV(6) provides that should goods of an inflammable, explosive or dangerous nature be shipped without the carrier's, or his agent's consent or knowledge, the carrier may, without pain of liability, for loss or damage to the cargo that could result thereof, land such cargo at any place, or destroy or render them harmless. Liability for any loss or damage caused as a result of the shipment of such dangerous goods shall lie on the consignor. The carrier will still be entitled to rid his vessel

³⁰⁴ Selvig E "Through-Carriage and On-Carriage of Goods by Sea" *American Journal of Comparative Law* (27) Unification of International Trade Law: UNCITRAL's First Decade 1979 369-389 <http://www.jstor.org/stable/840040> (Accessed: 26/07/2011 06:17).

³⁰⁵ [1980] 1 Lloyd's Rep 393.

³⁰⁶ [1954] 2 QB 402.

³⁰⁷ Chuah *Law of International Trade* 313.

of such dangerous goods even if he had previous knowledge of their nature without fear of liability, except to the general average, if any.³⁰⁸

The Rules do not provide a definition of the term 'dangerous goods', however the English courts in *Effort Shipping Co Ltd v Linden Management SA and Anor (The Giannis NK)*,³⁰⁹ per Lord Lloyd, provide that:

"Goods could be dangerous within rule 6 if they were dangerous to the other goods, even though they were not dangerous to the vessel itself. 'Dangerous' was not to be confined to goods which were liable to cause direct physical damage to other goods..."³¹⁰

3.2 DUTIES OF THE CARRIER UNDER THE HAGUE-VISBY RULES

Establishing the identity of 'the carrier' under the Rules is vital before we consider his responsibility under contracts covered by the Rules. This is so because the Rules impose a 1 year time limit within which period actions against the carrier must be brought, default of which the consignee is deemed to have forfeited any right to claims he has for breach of contract against the carrier.³¹¹ In defining who the carrier is, Article I (a) includes the owner (of the ship) or charterer who enters into a contract of carriage with the shipper (consignor). Within the definition of Article I(a) Robert Goff J in *The Khian Zephyr*,³¹² expounds on the meaning of the word 'carrier' as follows:

"... the function of Art I (a) ... in providing that the word 'carrier' includes the owner or the charterer who enters into a contract of carriage with the shipper, is to legislate for the fact that you may get a case-for example, under bills of lading-where the bills of lading are charterers' bills; and where there are charterers' bills, of course, the charterer is in a contractual relationship with the cargo owner and is responsible under the bills of lading to the cargo owners. In those circumstances, the effect of the definition in Article I(a) is to ensure that provisions which apply to the carrier under the Hague Rules shall likewise apply not only to the ship owner in whose ship the goods are physically being carried and through whose servants and agents, the master and the crew of the ship he is physically in possession of the goods, but shall also apply to a charterer who has contracted as the other party to the bill of lading. That makes good sense, and provides a common sense explanation why the definition of 'carrier' should be so defined in Article. I(a) as to include the

³⁰⁸ Chuah *Law of International Trade* 318.

³⁰⁹ [1996] 1 Lloyd's Rep 577 CA; [1998] 1 Lloyd's Rep 337 HL.

³¹⁰ Chuah *Law of International Trade* 319.

³¹¹ Carr *International Trade law* 237.

³¹² [1982] 1 Lloyd's Rep 72.

owner or the charterer who enters into a contract of carriage with a shipper (at pp 75-76).”³¹³

The definition of the term ‘carrier’ has been subject of much litigation in order to determine on whom liability for loss or damage to cargo shall lie as was seen in *Homburg Houtimport BV v Argosin Pvt Ltd and Others (The Starsin)*.³¹⁴ The following duties are imposed on the carrier under the Hague Visby Rules:

3.2.1 DUTY TO PROVIDE A SEA-WORTHY SHIP

Article III(1) provides that the carrier shall be bound before and at the beginning of the voyage to exercise due to:

- (a) Make the ship seaworthy;
- (b) Properly man, equip and supply the ship; and
- (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which the goods are carried fit and safe for their reception, carriage and preservation.

Article III(2) goes further to state that subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.³¹⁵

Similarly to what obtains under the Common law, the term ‘seaworthy’ under the provisions of the Rules relates to both the physical state of the ship and its fitness to carry the contractual cargo, that is, its cargo worthiness.³¹⁶ But unlike at Common law the undertaking of seaworthiness under the Rules is not absolute. This is in conformity with the provisions of Article IV(1) which provide that; the carrier shall not be liable for loss or damage arising or resulting from unseaworthiness *unless* caused by want of due diligence on the part of the carrier to make the ship seaworthy.³¹⁷

The courts in *The Amstelslot*,³¹⁸ in construing the meaning of ‘due diligence’ have likened it to negligence. Lord Devlin stated that:

“lack of due diligence is negligence; what is at issue... is whether there was an error of judgment that amounted to professional negligence [at p 235].”³¹⁹

³¹³ Carr *International Trade Law* 238.

³¹⁴ [2003] 1 Lloyd’s Rep 571.

³¹⁵ Murray et al *Schmitthoff’s Export Trade* 330.

³¹⁶ *Supra* Paragraph 3.2.

³¹⁷ Chuah *Law of International Trade* 323.

³¹⁸ [1963] 1 Lloyd’s Rep 40.

³¹⁹ Carr *International Trade Law* 240.

Where it established that the loss of damage to the cargo was as a result of the ship's unseaworthiness, the onus is on the carrier to prove that he exercised due diligence as was seen in *Owners of Cargo Lately Laden onboard the ship Torepo v Owners and/or Demise Charters of the ship Torepo*.³²⁰ Article IV(1) provides that:

"... neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy ... in accordance with the provisions of Article III(1). Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article."³²¹

More so, the carrier's duty to exercise due diligence is extended to affect the acts or omissions of his servants and agents in his employment.³²² In *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster castle)*,³²³ it was held that the carrier does not relieve himself of his burden of proving due diligence by merely showing that he had delegated responsibility to a competent or specialist contractor. In support of this position Lord Radcliffe stated that:

"I should regard it as unsatisfactory, where a cargo-owner has found his goods damaged through a defect in the seaworthiness of the vessel, that his rights of recovering from the carrier should depend on particular circumstances in the carrier's situation and arrangements with which the cargo-owner has nothing to do; as for instance, that liability should depend on the measure of control that the carrier had exercised over persons engaged on surveying or repairing the ship or upon such questions as whether the carrier had or could have done whatever was needed by the hands of his own servants or had been sensible or prudent in getting it done by other hands. Carriers would find themselves liable or not liable, according to circumstances quite extraneous to the sea carriage itself."³²⁴

In another connection, in *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd*,³²⁵ it was held that the provisions of Article III(1) should not be construed to mean two different instances (before, and at the beginning of the voyage), but rather should be construed in continuity in order to provide uniformity in its application and so as to impose the requirement on the carrier that his ship must be reasonably fit for the contemplated voyage not only at the start of loading and the start of the voyage when the ship sets in motion, but also the time between the loading and the sailing.³²⁶

³²⁰ [2002] EWHC 1481 (comm).

³²¹ Carr *International Trade Law* 244.

³²² Murray et al *Schmitthoff's Export Trade* 332.

³²³ [1961] AC 807.

³²⁴ Chuah *Law of International Trade* 324.

³²⁵ *Supra* 324.

³²⁶ Chuah *Law of International Trade* 327-328; Carr *International Trade Law* 240-241.

Also, in enforcing the provisions of Article III(2) (above), the courts in *Ministry of Food v Lamport and Holt Line Ltd*,³²⁷ held that the carrier was liable for damage to cargo caused by bad stowage due to his servants negligence.³²⁸

In order to ascertain whether the carrier acted with due diligence with regard to the cargo, the courts in *Erdania SpA v Rudolf A Oetker (The Fjord Wind)*,³²⁹ have established the standard in terms of whether a reasonable person in the shoes of the defendant, with the skill and knowledge that the defendant had or ought to have had, would have taken those extra precautions, or whether the independent contractors' survey had been as thorough as they could reasonably have been expected to conduct in the circumstances.³³⁰

Worthy of note is the fact that where a claimant alleges a breach of Article III(1) he must show that the actual loss or damage was as a result of the ship's unseaworthiness. The courts contend that the claimant need not show that the ship's unseaworthiness was the only cause of the loss so long as it was a cause, as was seen in *Smith Hogg & Co Ltd v Black Sea & Baltic General Insurance Co Ltd*.³³¹ per Lord Wright in this case:

"I can draw no distinction between cases where the negligent conduct of the master is a cause and cases in which any other cause, such as perils of the seas, or fire is a co-operating cause. A negligent act is as much a co-operating cause, if it is a cause at all, as an act which is not negligent. The question is the same in either case, it is, would the disaster not have happened if the ship had fulfilled the obligation of seaworthiness even though the disaster could not have happened if there had not also been the specific peril or action."³³²

3.2.2 DUTY TO CARE FOR THE CARGO

As provided by Article III(2), "subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried". Thus the carrier is liable for damage that occurs during the loading operation, as a result of his servant's negligence,³³³ as was the case in *Pyrene Co Ltd v Scindia Navigation Co Ltd*.³³⁴ The term 'carefully' has been construed to mean reasonable care.³³⁵ More so, the term 'properly' is not aimed at defining the scope of the carrier's responsibility in the loading process, but must be given regard as guidelines to be followed in rendering the

³²⁷ [1952] 2 Lloyd's Rep 371.

³²⁸ Murray et al *Schmitthoff's Export Trade* 332.

³²⁹ [2000] 2 Lloyd's Rep 191.

³³⁰ Chuah *Law of International Trade* 327-328.

³³¹ [1940] AC 997.

³³² Chuah *Law of International Trade* 328.

³³³ Murray et al *Schmitthoff's Export Trade* 332.

³³⁴ [1954] 2 QB 402.

³³⁵ Carr *International Trade Law* 245.

service of loading.³³⁶ In *Albacora SRL v Westcott & Laurance Line*,³³⁷ where a cargo of fish was being transported from Glasgow to Genoa, and the cargo deteriorated because it was not stored in a refrigerator. The claimants sued the carrier on grounds of a breach of the terms of Article III(2), the courts had to determine the meaning of the term 'properly' with regard to this article.³³⁸ Lord Reid stated to this effect that:

“the argument is that in this Article 'properly' means in the appropriate manner looking to the actual nature of the consignment, and that it is relevant that the ship owner and ship's officers neither knew nor could have discovered that special treatment was necessary. This construction of the word 'properly' leads to such an unreasonable result that I would not adopt it if the word can properly be construed in any other sense. The appellants argue that, because the article uses the word 'properly' as well as 'carefully', the word 'properly' must mean something more than 'carefully'. Tautology is not unknown even in international conventions, but I think that 'properly' in this context has meaning slightly different from 'carefully'.

In my opinion, the obligation is to adopt a system which is sound in the light of all the knowledge which the carrier has or ought to have about the nature of the goods and, if that is right, then the respondents did adopt a sound system. They had no reason to suppose that the goods required any different treatment from that which the goods in fact received [at p 58].”³³⁹

Also should the carrier fail to honor the provisions of Article III(2) he will not be able to avail himself from liability based on his reliance to expert opinion.³⁴⁰ It was held in *International Packers London Ltd v Ocean SS Co Ltd*³⁴¹ that the carrier was in breach of contract even though his actions were the direct result of advice given to him by a negligent independent contractor. More so, the duty under Article III(2) extends to efforts taken to protect or relieve the goods from circumstances caused by an earlier accident or danger, even when that earlier danger was an excepted peril or was brought about without the carrier's fault.(Berlingieri 1991 LQR 18).³⁴²

The carrier may however relieve himself from the duty imposed on him under Article III(2) to load, stow and discharge the goods, by including a clause into the contract that transfers this duty to consignor, as was seen in *Renton v Palmyra*.³⁴³ In this case, the House of Lords supported the dicta Devlin J in *Pyrene Co Ltd v Scindia Navigation Co Ltd*, to which effect:

³³⁶ Murray et al *Schmitthoff's Export Trade* 333.

³³⁷ [1966] 2 Lloyd's Rep 53.

³³⁸ Carr *International Trade Law* 245.

³³⁹ Note 66 in Carr *International Trade Law* 245.

³⁴⁰ Carr *International Trade Law* 246.

³⁴¹ [1955] 2 Lloyd's Rep 218.

³⁴² Chuah *Law of International Trade* 329.

³⁴³ [1957] AC 149.

“the extent to which the carrier has to undertake the loading of the vessel may depend not only upon different systems of law but upon the custom and practice of the port and nature of the cargo. It is difficult to believe that the Rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the Rules should not leave the parties free to determine by their own contract the part which each has to play. On this view the whole contract of carriage is subject to the Rules, but the extent to which loading and discharging are brought within the carrier’s obligations is left to the parties themselves to decide.”³⁴⁴

3.2.3 DUTY TO ISSUE THE BILL OF LADING

Article III(3) provides that the carrier is obliged to issue a bill of lading which stipulates amongst other things, the leading marks; the number of packages or pieces, the quantity or weight of the goods; the apparent order and condition of the goods.³⁴⁵ The issue of the bill of lading is only mandatory upon the request of the consignor, and the carrier is under no obligation to hand the bill of lading to any other person than the consignor.³⁴⁶ Article III(3) further provides that the carrier may include reservations in the bill of lading. Where the carrier or his agents have reasonable cause to believe that the leading marks, numbering or weight are not accurately represented, or he has not the means of asserting the veracity of the terms of the received bill of lading, he is not bound to include these marks in the shipped bill of lading.³⁴⁷ In *The Esmeralda*,³⁴⁸ it was seen that the carrier could qualify entries referring to the weight and quantity of the goods with terms such as ‘weight unknown’, ‘quantity unknown’. Where such clauses are incorporated into the bill of lading it automatically ceases to serve as *prima facie* evidence of the weight and quantity of cargo shipped against the carrier.³⁴⁹

Per Article III(4), the bill of lading shall serve as *prima facie* evidence of the state in which the carrier receives the goods. The carrier may provide evidence of the contrary whilst the bill of lading is in the possession of the consignor, but once the bill has been passed to a *bona fide* third party such evidence against statements in the bill of lading shall not be admissible in court.³⁵⁰

³⁴⁴ Chuah *Law of International Trade* 330.

³⁴⁵ *Supra* 336.

³⁴⁶ *Supra* 337.

³⁴⁷ *Supra* 337.

³⁴⁸ [1988] 1 Lloyd’s Rep 206.

³⁴⁹ Carr *International Trade Law* 247.

³⁵⁰ *Supra* 247.

Under the provisions of Article III(5), the carrier is entitled to indemnity from the consignor for any false statements incorporated into the final bill of lading as a result of misleading facts provided by the consignor, as was seen in *The Boukadoura*.³⁵¹ This indemnity shall nevertheless reduce the carrier's liability to third party interests under the contract of carriage.³⁵²

3.2.4 DUTY NOT TO DEVIATE

The carrier is under a general duty to proceed on the contract voyage.³⁵³ According to Article IV(4), "any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."³⁵⁴ The question that arose from the interpretation of this article has been whether a deviation by the carrier for the sole purpose of saving property is justified under the Rules, or such deviation finds justification only if it occurred for the purpose of saving a life.³⁵⁵ Should the provisions of Article IV(4) be so construed as to justify a deviation by the carrier to salvage property irrespective of any other circumstances, then Article III(4) shall have the effect of excluding the carrier from liability under Article IV(5), which excludes the carrier from the benefit of the limitation of liability should it be established that the damage was a result of an act or omission of the carrier performed with such damage intended or carelessly knowing that such act would likely result in damage.³⁵⁶ However, it is advised that the better approach at the provisions of Article IV(4) would be to justify deviation to save property in the course of saving a life, or deviation in order to save the voyage.³⁵⁷ The courts in *Stag Line v Foscola, Mango and Co*,³⁵⁸ held that for a deviation within the provisions of Article IV(4) to be justified, such a deviation must be a reasonable one.³⁵⁹ The House of Lords in an attempt to determine the scope of a 'reasonable deviation' received numerous meanings brought forward by their lordships,³⁶⁰ but much credit is given to that of Lord Atkin who suggested that a deviation should not be confined simply to a question of:

³⁵¹ [1986] 1 Lloyd's Rep 393.

³⁵² Chuah *Law of International Trade* 338.

³⁵³ Carr *International Trade Law* 248.

³⁵⁴ Chuah *Law of International Trade* 338.

³⁵⁵ Carr *International Trade Law* 248.

³⁵⁶ *Supra* 248.

³⁵⁷ Carr *International Trade Law* 249.

³⁵⁸ [1932] AC 328.

³⁵⁹ *Todd Cases and Materials* 510.

³⁶⁰ Carr *International Trade Law* 249; *Todd Cases and Materials* 510-513.

“a deviation to avoid some imminent peril; or deviation in the joint interest of cargo owner or ship; or deviation as would be contemplated by both cargo owner and ship.”³⁶¹

Lord Atkins further states that:

“a deviation may, and often will, be caused by fortuitous circumstances never contemplated by the original parties to the contract; and may be reasonable, though... indeed in the direct interest of neither: as for instance where the presence of a passenger or of a member of the ship or crew was urgently required after the voyage had begun or on a matter of national importance; or where some person on board was a fugitive from justice, and there were urgent reasons for his immediate appearance. The true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the obligation of anyone as conclusive.”³⁶²

It is settled that express terms in the contract that permit deviation will only determine the scope of the contract voyage and not affect the application of the provisions of the Rules which regulate the terms on which the voyage is to be performed.³⁶³

3.3 EXEMPTIONS TO CARRIERS' LIABILITY UNDER THE HAGUE-VISBY RULES:

The Hague-Visby Rules provide an extensive list of exclusionary clauses in favour of the carrier which are quite similar to those awarded at Common Law. But unlike at Common Law, the carrier under the Rules cannot increase the list of exceptions provided by the Rules.³⁶⁴ In the words of Wright J in *Gosse Millard v Canadian government Merchant Maine*,³⁶⁵ “Article IV of the Rules contains a long list of matters in respect of loss or damage arising or resulting from where the carrier is not liable.”³⁶⁶

Article IV provides that:

“neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness, unless caused by want of due diligence on the part of the

³⁶¹ Carr *International Trade Law* 249.

³⁶² Todd *Cases and Materials* 513.

³⁶³ Carr *International Trade Law* 249.

³⁶⁴ Carr *International Trade Law* 251.

³⁶⁵ 1927 2KB 432.

³⁶⁶ Murray et al *Schmitthoff's Export Trade* 334.

carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, 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 presentation in accordance with the provisions of the paragraph 1 of Article III.”

Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemptions under this article.³⁶⁷

Article IV(2) further states that, neither the carrier nor the ship shall be responsible for loss or damage arising of resulting from:

3.3.1 NEGLIGENCE IN NAVIGATION OR MANAGEMENT OF THE SHIP

The carrier is exempt from liability for any act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or management of the ship. Thus, the carrier could rely on the provisions of this clause if damage or loss resulted from a fault in navigation or management of the ship.³⁶⁸

A fault in navigation has been defined in *The Ferro*,³⁶⁹ as “something affecting the safe sailings of the ship.”³⁷⁰ On the other hand, determining what amounts to a fault in management has been more complex. It has however been held that a fault in the management of the ship must be established as a matter of fact for the carrier to a benefit of the protection of Article IV(2)(a). In *Goose Millerd Ltd v Canadian Government Merchant Maine Ltd*,³⁷¹ Lord Hailsman L.C upheld the ruling in *The Glenochil*,³⁷² where in Gorell Barnes J held:

“There will be found strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself and I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in this particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with cargo, that must be a matter which falls within the words (management of the vessel).”³⁷³

It stands to reason from presented facts that where loss or damage to cargo resulted from the negligence of the master or his crew to exercise due diligence in the management

³⁶⁷ *Supra* 334.

³⁶⁸ *Carr International Trade Law* 251.

³⁶⁹ [1893] 38.

³⁷⁰ *Chuah Law of International Trade* 331.

³⁷¹ [1929] AC 223.

³⁷² [1896] 10.

³⁷³ *Chuah Law of International Trade* 331.

of the cargo, the carrier cannot benefit from the exemption provided under Article IV(2) (a). For such exemption to avail the carrier, the fault must be one committed in the management of the ship itself as was reiterated by Greer L.J in the *Goose Millerd* case:³⁷⁴

“If the cause of the damage is solely, or even primarily, a neglect to take reasonable care of the cargo, the ship is liable, but if the cause of damage is a neglect to take reasonable care of the ship, or some part of it, as distinct from cargo, the ship is relieved from liability; but if the negligence is not negligence towards the ship, but only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved.”³⁷⁵

3.3.2 FIRE

Article IV(2) (b) exempts the carrier from liability for loss or damage caused by fire, unless the fire was caused by the actual fault or privity of the carrier.³⁷⁶

In *Tempus Shipping Co v Louis Dreyfus*,³⁷⁷ the courts held that mere heating without flames does not fall within its definition of fire.³⁷⁸ It is held that the carrier forfeits his right to the defence of Article IV(2)(b) if the loss or damage result from a fire caused by the carrier’s lack of due diligence to render the vessel seaworthy, as was seen in *Maxine Footwear Co Ltd v Canadian Merchant Marine*.³⁷⁹

Determining actual fault or privity on the part of the carrier is a matter of fact. This is made difficult in situations where the carrier is a company, as companies are inanimate entities that act through animate beings, and sometimes it is difficult to impute the negligent acts of persons working in a company to the actual acts of the company.³⁸⁰ It was held in *Lennard’s Carrying Co Ltd v Asiatic Petroleum co Ltd*,³⁸¹ that liability will lie on the company where the individual working for the company enjoys a relationship with the company wherein it stands to reason that the individual is the directing mind or the brain of the company, as stated by Viscount Haldane:

“...the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing *respondeat superior*, but somebody for whom the company is liable because his action is the very action of the company itself. It is not enough that the fault should be the fault of a servant in

³⁷⁴ *Supra* 331.

³⁷⁵ *Supra* 332.

³⁷⁶ *Supra* 333.

³⁷⁷ [1930] 1KB 699.

³⁷⁸ *Carr International Trade Law* 253.

³⁷⁹ [1959] 2 Lloyd’s Rep 105.

³⁸⁰ *Carr International Trade Law* 254.

³⁸¹ [1915] AC 705.

order to exonerate the owner, the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy.”³⁸²

3.3.3 PERILS OF SEA

Per Article IV(2)(c), the carrier shall not be liable for loss or damage to the goods where they resulted from the perils, dangers and accidents of the sea or other navigable waters.³⁸³

It is highly probable that the definition of ‘perils of the sea’ under the Rules be similar to that under the English common law.³⁸⁴ At Common Law, perils of sea refer to any damage caused by storms, sea waters, collision, stranding and other perils likely to affect a ship at sea, to which no measure of due diligence exercised by the carrier could have avoided their consequences.³⁸⁵ In *Hamilton Fraser and co. v Pandorf and Co*,³⁸⁶ this exception was limited only to perils encountered only at sea, nor would it apply to any other medium of transportation.³⁸⁷ Per Lord Herschell in *The Xantho*:³⁸⁸

“they do not protect, for example, against that natural and inevitable action of the winds and waves, which result in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure.”³⁸⁹

3.3.4 ACT OF GOD

The exception to liability for damage or loss caused by an Act of God is provided by the Article IV(2)(d).³⁹⁰ This provision has been interpreted at Common Law to mean any act by which no degree of human intervention, precaution or foreseeability could have prevented the result.³⁹¹ This was upheld in *Nugent v Smith*,³⁹² where the courts held that the loss of a horse as a result of injuries sustained during a storm could not have been prevented through any means by the carrier.³⁹³

³⁸² Carr *International Trade Law* 254.

³⁸³ *Supra* 255.

³⁸⁴ Chuah *Law of International Trade* 333.

³⁸⁵ Carr *International Trade Law* 255.

³⁸⁶ [1887] 12 AC 518.

³⁸⁷ Carr *International Trade Law* 255.

³⁸⁸ [1887] 12 App Cas 503.

³⁸⁹ Chuah *Law of International Trade* 334.

³⁹⁰ *Supra* 334.

³⁹¹ Carr *International Trade Law* 255.

³⁹² (1876) 1 CPD 423.

³⁹³ Carr *International Trade Law* 255.

3.3.5 ACT OF WAR, PUBLIC ENEMIES AND RIOT

Article IV(2)(e) provides that the carrier is not liable for loss or damage to goods that resulted from an act of war. The courts in *Kawasaki v Brantham SS Co*,³⁹⁴ defined war as a situation of hostility between two states and the exclusion may extend to civil war situations.³⁹⁵

Article IV(2)(f) further provides exemption from liability to the carrier for loss or damage caused by an act of public enemies. Per Article IV(2)(k) the carrier will be exempt from liability that results from disturbances such as riots and civil unrest.³⁹⁶

3.3.6 ACT OF AUTHORITIES AND QUARANTINE

In conformity with Article IV(2)(g), the carrier is exempt from liability for loss or damage due to the arrest or restraint of princes, or rulers or people, or seizure under legal process. This provision has been interpreted at Common Law to cover circumstances wherein loss or damage is caused due to the government of a country placing an embargo on the goods or where such government placed a prohibition against the import of the goods. Article IV(2)(h) goes further to exempt the carrier where the goods cannot be discharged due to quarantine restrictions.³⁹⁷

3.3.7 ACT OR OMISSION OF THE CONSIGNOR

Article IV(2)(i) relieves the carrier from liability where the loss or damage to the cargo is due to an act or omission of the consignor or owner of the goods, his agent or representative. This provision considers the possibility that goods in the carrier's possession may suffer loss or damage due to inaccurate directives provided by the consignor with regards to their handling.³⁹⁸

3.3.8 STRIKES AND LOCKOUTS

Article IV(2)(j) relieves the carrier from liability for loss or damage due to strikes or lockouts or restraints of labour from whatever cause, whether partial or general. Lord Denning defines 'strike' in *The New Horizon*,³⁹⁹ as:

³⁹⁴ [1939] 2 KB 544.

³⁹⁵ Carr *International Trade Law* 255.

³⁹⁶ *Supra* 256.

³⁹⁷ Carr *International Trade Law* 256.

³⁹⁸ Chuah *Law of International Trade* 334.

³⁹⁹ [1975] 2 Lloyd's Rep 314 317.

“... a conceited stoppage of work done by men with a view to improving their wages or conditions, or giving vent to grievance, or making a protest about something or other, or supporting or sympathising with other workmen in such endeavour. It is distinct from a stoppage brought about by an external event such as bomb scare or by apprehension of danger.”⁴⁰⁰

3.3.9 SAVING LIFE OR PROPERTY AND DEVIATION

Article IV(2)(1) exempts the carrier for loss or damage to goods due to an attempt to save a life or property at sea. This provision will apply where the carrier pursuing the contracted route causes damage or loss of the cargo. Mention is not made in the provision as to its applicability where the loss or damage was the result of a deviation from the contracted route to save a life.⁴⁰¹ However, Article IV(4) exempts the carrier from liability for loss or damage to the goods resulting from a reasonable deviation.⁴⁰² Should the deviation be deemed a wrongful one, the carrier loses the defence under Article IV(2).⁴⁰³

3.3.10 WASTAGE AND INHERENT VICE

In accordance with Article IV(2)(m), the carrier is exempted from liability due to wastage in bulk or weight or any other loss or damage arising from an inherent defect, quality or vice of the goods.⁴⁰⁴ Inherent vice has been defined to mean an inability borne of the very nature of the particular good to overcome the ordinary incidents of the voyage regardless of the exercise of all due diligence necessary for the care of the goods.⁴⁰⁵ This defence has found explanation at Common Law in *The Barcore*:⁴⁰⁶

“[The] cargo was not damaged by reason of the [carrier] committing a breach of contract, or omitting to do something which he ought to have done, but it was deteriorated in condition by its own want of power to bear the ordinary transit in a ship.”⁴⁰⁷

⁴⁰⁰ Carr *International Trade Law* 256.

⁴⁰¹ *Supra* 257.

⁴⁰² Carr *International Trade Law* 257.

⁴⁰³ Chuah *Law of International Trade* 335.

⁴⁰⁴ *Supra* 335.

⁴⁰⁵ Carr *International Trade Law* 257.

⁴⁰⁶ [1896] 294.

⁴⁰⁷ Chuah *Law of International Trade* 335.

3.3.11 DEFECTIVE PACKING AND MARKING

Article IV(2)(n) provides that the carrier is not liable for loss or damage due to an insufficiency of packing. *In Silver v Ocean Steamship Co*,⁴⁰⁸ it was held that goods shall be deemed insufficiently packed if they cannot bear the likely manoeuvres which such goods are likely to undergo in the course of the voyage. However, the carrier shall be estopped from pleading this defence where he issued a clean bill of lading to a bona fide consignee or endorsee.⁴⁰⁹

Article IV(2)(o) further exempts the carrier from loss or damage to the goods due to insufficiency or inadequacy of marks placed on the goods. Like under Article IV(2)(n), should the carrier transfer a bill of lading to a bona fide third party, he forfeits his defence.⁴¹⁰ Be that as it may, where it is established that the marks on the bill of Lading are inaccurate, in conformity with Article III(5), the carrier can claim indemnity from the consignor.⁴¹¹

3.3.12 LATENT DEFECTS

Per Article IV(2)(p), the carrier is not liable for loss or damage to goods caused due to latent defects not discoverable by due diligence. The latent defects do not refer to defects in the goods, but latent defects in the vessel transporting the goods.⁴¹² It is supposed that this provision adds to the immunity provided to the carrier under Article IV(1), as it will cover defects which the carrier couldn't have discovered through the exercise of due diligence, and where the carrier could not establish as a matter of fact that he had exercised due diligence.⁴¹³

3.3.13 CATCH ALL EXEPTION

Article IV(2)(q) provides a 'catch all exception' as it states that neither the carrier nor the ship is liable for loss or damage that arises or results from any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier.⁴¹⁴

Commentators have opined that this provision cannot be given an *ejusdem generis* interpretation since the exceptions under Article IV(2) do not form a single genus. Thus the provisions must be regarded as covering circumstances not referred to under Article IV

⁴⁰⁸ [1930] 1 KB 416.

⁴⁰⁹ Carr *International Trade Law* 257.

⁴¹⁰ *Supra* 257.

⁴¹¹ Carr *International Trade Law* 257.

⁴¹² Chuah *Law of International Trade* 335.

⁴¹³ Carr *International Trade Law* 258.

⁴¹⁴ Chuah *Law of International Trade* 336.

(2)(a)-(p).⁴¹⁵ However, this is not a common defence sought by carriers, and this is due to the fact that firstly, the provisions of Article IV(2) are very extensive, not covering only the rarest situations; and secondly, in order for the carrier to use this defence he must establish that neither he or his crew were negligent or at fault.⁴¹⁶

It is unlikely as it seems that this defence be sought by the carrier due to his burden of proof,⁴¹⁷ but it does not fall short of usefulness, as it was employed with success in *Leesh River Tea Co v British India Steam Navigation*.⁴¹⁸

3.4 LIMITATION OF CARRIERS' LIABILITY UNDER THE HAGUE-VISBY RULES

Although the Hague Visby Rules seemingly favour the carrier with the numerous defences it provides to its liability, the Rules also provide limits to his liability.⁴¹⁹

Per Article IV bis(1), the defences and limits of liability available to the carrier of goods shall apply in an action for loss or damage to goods covered by the contract of carriage whether the action is brought on contract or in tort. In conformity with Article IV bis(1) and (2), the defences and limits to liability apply to the carrier and his servants or agents, provided such servant or agent is not an independent contractor.⁴²⁰ However, the carrier may extend the cover of Article IV bis(1) and (2) to independent contractors by expressly including them in a clause in the bill of lading. Such a clause is known as the 'Himalaya' clause,⁴²¹ which owes its name after the vessel in *Adler v Dickson*.⁴²² In *New Zealand Shipping Co Ltd v AM Satterthwaite and Co Ltd (The Eurymedon)*,⁴²³ Lord Wilberforce said that such a clause will be effective with regards to independent contractors to include; exemptions, limitations, defences and immunities contained in the bill if the lading.⁴²⁴ Apart from the defences awarded to the carrier under the Rules, the Rules also provide for a financial limit in damages claimed, as well as a time limit within which action must be brought against the carrier.⁴²⁵

Per Article IV(5)(a) the sum of liability shall be calculated in terms of package, unit or weight of the goods, and it is at the discretion of the consignor to use the measure of

⁴¹⁵ Carr *International Trade Law* 258.

⁴¹⁶ Chuah *Law of International Trade* 336.

⁴¹⁷ Carr *International Trade Law* 258.

⁴¹⁸ [1966] 2 Lloyd Rep 193.

⁴¹⁹ Chuah *Law of International Trade* 339.

⁴²⁰ Carr *International Trade Law* 259.

⁴²¹ Carr *International Trade Law* 260.

⁴²² [1954] 2 Lloyd's Rep 267.

⁴²³ [1975] AC 169.

⁴²⁴ Carr *International Trade Law* 261.

⁴²⁵ Chuah *Law of International Trade* 339.

calculation that provides a higher amount in damages.⁴²⁶ Where the consignor makes use of a container for the carriage of his goods, Article IV(5)(c) further provides that:

“Where a container, pallet or a similar article of transport is used to consolidate the goods, the number of packages enumerated in the bill of lading as packaged in such article of transport shall be deemed the number of packages or units concerned. Except as aforesaid, such article shall be considered the package or unit.”⁴²⁷

3.4.1 FINANCIAL LIMITATION

Article IV(5)(d) provides that the unit of account for calculation purposes in the Special Drawing Right,⁴²⁸ as defined by the International Monetary Fund(IMF).⁴²⁹ The Rules provide a limit for recoverable damages. This serves to encourage carriers to offer lower freight rates, provided the law limits their liability in the carriage of goods whose value is not disclosed by the consignor.⁴³⁰

Article IV(5)(a) of the Rules limits the amount payable by the carrier in the event of loss or damage to 666.67 units of account per package or unit or 2 units of accounts per kilo of gross weight of the goods lost or damaged, whichever is the higher, provided the value of the goods at the time of shipment had not been declared by the consignor. However, Article IV(5)(f) provides that should the consignor declare the value of goods and inserts the declaration into the bill of lading, it shall only serve as *prima facie* evidence of the amount declared, but shall not bind the carrier. Article IV(5)(g) further states that by mutual agreement between the carrier or his agent and the consignor, the limit may be increased to one higher than prescribed by the Rules. However the limit may not be set lower if not it shall be void in conformity with the provisions of Article III(8).⁴³¹ More so, under Article IV(5)(e), neither the carrier nor the ship shall benefit of the limitation of liability provided in Article IV(5)(a), if it is established that the damage resulted from an act or omission of carrier done with intent to cause damage, or recklessly, and with knowledge that damage would probably result.

3.4.2 TIME LIMITATION

Article III(6) provides that the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may

⁴²⁶ Carr *International Trade Law* 264.

⁴²⁷ *Supra* 264.

⁴²⁸ Hereinafter referred to as SDR.

⁴²⁹ Carr *International Trade Law* 265.

⁴³⁰ Chuah *Law of International Trade* 344.

⁴³¹ Carr *International Trade Law* 266.

however be extended if the parties so agree after the cause of action has arisen. The parties however, may not agree to reduce this period.⁴³²

The provisions of this article imply that should the claimant fail to bring an action against the carrier within one year of him having delivered the goods, or one year from the time when the carrier was expected to have made the delivery, the carrier shall be exempt from all liability for loss damage to the goods after this time limit.⁴³³ The courts have adopted a strict approach to this time limitation which operates to the favour of the defendant (the carrier),⁴³⁴ as was seen in *Compania Culumbiana de Seguros v Pacific SN Co.*⁴³⁵ In conformity with Article III (6) bis, an action for indemnity against a third party may be brought outside of the one year time limit, provided such an action is brought within the period permitted by the law of the court seized of the matter. This time shall however not be less than three months, beginning from the day when the party seeking indemnity has settled the claim or has been served with process in the action against him.

3.5 CONCLUSION

The objective of the Hague-Visby Rules was to protect the interest of the consignor, and any other party with bona fide claim to the goods in the possession of the carrier from the inexhaustible lists of exclusionary clauses incorporated into the bill of lading by the carrier.⁴³⁶ To this effect, Article III(8) provides that any attempt to derogate from the liability imposed under the Rules will be null and void.⁴³⁷ In this light, it was held in *The Hollandia*,⁴³⁸ that the carrier will not reduce the limits of his liability by including a choice of forum clause in the contract. Lord Diplock contended that a choice of forum clause that seeks to reduce the liability under the Rules is void, and he further stated that to grant assent to such provision:

“would leave it open to any ship-owner to evade the provision of Article III paragraph 8 by the simple device of inserting in his bills of lading issued in, or for carriage from a port in, any contracting state a clause in standard form providing as the exclusive forum for resolution of disputes what might aptly be described as a court of convenience, *viz*, one situated in a country which did not apply the Hague-Visby Rules or, for that matter, a country whose law recognised an unfettered right

⁴³² Note 153 in Carr *International Trade Law* 267.

⁴³³ Chuah *Law of International Trade* 340.

⁴³⁴ Carr *International Trade Law* 267.

⁴³⁵ [1963] 2 Lloyd's Rep 527.

⁴³⁶ Wanigasekera “Comparison of Hague-Visby and Hamburg Rules”1.

⁴³⁷ Carr *International Trade Law* 285.

⁴³⁸ [1985] 1 AC 565.

in a ship-owner...to relieve himself from all liability for loss or damages to goods caused by his own negligence, fault or breach of contract.”⁴³⁹

Be that as it may, the provisions of the Rules still contain numerous exceptions to liability that operate in favour of the carrier, to which no better justification could be made than the simple desire to exempt him from liability for loss or damage of goods in his care.⁴⁴⁰

The Second World War caused significant economic and political changes across the world. Many nations in Asia and Africa gained independence, and soon thereafter joined the international trade transaction as exporters (consignors). These new countries contributed to about 65% of all maritime shipment. Despite this great input to maritime commerce, this business of carriage was still dominated by the industrialised countries that possessed 93% of mercantile fleets.⁴⁴¹ The domination of the carriage business by the developed nations enabled them to subject the consignors to their terms of contract which were considered detrimental to the developing nations. These developing nations saw the need for a new convention that will replace the old and out-dated Hague regime, and place them on level ground with the developed nations. In the light of this, the developing nations urged the international community to review the Rules on carriage by sea, which led to the development of a new law of the sea called the United Nations Convention on Carriage of Goods by Sea 1978, commonly known as the Hamburg Rules.

⁴³⁹ Chuah *Law of International Trade* 322.

⁴⁴⁰ Zamora *American Journal of Comparative Law* 418-419 <http://www.jstor.org/stable/839373>.

⁴⁴¹ Karan H “Any Need for a New International Instrument on the Carriage of Goods by Sea: The Rotterdam Rules?” 2011 (42) *Journal of Maritime Law & Commerce* 441-451 446
<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=66465322&site=ehost-live> (Accessed: 17/11/2011).

CHAPTER FOUR

CARRIERS' LIABILITY UNDER THE HAMBURG RULES AND REASONS FOR THEIR FAILURE

4.1 INTRODUCTION

The greatest impediment to the laws regulating the carriage of goods by sea has been the validity of the numerous exclusionary clauses included into the bill of lading, that aim to reduce the carriers liability under the contract of carriage.⁴⁴² Early disparity in the law of nations in relation to this issue led to an urge for compromise and international unification of trade legislations, which culminated in the adoption of the Hague Rules in 1924, and subsequent revision of these Hague Rules by the United Nations Conference on Trade and Development (UNCTAD) to meet needs of economic development.⁴⁴³ More so, by the end of the 1960's, the Hague-Visby Regime,⁴⁴⁴ had obtained great criticism from developing countries. Representatives of developing countries, as well as some developed countries, contended that their nationals were mainly consignors, and were on the losing end of the bargain in relation to the carriers, given the terms of the contract of carriage. Moreover, most of these developing countries were not consulted before the drafting of the existing international legislation on carriage.⁴⁴⁵

Some of the reasons that encouraged the need for a new law regulating sea carriage were the following;⁴⁴⁶

- The burden of proof under the Rules weigh too heavily on the consignor;
- The long list of exclusionary clauses included in the bill of lading by virtue of Article IV(2), operate solely to the benefit of the carrier. Per Article IV(2)(a), the Rules allow

⁴⁴² Sinha 1979 *American Journal of Comparative Law* 353 <http://www.jstor.org/stable/840038>.

⁴⁴³ *Supra* 353.

⁴⁴⁴ Carr *International Trade Law* 291.

⁴⁴⁵ Sinha 1979 *American Journal of Comparative Law* 354 <http://www.jstor.org/stable/840038>.

⁴⁴⁶ Carr *International Trade Law* 291.

the carrier to escape liability for the 'act neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management'. Such an exclusion from liability is unacceptable, provided it would be bad policy to exempt the carrier from liability for a negligent act committed aboard his vessel while he was in control of it.⁴⁴⁷ Also in *Leesh River tea Co v British Steam Navigation*,⁴⁴⁸ the catch all exception provided by Article IV(2)(q) frees the carrier from liability not covered by the provision of Article (1)(a-p);

- Loss due to delay in delivery is not specifically covered by the Rules as seen in *Anglo-Saxon Adamastos Shipping Co*;⁴⁴⁹
- It is difficult to identify the party against whom action must be brought under a contract of carriage; hence the One year time line limit for action to be brought against a carrier is too short;⁴⁵⁰
- The carriers tended to include unfair clauses in the bill of lading with regard to jurisdiction and arbitration because the Rules failed to make provisions to this effect;⁴⁵¹
- The Rules applied only to contracts of carriage evidenced by a bill of lading;⁴⁵²
- The application of the Rules did not extend to any period of storage, or consolidation of the goods at the port of shipment, though the goods have been delivered to the carrier.⁴⁵³

In the light of the foregoing, UNCITRAL took over the task of drafting a new convention.⁴⁵⁴ UNCITRAL formed a working group made up of representatives of 21 member states selected on basis of geographic distribution and representation of the economic interest involved, and also considering different legal systems. This working Group prepared a draft convention for review by UNCITRAL, which was approved in May 1976 as the Draft Convention on the Carriage of Goods by Sea. From the 6-31 of March 1978 a United Nations conference on Carriage of Goods by sea, held at Hamburg, received the Draft Convention and draft provisions regarding its implementation, reservations and other clauses, as prepared by the UN secretariat for consideration. On the 30th of March, the conference adopted the text of the United Nations Convention on the Carriage of Goods by

⁴⁴⁷ *Gosse Millerd v Canadian Government* (1927) 44 TLR 143 151.

⁴⁴⁸ [1966] 3 A11 ER 593.

⁴⁴⁹ [1957] 1 Lloyd's Rep 79.

⁴⁵⁰ *Carr International Trade Law* 292.

⁴⁵¹ *Supra* 292.

⁴⁵² *Chuah Law of International Trade* 353.

⁴⁵³ *Supra* 353.

⁴⁵⁴ *Carr International Trade Law* 292.

Sea, 1978 (The Hamburg Rules).⁴⁵⁵ The Hamburg Rules exists alongside The Hague Rules and Hague-Visby Rules,⁴⁵⁶ and most recently, the Rotterdam Rules.

4.2 MAJOR CHANGES BROUGHT TO THE HAGUE-VISBY RULES BY THE HAMBURG RULES

4.2.1 SCOPE OF APPLICATION

The Hamburg Rules were developed to take over the Hague/Hague-Visby regimes.⁴⁵⁷ One major change brought about by the Hamburg Rules to The Hague/Hague-Visby regimes can be seen from their title, the 'Convention on the carriage of goods by Sea'. Thus while the Hague/Hague Visby regimes apply to 'Certain Rules of Law relating to Bills of Lading', The Hamburg Rules simply apply to contracts of Carriage of Goods by Sea.⁴⁵⁸ Article 3 of the Hamburg Rules provides that, "in the interpretation and application of the provisions of this convention, regard shall be had to its international character and need to promote uniformity."⁴⁵⁹ The Hamburg Rules shall apply to all "contracts of carriage by sea between two different states", unlike the Hague/Hague-Visby Rules which limits their application only to contracts of carriage by sea evidenced by a bill of lading.⁴⁶⁰ Per Article 2 of the Hamburg Rules, the convention shall apply where:⁴⁶¹

"The port of loading as provided for in the contract of carriage is located in a contracting state; the port of discharge as stated in the contract of carriage is located in contracting state; or one of the optional ports of discharge turns out to be actual port of discharge as stipulated in the contract and such a port is located in a contracting state; or the bill of lading or other document evidencing the contract of carriage is issued in a contracting state; in circumstances where the provisions of the bill of lading or other document evidencing the contract of carriage by sea provides that the Hamburg Rules apply."⁴⁶²

As such, carriage to and from a contracting state shall attract the application of The Hamburg Rules as seen in the case of *Compagnie S n glaise d'Assurances et de*

⁴⁵⁵ Sinha 1979 *American Journal of Comparative Law* 355 <http://www.jstor.org/stable/840038>.

⁴⁵⁶ Carr *International Trade Law* 293.

⁴⁵⁷ Murray DE "The Hamburg Rules: A Comparative Analysis" 1980 (12) *Lawyer of the Americas* 59-92 59 <http://www.jstor.org/stable/40175868> (Accessed: 11/08/2011 07:31).

⁴⁵⁸ Ramberg J "The Vanishing Bill of Lading & the 'Hamburg Rules Carrier'" 1979 (27) *American Journal of Comparative Law* 391-406 391 <http://www.jstor.org/stable/840041> (Accessed: 11/08/2011 07:31).

⁴⁵⁹ Murray 1980 *Lawyer of the Americas* 59 <http://www.jstor.org/stable/40175868>.

⁴⁶⁰ Chuah *Law of International Trade* 353.

⁴⁶¹ *Supra* 353.

⁴⁶² Explanatory note by UNCITRAL secretariat on the United Nations Convention on the carriage of Goods by Sea 1978(Hamburg)(A/CN. 9/306) 11

*Réassurance CSA and 27 Other Companies v Rascoe Shipping Co, the Captain of the Ship 'World Appolo', and the Steaming Mutual Underwriting Association.*⁴⁶³ This is a major improvement to the Hague-Visby Rules which apply only to outward carriage from a contracting state.⁴⁶⁴ It should also be noted that the application of the provision of The Hamburg Rules is not subject to physical contact with a contracting state, provided the parties thereto expressly agree in contract that the provisions of The Hamburg Rules, or the laws of a state that implements The Hamburg Rules are to govern the contract of carriage.⁴⁶⁵

More so, per Article 2(3), The Hamburg Rules shall not apply to charter parties unless a bill of lading was issued under such a charter party with the intention that the terms in that bill of lading regulate the relationship between the carrier and the holder of the bill who is not a charterer.⁴⁶⁶ Be that as it may, a major drift from the Hague regime by the Hamburg Rules is the fact that the provisions of the Hamburg Rules will apply to contracts of carriage regardless of whether or not a bill of lading has been issued.⁴⁶⁷ Unlike under the Hague/Hague-Visby regimes, the Hamburg Rules do not apply only to negotiable bills of lading, their provisions will apply to non-negotiable bills of lading, seaway bills and electronic documents.⁴⁶⁸

Also, under the Hague-Visby Rules, the carrier, if liable for loss or damage to goods in his possession, this liability shall attach to him only if it occurred from the time when the goods were loaded on board his ship to the time when they are discharged, unless, this period of liability was extended by the parties by mutual agreement, such that it extends to the management of the cargo before loading and subsequent to their discharge from the ship. But still, the limitation of liability awarded the carrier under the Hague Visby Rules still operate in favour of the carrier irrespective of the agreement.⁴⁶⁹ The Hamburg Rules change this position of the carrier as Article 4(1) provides that the carrier shall not only be liable for the period of carriage, but also for the period during which the goods are in his custody at the port of loading and at the port of discharge.⁴⁷⁰ In other words, the Hamburg Rules provide that the carrier is liable from the time the goods are in his possession until he either delivers them to the consignee, or places the goods at the consignees disposal in conformity with contracted terms, law or custom applicable to the transaction at the port of discharge,

⁴⁶³ UNCITRAL A/CN.9/SER.C/ABSTRACTS 11, 2 December 1996 (Case 159) Commercial Court of Marseilles (France).

⁴⁶⁴ Carr *International Trade Law* 296.

⁴⁶⁵ *Supra* 296.

⁴⁶⁶ Explanatory note by UNCITRAL Secretariats on the United Nations Convention on the Carriage of Goods by Sea 1978(Hamburg)(a/CN. 9/306) 12.

⁴⁶⁷ Chuah *Law of International Trade* 354.

⁴⁶⁸ Pravin 2011 <http://pravinrathinam.blogspot.com/2011/06/hamburg-rules-failure-or-success-review.html>.

⁴⁶⁹ Murray 1980 *Lawyer of the Americas* 61-62 <http://www.jstor.org/stable/40175868>.

⁴⁷⁰ Honnold J "Ocean Carriers and Cargo; Clarity and Fairness-Hague or Hamburg?" 1993 (24) *Journal of Maritime Law and Commerce* 75-109 82 Sabinet (Accessed: 24/10/2011).

or delivers the goods to a third party or an authority entitled to receive the goods by operation of law or custom of the port of discharge.⁴⁷¹

Also, the Hamburg Rules resolve the problem under the Hague-Visby Rules of determining who the 'carrier' is when two or more carriers are involved in the carriage of the goods.⁴⁷² The Hamburg Rules provide a distinction between a carrier and an actual carrier so as to ease the process of any claimant's recourse to litigation, by identifying the party against whom an action can be brought.⁴⁷³ Per Article 1, a carrier is defined as 'any person by whom or in whose name a contract of carriage of goods by sea is concluded with any (consignor)'. This has been interpreted to include the ship owner, the charterer, the freight forwarder or any transport operator who has entered into the contract of carriage.⁴⁷⁴ The actual carrier is defined in Article 1 as 'any person to whom the performance has been entrusted'. From the wordings of Article 10(1), it can be understood that the contracting carrier is liable for the entire journey as it states that:

"Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage ... The carrier is responsible, in relation to the carriage performed by the actual carrier and of his servants and agents acting within the scope of their employment."⁴⁷⁵

Be that as it may, the actual carrier shall bear liability only for his leg of the carriage. Per Article 11(1) the contract carrier shall exempt himself from liability for loss or damage to the goods while in the custody of the actual carrier if he named such actual carrier, as well as specified details about his leg of the carriage in the contract of carriage. Worthy of note is the fact that this exclusion from liability by the contracting carrier shall only avail him if it is possible for the proceedings to be brought against the actual carrier within the provisions of Article 21(1)(2). Despite this requirement, the contracting carrier has recourse to claim from the actual carrier for any indemnity paid to cargo claimants.⁴⁷⁶

Furthermore, The Hamburg Rules will cover the carriage of all kinds of goods, including live animals per Article 5(5), and deck cargo provided he conforms to the specific rules regulating the carriage of such cargo per Article 9. Carriage of deck cargo by agreement between the parties was not covered under the Hague Rules due to the high risks of loss involved. With developments in transport practices such as the use of containers, the risk is now manageable. The Hamburg Rules thus allow the carrier to carry goods on deck, not only by agreement with the consignor, but if such deck carriage conforms to the custom of the particular trade or if it is legally sanctioned. Under the

⁴⁷¹ Murray 1980 *Lawyer of the Americas* 62 <http://www.jstor.org/stable/40175868>.

⁴⁷² Selvig 1979 *American Journal of Comparative Law* 369 <http://www.jstor.org/stable/840040>.

⁴⁷³ Carr *International Trade Law* 298.

⁴⁷⁴ *Supra* 298.

⁴⁷⁵ Chuah *Law of International Trade* 354.

⁴⁷⁶ *Supra* 354-355.

Hamburg Rules however, the carrier shall be held liable for loss, damage or delay relating to the permitted deck cargo based on a presumption of fault or neglect. The carrier loses the right to the defence if the cargo had been carried on deck without prior agreement with the consignor.⁴⁷⁷

4.2.2 CARRIER'S DOCUMENTARY RESPONSIBILITY

Article 14(1) of the Hamburg Rules provides that on the request a consignor, the carrier must issue a bill of lading. Per Article 15(1) and (2) the bill of lading issued by the carrier must contain particulars that relate to the cargo. However, failure on the part of the carrier to describe some of the particulars of the cargo shall not impede on the legitimacy of the bill of lading as provided by Article 1(7).⁴⁷⁸ The carrier or any other person issuing the bill of lading may include reservations on the bill relating to the general nature of the cargo, where they had no reasonable means of verifying the particulars of the cargo, or has knowledge or reasonable cause to believe that the description provided him was incorrect.⁴⁷⁹ Thus, where the consignor makes entries in the bill of lading, which the carrier can't reasonably check, he may enter a reservation on such a bill with a phrase such as 'said to contain.'⁴⁸⁰

4.2.3 LIABILITY OF THE CARRIER UNDER THE HAMBURG RULES

The carrier's liability under the Hamburg Rules is based on a presumption of fault.⁴⁸¹ Article 5(1) of the Hamburg Rules provides that:

"the carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences."⁴⁸²

This is a major development from the liability regime under the Hague-Visby Rules, as it changes the fundamental rules on the allocation of risks between the consignor and the carrier, where at first the burden was on the claimant to prove the fault of the carrier, but

⁴⁷⁷ Yearbook of UNCITRAL 1988(19) 105.

⁴⁷⁸ Carr *International Trade Law* 300; per Article 1(7) a bill of lading is 'a document which evidences a contract of carriage by sea and the taking over as the loading of goods by the carrier, and by which the carrier undertakes to goods deliver the goods against its surrender. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer would constitute such an undertaking'.

⁴⁷⁹ Carr *International Trade Law* 301.

⁴⁸⁰ *Carté Société tuniso-européenne d'assurances et de réassurances v Sudcargos* 1996 Rev Scapel 40-42

⁴⁸¹ Carr *International Trade Law* 302.

⁴⁸² Luddeke C & Johnson A (eds) *The Hamburg Rules* 2 ed (1995) 11.

under the new regime, the carrier is presumed at fault for any loss, damage or delay in shipment unless he provides evidence to the contrary.⁴⁸³

The Hague-Visby Rules provided a long list of exceptions to carrier liability, including unconditional exoneration of carrier liability for loss or damage to the goods resulting from; an act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship.⁴⁸⁴ The provisions of Article 5(1) of the Hamburg Rules erase these exceptions by imposing a single standard of liability.⁴⁸⁵ The liability scheme awarded under the Hague-Visby Rules has no parallel in the law regulating other transport modes, more so, its contrary not only to the general legal concept that one should be liable to pay compensation for loss or damage caused by his fault, or that of any person under his employment, but also to the economic rationale that the party who is in position to avoid a loss should be liable for its occurrence.⁴⁸⁶

In another connection, The Hamburg Rules improve on the provisions of the Hague-Visby Rules, as they provide partial liability for delay, loss or damage to the goods in circumstances of joint of causation:⁴⁸⁷

“where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery, the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.”⁴⁸⁸

Following the model of the Warsaw convention 1928, regulating air carriage, the CMR regulating carriage by road and the CIM convention 1962 regulating carriage by rail, the Hamburg Rules impose liability on the carrier for delayed delivery, unless the carrier can prove that he took all reasonable measures to avoid the delay and its consequences.⁴⁸⁹

The provisions of Article 5(1) of the Hamburg Rules are a significant advancement to maritime law, as under the Hague regime, it is evident that there was uncertainty with regards to the party on whom the burden of proof rested. This burden fluctuated between the consignor and the carrier, and more often than not, leaving the consignor with the burden of proving facts that were particularly within the knowledge of the carrier.⁴⁹⁰

⁴⁸³ Hellawell R “Allocation of Risk between Cargo Owner and Carrier” 1979 (27) *American Journal of Comparative Law* 357-36 357 <http://www.jstor.org/stable/840039> (Accessed: 05/10/2010 07:02).

⁴⁸⁴ Article 4(2)(a) of the Hague Visby Rules.

⁴⁸⁵ Hellawell 1979 *American Journal of Comparative Law* 358 <http://www.jstor.org/stable/840039>.

⁴⁸⁶ Explanatory note by UNCITRAL Secretariat on the United Nations Convention on the Carriage of Goods by Sea 1978(A/CN. 9/306) 17.

⁴⁸⁷ Carr *International Trade Law* 302.

⁴⁸⁸ Luddeke & Johnson *The Hamburg Rules* 11.

⁴⁸⁹ Pravin 2011 <http://pravinrathinam.blogspot.com/2011/06/hamburg-rules-failure-or-success-review.html>.

⁴⁹⁰ Hellawell 1979 *The American Journal of Comparative Law* 361-362 <http://www.jstor.org/stable/840039>.

4.2.4 EXCEPTIONS TO CARRIER LIABILITY UNDER THE HAMBURG RULES

The Hamburg Rules drop all the exceptions awarded the carrier under the Hague-Visby Rules including the heavily criticized navigational exception.⁴⁹¹ Under the Hague-Visby Rules the carrier could exempt himself from liability for damage or loss that arose as a result of a nautical fault,⁴⁹² but under the Hamburg Rules, liability shall attach to the carrier if he cannot show that his agent, servant or himself took all reasonable measures required to avoid the loss, damage or delay.⁴⁹³ However, Article 5 of the Hamburg Rules provides exceptions to the liability of the carrier in specific instances.⁴⁹⁴ Per Article 5(5) where live animals are carried:

“the carrier is not liable for loss, damage or delay in delivery resulting from any special risk inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the (consignor) respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or part of the loss, damage or delay in delivery resulted from default or neglect on the part of the carrier, his servants or agents.”⁴⁹⁵

The Hamburg Rules also provide an exemption to liability caused by fire. Under the Hague Rules the carrier is exempted from liability for loss or damage caused by fire that occurred as a result of his fault or negligence or that of his servants or agents. Similarly favouring the carrier, Article 5(4) of the Hamburg Rules provides that the carrier shall be liable for loss, damage or delay caused by fire if the claimant can prove either that the fire arose from neglect on the part of the carrier, his servants or agents or the carrier, his servants or agents were guilty of fault or neglect in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.⁴⁹⁶ Be that as it may, while under The Hague Rules, the claimant has to prove not only the fault or negligence of the carrier’s servant, but also the actual negligence of the carrier, under the provisions of the Hamburg Rules, it shall suffice that the claimant proves merely the fault or negligence of the carrier’s servants.⁴⁹⁷

More so, the carrier shall be exempted from liability for loss or damage as a result of a deviation to save a life or property at sea,⁴⁹⁸ however, any deviation to save a life or property must be a reasonable one in order to exempt the carrier from liability for any

⁴⁹¹ Carr *International Trade Law* 303.

⁴⁹² *Infra* paragraph 4.3.

⁴⁹³ Murray 1980 *Lawyer of the Americas* 63 <http://www.jstor.org/stable/40175868>.

⁴⁹⁴ Carr *International Trade Law* 303.

⁴⁹⁵ Luddeke & Johnson *The Hamburg Rules* 11.

⁴⁹⁶ *Supra* 13.

⁴⁹⁷ Ainuson K “THE HAMBURG RULES: DID IT INCREASE THE LIABILITY OF THE CARRIER?” LLM Thesis Athens Georgia (2006) 1-60 45.

⁴⁹⁸ Article 5(6).

resulting loss or damage.⁴⁹⁹ No specific definition is provided to the term 'deviation' under the Hamburg Rules, however, Article 5(6) provides that, "the carrier is not liable, except in general average; where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea."⁵⁰⁰

4.2.5 LIMITATION OF LIABILITY UNDER THE HAMBURG RULES

As afore mentioned, the Hamburg Rules draw a distinction between the carrier and the actual carrier, so as to facilitate litigation and the settlement of claims. An interpretation of Article 10 of the Hamburg Rules provides that the carrier is responsible for the part of the carriage performed by the actual carrier, and they are both liable jointly and severally for any loss or damage to the goods.⁵⁰¹ However, Article 10(5) states that the aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limit of liability provided for under the convention.⁵⁰²

4.2.6 FINANCIAL LIMITATION

Like The Hague Visby Rules, the Hamburg Rules employ the SDR as its unit of account.⁵⁰³ The Hamburg Rules however increase the limit of liability awarded under the Hague-Visby Rules from 666.6 SDR per package or unit and 2 SDR per kilogram to 835 SDR and 2.5 SDR per kilogram.⁵⁰⁴ The carrier and consignor may agree to increase this limit, but the limits cannot be lowered.⁵⁰⁵ Luddeke & Johnson have summarised the package limitation under the Hamburg Rules as follows:

- a. Where the bill of lading enumerates the contents of the container or pallet, each package or other shipping unit is one shipping unit e.g. 1 container containing 106 packages = 106 shipping units.
- b. Where the bill of lading does not enumerate the contents of the container or pallet, the container is one shipping unit:
1 container containing general cargo=1 shipping unit

⁴⁹⁹ Luddeke & Johnson *The Hamburg Rules* 14.

⁵⁰⁰ Zorlu R "The main features of the Hamburg rules and the Hague-Visby rules" 5 Google http://www.akellawfirm.com/yayinlar/THE_MAIN_FEATURES_OF_THE_HAMBURG_RULES_AND_THE_HAGUE-VISBY_RULES.pdf (Accessed: 13/08/2011).

⁵⁰¹ Murray 1980 *Lawyer of the Americas* 72 <http://www.istor.org/stable/40175868>.

⁵⁰² Luddeke & Johnson *The Hamburg Rules* 23.

⁵⁰³ Carr *International Trade Law* 307.

⁵⁰⁴ Berlingieri F "A COMPARATIVE ANALYSIS OF THE HAGUE-VISBY RULES, THE HAMBURG RULES AND THE ROTTERDAM RULES" 32 Google http://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf (Accessed: 13/08/2011).

⁵⁰⁵ Explanatory note by UNCITRAL Secretariat on the United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg) (a/CN. 9/306) 22.

- c. Where the bill of lading enumerates the contents of the container or pallet in general terms:
1 container containing 7 items of general cargo =7 shipping units
- d. Where the bill of lading enumerates the contents of the container as partly packages and partly general cargo, each package is equated to a shipping unit, and the general cargo is equated as a shipping unit to:
e.g. 1 container containing 7 packages and some general cargo=8 shipping units.⁵⁰⁶

4.2.7 TIME LIMITATION

The Hamburg Rules expand the time within which action can be brought against the carrier to two years, unlike the Hague-Visby Rules which provide a one year time bar within which claims against the carrier must be brought.⁵⁰⁷ The provision of a two year time bar by the Hamburg Rules was to improve on the position of the consignor under the Hague/Visby regime, which was deemed extremely difficult due to practical difficulties in identifying the carrier against whom action must be brought within such a limited time frame.⁵⁰⁸ Per Article 20(2), this limitation period runs from when the goods have been delivered, or parts of them have been delivered, or where delivery has not been made, on the last day on which they were supposed to have been delivered.⁵⁰⁹

4.3 WHY HAVE THE HAMBURG RULES FAILED?

The success of an international convention lies not only in its approval by the regulating body, but also, in the incorporation of its provisions into the national laws of the states concerned, uniform judicial interpretation thereof, and application of the rules.⁵¹⁰ It will be right to say that the failure of the Hamburg Rules stems from the fact that very few nations have ratified the Hamburg Rules, and more so, none of these nations constitutes a major shipping nation that could pull its trading partners to ratify the convention. Thus, a major part of the international community has not ratified the Hamburg Rules as a marine cargo liability regime deserving of global implementation through a mandatory instrument.⁵¹¹ Furthermore, it is suggested that the limited support to the convention provided by the developing countries, at whose behest it was created, is because the

⁵⁰⁶ Luddeke & Johnson *The Hamburg Rules* 17.

⁵⁰⁷ Murray 1980 *Lawyer of the Americas* 80 <http://www.jstor.org/stable/40175868>.

⁵⁰⁸ Carr *International Trade Law* 308.

⁵⁰⁹ Luddeke & Johnson *The Hamburg Rules* 35.

⁵¹⁰ Bonell MJ "International Uniform Law in Practice - Or Where the Real Trouble Begins" *American Journal of Comparative Law* (38) 4 (1990) 865-888 866 <http://www.jstor.org/stable/840615> (Accessed: 05/10/2010 07:48).

⁵¹¹ Makins 1991 *MLAANZ* 42.

ratification of the Hamburg Rules would not improve on their economic position on the international scene.⁵¹²

According to Tetley, given the circumstances under which the Hamburg Rules were drafted, the convention was bound to be a failure, as the drafting of the convention was done publicly by committee in a large hall. He states that; “Just as great poetry has never been written by a committee so great laws are unlikely to be written by a committee even if the parties have a common purpose.”⁵¹³

In another connection, it is opined that the changes brought to carrier liability by the Hamburg Rules are too radical. A case in point is the abandonment of the catalogue of exceptions awarded to the carrier under the Hague-Visby Rules. Opponents to the Hamburg Rules contend that such radical changes to timeless maritime tradition would lead to uncertainty and open the flood gates for litigation under the new regime.⁵¹⁴ Legal reasoning supports that when provisions of a law are unclear and unpredictable, the likelihood of litigation resulting thereof increases, while the chances of such litigation being resolved through settlement once a suit has been filed fall. The rationale behind this is that the odds of compromise are greater when the claimant’s expected recovery and the defendant’s predicted total expenditure are certain. The opposite will not favour settlement.⁵¹⁵

More so, opposition to the ratification of the Hamburg Rules contend that the provisions of the Hague Visby Rules have been subjected to more than half a century of judicial review and interpretation, thus ratifying a new regime that discards existing law will be taking maritime judicial practice backwards.⁵¹⁶

On another level, opponents to the ratification of the Hamburg rules contend that their new risk allocation scheme will lead to an increase in Protection and Indemnity Club (P&I) insurance premiums, which the carriers will likely pass down to the consignor through a subsequent increase in freight rate. In other words, the fact that the provisions of the Hamburg Rules shift the burden of proof to the carrier, and eliminates all his exceptions to liability under the Hague regime, is going to increase the carrier’s risks over the cargo, and P&I clubs will hence increase their premiums since the risk they have to cover has increased. On the other hand, the carriers’, in order to make up for this increase will have to increase their freight charges thus throwing the expenses back to the consignor of the goods. In

⁵¹² *Infra* paragraph 4.4.

⁵¹³ Tetley QC “The Hamburg Rules - a commentary” 1979 (1) *Lloyd's Maritime and Commercial Law Quarterly* 1-20 5 <http://tetley.law.mcgill.ca/> (Accessed: 13/08/2011).

⁵¹⁴ Werth D “The Hamburg Rules Revisited-A Look at U.S. Options” 1991 (22) *Journal of Maritime Law and Commerce* 59-79 70 Sabinet (Accessed: 24/10/2011).

⁵¹⁵ Sturley M “Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence” 1993 (24) *Journal of Maritime Law and Commerce* 119-149 134-135 Sabinet (Accessed: 24/10/2011).

⁵¹⁶ Moore J “The Hamburg Rules” 1978 (10) *Journal of Maritime Law and Commerce* 1-11 2 UNISA Library (Accessed: 23/10/2011).

brief, their argument is that the domestication of the Hamburg Rules will not only increase insurance costs but the cost of the transaction as a whole.⁵¹⁷

Sturley,⁵¹⁸ though adopting a neutral approach to the validity of the insurance argument, asserts that the argument has been in debate for decades and surfaces every time change to a maritime regime has been suggested. The basis of this insurance argument by the opponents of the Hamburg regime is that, the result of cargo insurer's increased possibilities of recourse from the liability insurers will cause not only a greater increase in P&I premiums than there would be a decrease in cargo premiums, but also, increase freight rates imposed on the consignor's will be greater than the decrease in cargo insurance, thereby leading to higher costs of transportation than what was obtained under the Hague/Hague-Visby regimes.⁵¹⁹

In another connection, accent the Hamburg Rules was not favoured because it is held that the provisions of the Hamburg Rules are merely a codification of established case law under the Hague Visby Rules.⁵²⁰ More so, the drafting of the Hamburg Rules is said to be ambiguous and purposely drafted as such to make believe, the country representatives that took part in its drafting, that their interpretations of its provisions are valid. The result of this alleged ambiguity is criticized as going contrary to the *raison d'être* of the convention, which was to foster uniformity in the interpretation and application of the Hamburg Rules.⁵²¹

Also, though the Hamburg Rules impose financial limitations similar to that provided under the Hague Visby, in the light of inflation, the per package value of 2.5 SDR provided under the Hamburg Rules is lower than the real value of the per package limitation adopted by the Hague Visby in 1986, and the Hague in 1924.⁵²²

In as much as the applicability of the Hamburg Rules to inward and outward carriage is a compelling force favouring its position over the Hague/Hague-Visby regimes, the application of the Hamburg Rules just by a hand full of contracting states makes the impact of their provisions negligible on the international scene.⁵²³

⁵¹⁷ Werth 1991 *Journal of Maritime Law and Commerce* 71 Sabinet.

⁵¹⁸ Sturley 1993 *Journal of Maritime Law and Commerce* 133 Sabinet.

⁵¹⁹ Selvig 1981 *Journal of Maritime Law and Commerce* 315 Sabinet.

⁵²⁰ Tozaj D & Xhelilaj E "HAMBURG RULES V HAGUE VISBY RULES. AN ENGLISH PERSPECTIVE" 2010 (51) *Constanta Maritime University Annals* 30-34 32 (Accessed: 10/11/2011 07:48)

⁵²¹ *Supra* paragraph 3.3.

⁵²² Tetley 1979 *Lloyd's Maritime and Commercial Law Quarterly* 9 <http://tetley.law.mcgill.ca/>.

⁵²³ Carr *International Trade Law* 311.

4.4 CALL FOR A NEW CONVENTION

In the light of the confusion that characterised the maritime community, the USA, in a bid to protect its carriers proposed an amendment to the Hague regime in the form of a new US Carriage of Good by Sea Act 1998. This proposal presented before the US congress, abolished the nautical fault and fire exemptions awarded to the carrier, extended the carriers period of responsibility beyond the tackle-to-tackle, as well as extended the carriers liability to the actual carrier. Also, it adopted amendments in the Visby Protocol, and regulated multimodal carriage. Be that as it may, the USA foresaw that any national act protecting their carriers may lead to further duress on their carriers on an international platform. Hence the USA submitted their grievances with the status quo to the UNCITRAL for a solution.⁵²⁴

The result of intensive work undertook for almost Twelve years-firstly by the CMI for four years, and then the Working Group three on Transport Law of the UNCITRAL for Eight years, the United Nations Conventions on Contracts for the International Carriage of Goods Wholly or Partly by Sea, (the Rotterdam Rules) was adopted by the UN general assembly in New York USA, on December 11th, 2008, and was opened for signature in Rotterdam, Netherlands on September 23, 2009.⁵²⁵

CHAPTER FIVE

THE ROTTERDAM RULES

5.1 DEVELOPMENTS INTRODUCED BY THE ROTTERDAM RULES

5.1.1 SCOPE OF APPLICATION

The Rotterdam Rules were designed to apply to any international carriage contract to which a sea leg is included. Thus the complexity of multimodal transport, the fact that the different transport modes regulated by different conventions will be involved, is considered and resolved under the Rotterdam Rules. Commentators have stated that the new convention was designed to be more than just a multimodal convention; one which

⁵²⁴ Karan 2011 *Journal of Maritime Law & Commerce* 447
<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=66465322&site=ehost-live>.

⁵²⁵ Karan 2011 *Journal of Maritime Law & Commerce* 441
<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=66465322&site=ehost-live>.

emphasises the dominant position of the sea carriage leg in the performance of the entire carriage, such that other stages of the carriage covered by other modes of transport would be governed entirely by the Rotterdam Rules. Thus the application of the Rotterdam Rules should have the effect of providing a single standard of protection to the consignor or consignee under the contract of the carriage.⁵²⁶ Nevertheless, it should be borne in mind that the Rotterdam Rules are mainly a 'maritime plus', rather than a convention on multimodal carriage, since for it to bind a contract, there must not only be a sea leg, but an international sea leg.⁵²⁷

Aware that many countries apply regional conventions to inland carriage, in order to avoid conflict, the Rotterdam Rules adopt a limited network system of liability – when damage to cargo can be localised, the convention will recognise the authority of any unimodal convention regulating that leg of the carriage. This shall place the carrier under liability according to the provisions of the convention regulating that mode of transportation as if the carrier has concluded a separate contract for that leg of the carriage.⁵²⁸ This is in conformity with Article 26 of the Rotterdam Rules which provides that:

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

- a. Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;
- b. Specifically provide for the carrier's liability, limitation of liability, or time for suit; and
- c. Cannot be departed from by contract either at all or to the detriment of the consignor under that instrument.”⁵²⁹

⁵²⁶ Pallarés 2011 *Journal of Maritime Law & Commerce* 456-457

<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=66465323&site=ehost-live>.

⁵²⁷ *Supra* 459.

⁵²⁸ *Supra* 459.

⁵²⁹ Ling L “The Application of the Rotterdam Rules in international Multimodal Transportations: The Conflicts of Liability Between the Rotterdam Rules and Other Relevant International Legal Regimes” 2011 (78) *Journal of Transportation Law, Logistics & Policy* 207-220 217
<http://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=67046335&site=ehost-live> (Accessed: 17/11/2011).

Be that as it may, where the point of damage cannot be localised, the Rotterdam Rules shall apply as “fall back” rules. More so, the provision of this article shall apply only where there could likely be the application of another convention of international character, as the Rotterdam Rules takes precedence over national law. Article 26 is read in conjunction with article 86 to reduce the risk of conflict in laws in the application of the Rotterdam Rules, as article 86 provides that:

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

- a. Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;
- b. Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;
- c. Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or
- d. Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.”⁵³⁰

Also, while the Hague Visby Rules apply only to outward carriage, like the Hamburg Rules, the provisions of the Rotterdam shall apply to both inbound and outbound carriage. As provided by article 5.1:

“Subject to article 6, this convention applies to contracts of carriage in which the place of receipt and place of delivery are in different states, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different states, if, according to the contract of carriage, anyone of the following places is located in a contracting state: the place of receipt; the port of loading; the place of delivery; or the port of discharge.”⁵³¹

⁵³⁰ Ling L “The Application of the Rotterdam Rules in international Multimodal Transportations: The Conflicts of Liability Between the Rotterdam Rules and Other Relevant International Legal Regimes” 2011 (78) *Journal of Transportation Law, Logistics & Policy* 218-219

<http://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=67046335&site=ehost-live>.

⁵³¹ *Supra* 216.

5.1.2 DOCUMENTARY REQUIREMENTS

The use of electronic documents in electronic commerce has been a major innovation in carriage by sea. While the out dated Hague and Hague Visby Rules do not have provisions that accommodate such technological developments, and the Hamburg Rules merely make mention of electronic writing and signature, the Rotterdam Rules meet up with technological development as they contain functional provisions on electronic transactions.⁵³²

Also, the Hague/Hague-Visby regimes adopted a documentary approach to contracts of carriage. The provisions of the convention would bind the parties to the contract only upon the issue of a bill of lading. This bill of lading has the effect of extending the protection awarded to the parties to the contract to a third party holder of the bill of lading. The Hamburg Rules on the other hand adopt a contractual approach, hence the terms of the convention will regulate the relationship of the parties should they enter a contract of carriage. Thus while under the Hague Visby Rules and Hamburg Rules, the carrier is expected to issue a bill of lading to the consignor as evidence of their contract of carriage for the convention to apply to their contract, the Rotterdam Rules do not require the issuance of any such document. The issue of a bill of lading shall not be a precondition for the provisions of the Rotterdam Rules to apply to the contract, if the carrier and the consignor agree to the transaction otherwise than with the use of documents; or if the custom of the area does not require the issuances of any document.⁵³³ The Rotterdam Rules introduce a hybrid approach, but the application of the convention must be borne in contract. Per Article 1 of the Rotterdam Rules, a contract of carriage is “one in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes in addition to the sea carriage.”⁵³⁴

5.1.3 LIABILITY OF THE CARRIER UNDER THE ROTTERDAM RULES

Just like under the Hamburg Rules, the Rotterdam Rules carrier shall be liable for loss, damage or delay caused by his fault, or that of his servant or agent. But while under the Hague Visby Rules and Hamburg Rules there is no reference to burden of proof lying on

⁵³² Karan 2011 *Journal of Maritime Law & Commerce* 444

<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=66465322&site=ehost-live>.

⁵³³ Berlingieri F “A COMPARATIVE ANALYSIS OF THE HAGUE-VISBY RULES, THE HAMBURG RULES AND THE ROTTERDAM RULES” 25 *Google*

http://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf (Accessed: 13/08/2011).

⁵³⁴ Note 10 in Mukherjee & Bal 2009 *Journal of Maritime Law & Commerce* 582

<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=47882772&site=ehost-live>.

the claimant, Article 17(1) of the Rotterdam Rules provide that liability shall lie on the carrier, should the claimant establish that the loss, damage or delay occurred during the carrier's period of responsibility.⁵³⁵

The Rotterdam Rules also extend the period of responsibility for the carriage of goods to 'door to door', rather than the 'tackle to tackle' under the Hague and Hague Visby Rules, and 'port to port' under the Hamburg Rules. This is a major evolution in the law on carriage. Modern day practice enables the parties to extend their contract of carriage by sea inland, but such an agreement can be enforced only under the contract, whereas, under the Rotterdam Rules, the provisions have the force of law.⁵³⁶ To this effect, Article 12(1) of the Rotterdam Rules provides that:

"the period of responsibility of the carrier for the goods under this convention begins when the carrier or performing party receives goods for carriage and ends when the goods are delivered."⁵³⁷

Thus, the Rotterdam Rules meet the needs of modern day transport practice which requires door to door sales, hence door to door carriage.⁵³⁸

The Rotterdam Rules also impose an obligation on the carrier to ensure that the ship is seaworthy not only at the start of the voyage as under the previous regimes, but the carrier must ensure that the ship is seaworthy throughout the entire voyage.⁵³⁹ Whilst the Hague and Hague Visby regimes and English common law impose a duty on the carrier to render the vessel seaworthy before and at the beginning of the voyage, the Rotterdam Rules,⁵⁴⁰ supplement to the duties of the carrier as imposed under the earlier regimes, and imposes duties on the carrier that must be performed during the sea voyage.⁵⁴¹

Since the development of steam powered vessels, the use of containers for carriage of goods has been a major revolution in the entire transport sector. Containers have been

⁵³⁵ Berlingieri 8 *Google*
[http://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.p
df.](http://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf)

⁵³⁶ Pallarés 2011 *Journal of Maritime Law & Commerce* 459
<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=66465323&site=ehost-live>.

⁵³⁷ Ling 2011 *Journal of Transportation Law, Logistics & Policy* 216
<http://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=67046335&site=ehost-live> .

⁵³⁸ Karan 2011 *Journal of Maritime Law & Commerce* 443
<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=66465322&site=ehost-live>.

⁵³⁹ Khalid N & Suppiah R "The Rotterdam Rules: Catalyst for trade or cumbersome convention?" 2010 (37) *Maritime Policy & Management* 447-450 449
<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=52063205&site=ehost-live> (Accessed: 17/11/2011).

⁵⁴⁰ Article 14.

⁵⁴¹ Aladwani T "The Supply of Containers and "Seaworthiness"-The Rotterdam Rules Perspective" 2011 (42) *Journal of Maritime Law & Commerce* 185-209 185
<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=61467911&site=ehost-live> (Accessed: 17/12/2011).

employed for carriage of goods since 1950.⁵⁴² The Rotterdam Rules, unlike the previous regimes that require that the carrier render his vessel seaworthy before and at the start of the voyage, extends this duty to the use of containers, as it imposes an obligation on the carrier to provide seaworthy containers, which is more consistent with modern day practice of carriage of goods. The container is vital in modern day carriage. From the view point of the carrier, the container is an extension of the vessel, as it protects the cargo on its own, and from the consignor's position, it serves as a package securing his cargo onboard the vessel.⁵⁴³ Where it is established that the container is part of the vessel's superstructure, or equipment of the vessel, liability for loss, damage or delay caused by the unseaworthiness of the container may make the carrier liable for such loss, delay or damage to the cargo.⁵⁴⁴ Hence the carrier must ensure that not only the vessel is seaworthy, but the containers are seaworthy and cargo worthy as well.⁵⁴⁵ Defective containers endanger not only the cargo they contain, but are hazardous to the vessel and crew as well.⁵⁴⁶

In a nutshell, the Rotterdam Rules improve on the previous regimes by providing guidelines for the use of containers in the performance of carriage, and by virtue of Article 14(c), imposing an obligation that such containers be supplied by the carrier, and that they be as seaworthy as any other hold or part of the vessel throughout the voyage. The extension of the carrier's duty of providing a seaworthy vessel to the carrier's use of containers justifies Sturley's position that one of the major aims of the Rotterdam Rules is to establish practical measures to reconcile transport law, and fast developing modern day transport practices in order to solve maritime problems.⁵⁴⁷

More so, the Rotterdam Rules address the problem of classification societies and their unlimited liability toward third parties. The argument on classification societies has been a perpetual one.⁵⁴⁸ Under the Hague and Hague Visby regimes, rather than obtain a limited compensation that conforms to the provisions of the conventions, the cargo claimant could claim full compensation from a third party who is not considered an agent or servant of the carrier, but caused loss or damage to his goods. This position was eventually changed with the introduction of the Himalaya clause in transport agreements, which has the effect of extending the defenses and limitation of liability cover awarded to the carrier under the Hague/Hague-Visby regimes, to third parties and persons acting in the course of the employment by the carrier. This pushed cargo claimants to seek to recover full compensation from independent contractors not privy to a Himalaya clause. Classification

⁵⁴² *Supra* 186.

⁵⁴³ *Supra* 186.

⁵⁴⁴ *Supra* 188 .

⁵⁴⁵ *Supra* 187.

⁵⁴⁶ *Supra* 189.

⁵⁴⁷ Note 66 in Aladwani 2011 *Journal of Maritime Law & Commerce* 197

<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=61467911&site=ehost-live>.

⁵⁴⁸ Bäckdén P "Will Himalaya Bring Class Down from Mount Olympus? - Impact of the Rotterdam Rules" 2011 (42) *Journal of Maritime Law & Commerce* 115-123 115

<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=60679772&site=ehost-live> (Accessed: 17/12/2011).

societies comprise such a body of independent contractors that have been targeted by cargo owners for claims in tort. The rationale for the action of the cargo claimant is that when the classification societies perform their duties negligently, and as a result, a cargo interest suffers loss or damage to his cargo, it would only be fair that such a classification society indemnify the claimant.⁵⁴⁹

Hitherto the Rotterdam Rules, these classification societies have enjoyed a form of immunity from liability for loss or damage caused to third parties.⁵⁵⁰ In the UK, attempts to bring action against for damages by third parties had been deemed inadmissible by the courts as seen in *Nicholas H.*⁵⁵¹ The House of Lords held that it would be unjust and unreasonable to impose liability on classification societies towards third parties. Worthy of note here is the fact that under English Tort law, for an action to be brought against a defendant three major criterion must be satisfied; foreseeability of damages, proximity between parties and reasonableness. The rationale for the decision of the House of Lords was that allowing such liability would upset long term established business practices, and that it would be unfair since these classification societies are not covered by the limitation of liability awarded the carrier under the Hague regimes, nor are the classification societies given an opportunity to limit their liability under contract.⁵⁵²

The liability regime established by the Rotterdam Rules extends the defenses and limitations of liability awarded to the carrier to any 'maritime performing party'.⁵⁵³ Per Article 1 of the Rotterdam Rules, such a performing party is considered as such:

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

Thus the immunity hitherto awarded to the classification societies is broken as the Rotterdam Rules have extended the protection awarded to the carrier to such classification societies.⁵⁵⁴

⁵⁴⁹ *Supra* 116.

⁵⁵⁰ *Supra* 123.

⁵⁵¹ *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1995] Lloyd’s Law Rep 2. 299.

⁵⁵² Bäckdén 2011 *Journal of Maritime Law & Commerce* 118

<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=60679772&site=ehost-live>.

⁵⁵³ Khalid & Suppiah 2010 *Maritime Policy & Management supra*

<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=52063205&site=ehost-live>.

⁵⁵⁴ Bäckdén 2011 *Journal of Maritime Law & Commerce* 120

<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=60679772&site=ehost-live>.

5.1.4 EXCEPTIONS FROM LIABILITY UNDER THE ROTTERDAM RULES

The Rotterdam Rules put an end to the carrier's nautical fault exemption for damage of loss of the cargo that arises from an error in navigation.⁵⁵⁵ More so, though controversial, the Rotterdam Rules increase the contracting parties' freedom of contract. This freedom is extended to volume contracts.⁵⁵⁶ Such volume contracts shall be subjected to the Rotterdam Rules unless the contracting parties agree to contract out of the cover of the convention,⁵⁵⁷ in conformity with Article 80(2) of the Rotterdam Rules. During the negotiations for the adoption of the Rotterdam Rules the USA delegation insisted on this provision as compromise for their acceptance of the higher limits of compensation provided under the new convention. The rationale for this according to Carlson⁵⁵⁸ was that, it is necessary to "give flexibility to parties for a convention to last 50 years. There are going to be developments in how people do business that we can't foresee."⁵⁵⁹

5.1.5 LIMITATION OF LIABILITY UNDER THE ROTTERDAM RULES

The Rotterdam Rules provide for a two year time bar within which action against the carrier in relation to the contract may be brought, rather than the one year time bar provided under the Hague regime.⁵⁶⁰

Also, while financial compensation under the Hague Visby Rules, that is limited to 666.67 SDR per package or unit, and 2 SDR per kilogram are increased to 835 SDR and 2.5 SDR respectively under the Hamburg Rules, the Rotterdam Rules increase these limits to 875 SDR and 3 SDR. This increase by the Rotterdam Rules in contrast to the Hague Visby Rules reflect a 31.25% increase per package limit, and a 50% increase for the per Kilogram limit.⁵⁶¹

⁵⁵⁵ Khalid & Suppiah 2010 *Maritime Policy & Management* 449

<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=52063205&site=ehost-live>.

⁵⁵⁶ Article 1(2) defines 'volume contracts' as, "a contract of carriage that provides for the carriage of a specific quantity of goods with a service of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range."

⁵⁵⁷ Pallarés 2011 *Journal of Maritime Law & Commerce* 460

<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=66465323&site=ehost-live>.

⁵⁵⁸ Mary Helen Carlson, the U.S. lead negotiator at UNCITRAL.

⁵⁵⁹ Edmonson RG "New Rules of the Sea" 2009 (10) *Journal of Commerce* 10-14

<http://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=44455364&site=ehost-live> (Accessed: 17/12/2011).

⁵⁶⁰ Khalid & Suppiah 2010 *Maritime Policy & Management* 449

<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=52063205&site=ehost-live>..

⁵⁶¹ Berlingeri 32 *Google*

http://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf.

CHAPTER SIX

CONCLUSION

6.1 RECOMMENDATION

This dissertation establishes a map on the evolution of international conventions that were developed over the years to regulate maritime carriage. A major problem of maritime practice has always been the scope of the carrier's liability with regards to the cargo in his care. At first the law imposed a strict liability on the carrier for loss or damage to goods with the only exemptions to this liability being loss or damage resulting from an Act of God, Inherent vice, Public enemies, or fault of the consignor. But as the carrier's position was reinforced at the turn of the 19th century, the carrier introduced more and more exceptions into the bill of lading, and it didn't take long before the carrier could exempt himself from almost every form of liability including liability for loss or damage resulting from his own negligence.⁵⁶² Consignors felt that with developments in the shipping industry as well as new advanced means of communication available, the exceptions awarded to the carrier under the contract of carriage must be limited so as to provide certainty and equality in the allocation of risks between the carrier and the consignor. The first rules regulating sea carriage that were drafted by the merchants were deemed satisfactory at the time given the nature of the ships, made of wood, and lack of means by the carrier to control operations on his vessels from a distance while the ship was at sea. These early rules that were incorporated into the bill of lading, which served as evidence of the contract of carriage, were backed by the common law courts. Recommendations and a lot of pressure from the

⁵⁶² Hellawell 1979 *American Journal of Comparative Law* 357 <http://www.jstor.org/stable/840039>.

consignors within their states, led to government intervention in the business of carriage, and the passing of local legislation to regulate the relationship between the parties. This was the beginning of a bigger problem, as this led to a great disparity in the rules regulating international carriage by sea, as the rules changed as the ships moved from one country to another.

Be that as it may, early international intervention to remedy the situation led to the adoption of the Hague Rules in 1924 (International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading), and the adoption of the Visby Protocol in 1968 (Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading), the Hague /Visby Rules. The problem however persisted as these two international conventions were modelled on the bill of lading, which provided much advantage to the carriers, to the dissatisfaction of the consignors. To this effect the consignors, mainly from developing countries called on the international community,⁵⁶³ to redress their situation and draft a new convention that will consider their views and position with regard to carriage by sea. It is in this light that the Hamburg Rules (United Nations Convention on the Carriage of Goods by Sea), were adopted in 1978 to replace the Hague/Visby regime.

From an overview of the evolution of laws regulating carriage by sea, it is obvious that one of the primary goals of the international maritime community has been to establish and promote uniformity and clarity in the application of rules governing sea transport. Although economic and political agendas were a major force behind the working groups that took part in the adopting of the above discussed international conventions, as well as judgements of the courts, the idea has always been to create a platform wherein the business of carriage by sea could be conducted safely, equitably and to the satisfaction of all the parties involved.

The Hamburg Rules, like any convention before it was subject of extensive and intensive study, and was the culminating event from the revision of the issues that plagued the relationships of parties to contracts of carriage by sea under the Hague Visby Rules. A number of arguments have been advanced as to why the Hamburg Rules should be abandoned. As earlier seen, the insurance argument is one which has been most recurrent over the years every time change in regime was suggested. However, the provisions of the Hamburg Rules establish not only efficiency, but also fairness in the business of carriage of goods by sea. It is established that the law must determine a scheme of allocation of risks for loss when such loss arise between parties to a transaction. The best theories to this effect provide that such division in the allocation of risks require that a big enough burden be placed on the carrier in order to encourage him to exercise utmost care in the handling of goods in his possession, and once this threshold level is attained, the remaining risks must

⁵⁶³ A draft Convention was completed by UNCITRAL in 1976 and submitted to a diplomatic conference at Hamburg.

be passed to the [consignor] or cargo insurer.⁵⁶⁴ In this light, by eliminating the defence awarded to carriers under the Hague regime for negligence in navigation and management of the ship, the Hamburg Rules foster not only fairness in the transaction but also encourage efficiency. It is only fair that greater liability for loss or damage be imposed on the party (carrier) in the best position to prevent its occurrence. Hence loss resulting from negligent navigation or management of the ship is likely to reduce considerably should more nations choose to ratify the Hamburg Rules.⁵⁶⁵

A common trend amongst all the conventions adopted before the Rotterdam Rules is their applicability only to contracts of carriage by sea. It is established that the modern day maritime contract is multimodal. The use of containers for carriage has greatly boosted the demand for multimodal contracts for door to door carriage, which has proven efficient for international traders and carriers.⁵⁶⁶

From the multiple conventions that were developed to regulate maritime carriage, it is understandable why the legal atmosphere surrounding carriage by sea has been described as a legal tower of Babel.⁵⁶⁷ Most of the world's shipping operations are regulated by the Hague Visby Rules, but these are not the only rules regulating sea carriage. More so, another significant portion of carriage operations are regulated by the out-dated Hague Rules and only a hand full of other trading countries have adopted the Hamburg Rules. As if this wasn't confusing enough, some countries have adopted a hybrid regime; – China for instance, which is considered a world heavy weight in the transport industry, has adopted a maritime regime which incorporates not only the Hague Visby Rules and Hamburg Rules, but also provisions peculiar to Chinese law.⁵⁶⁸ Other nations have also adopted hybrid regimes as they incorporate major elements of the Hamburg Rules into their ratified versions of the Hague Visby Rules,⁵⁶⁹ which has led to a flood in litigation, as these hybrid regimes are applied to both inward and outward carriage causing a conflict of laws.⁵⁷⁰

It is in a bid to repair the conflicts caused by the hitherto maritime conventions that the Rotterdam Rules incorporate provisions of both the Hamburg and Hague Visby Rules in order to promote harmonization, and to update and modernize the present practices to meet today's realities of an increase in multimodal carriage, the growing influence of transport intermediaries, and the ever increasing technological innovations.⁵⁷¹

⁵⁶⁴ Sturley 1993 *Journal of Maritime Law and Commerce* 127-128 Sabinet.

⁵⁶⁵ *Supra* 129-130.

⁵⁶⁶ Ling 2011 *Journal of Transportation Law, Logistics & Policy* 207

<http://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=67046335&site=ehost-live>.

⁵⁶⁷ Pallarés 2011 *Journal of Maritime Law & Commerce* 453

<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=66465323&site=ehost-live>.

⁵⁶⁸ *Supra* 457.

⁵⁶⁹ Note 5 in Mukherjee & Bal 2009 *Journal of Maritime Law & Commerce* 580

<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=47882772&site=ehost-live>.

⁵⁷⁰ *Supra* 580.

⁵⁷¹ Pallarés 2011 *Journal of Maritime Law & Commerce* 457-458

<http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=66465323&site=ehost-live>.

On the 23rd of September 2009 when the Rotterdam Rules were opened for signature, 16 countries signed them on that same day. Not only is this the most impressive turn out obtained on a convention developed by UNCITRAL on the day it opened for signature, but the countries that signed the Rotterdam Rules on this day included the world's heavy weights in the shipping industry; the USA, France, Greece, Norway, Denmark and the Netherlands, as well as prominent developing nations such as, Nigeria, Senegal, Congo, Gabon, Ghana, Guinea, and Togo. All the countries that signed this convention on the opening day represent over 25% of the world trade volume at that time, according to the United Nations 2008 International Merchandise Trade Statistics Yearbook, unlike the Hamburg Rules whose total number of signatories represent just approximately 5% of the world trade volume.⁵⁷² Barely a month following the opening to signature of the Rotterdam Rules five more countries signed the convention, these include; Armenia, Cameroon, Madagascar, Niger and Mali, while other major shipping nations such as Britain and Belgium pledge their support to the promotion of the new convention whilst yet considering its adoption. A close look at the nations that have signed the Rotterdam Rules so far would show that, it has gained ready support from carrier and consignor nations, and also gained an equilibrium that was lacking under the previous maritime regimes, and hence more likely to succeed, unlike its predecessor. As stated by the Belgian representative at the signing ceremony in Rotterdam:

“International trade will of course be the first beneficiary. But worldwide harmonized rules are also an essential factor in the development of a sustainable mobility and transport, because worldwide harmonized rules will enable a better integration of sea transport in the multimodal transport, which is essential to reach that objective of sustainable mobility and transport”⁵⁷³

Incentive to ratify the Rotterdam Rules in the USA is tremendous, not only due to the very active role played by the USA delegation in the negotiations for this new convention, but also, delegates from the American Bar Association highly recommend the ratification of the new convention as they state that the Rotterdam Rules:

“set forth, with greater clarity, the rights and responsibilities of the interested parties” and provide ‘an efficient and predictable uniform legal regime for maritime carriage, as well as maritime carriage involving inland legs’.⁵⁷⁴

Supporting the view of the International Chamber of Shipping, it is very much likely that a failure to ratify the Rotterdam Rules will maintain the status quo on the international scene. There is bound to be development to meet the changes in maritime activity. Such changes may entail individual states resorting to enacting national legislature to protect

⁵⁷² Kate L “A Win-Win Proposition” 2009 *maritime gateway* 13 Google (Accessed: 17/11/2011).

⁵⁷³ Kate 2009 *maritime gateway* 13.

⁵⁷⁴ “ABA Delegates Approve “Rotterdam Rules” Resolution” 2010 (65) *Dispute Resolution Journal* 21 <http://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=50295628&site=ehost-live> (Accessed: 17/11/2011).

their interests. In sum, failure to ratify the Rotterdam Rules will only incite regionalism, which in turn will increase uncertainty and conflict due to the lack of uniformity between legal regimes, to the detriment of international trade.⁵⁷⁵

The Rotterdam Rules in contrast to the earlier regimes regulating maritime carriage allows more flexibility to the parties in their dealings by enumerating circumstances wherein the parties may derogate from the mandatory provisions of the convention,⁵⁷⁶ whereas the Hague regimes provide no such derogation to their terms, and the Hamburg Rules only make mention of derogation in the light of carriage of goods in a series of carriage transactions.⁵⁷⁷

Other than the liability relationship between the carrier and the consignor, another important dimension of the relationship between the parties to the contract of carriage that cannot be ignored is their trade relationship, which impacts international trade as a whole.⁵⁷⁸ In developing provisions to regulate the liability of parties under contracts of carriage, no international convention, nor national regime, hitherto the Rotterdam Rules has considered the impact of the trade relationship between the parties on their economic efficiency. The provisions of the Rotterdam Rules provide such flexibility in their application, especially in the light of volume contracts that enhance economic efficiency and international trade in general.⁵⁷⁹ In the words of Edmonson, the Rotterdam Rules 'are the best agreement everyone is likely to get, and a quantum leap ahead of earlier liability treaties.'⁵⁸⁰

The author strongly supports that given the new scope of liability and application introduced by the Rotterdam Rules, coupled with the diverse and significant support it has obtained from major shipping nations not only from the developed countries, but also developing nations, the Rotterdam Rules are the most effective tool yet, regulating carrier liability. Thus, the author suggests that it be ratified by more, if not all shipping nations. As Sturley⁵⁸¹ advised in the USA, the ratification of the Rotterdam Rules will not only promote greater certainty, predictability and uniformity within the USA but between the USA and other countries.

⁵⁷⁵ The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The "Rotterdam Rules") A Position Paper by the International Chamber of Shipping 2009 http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/ICS_PositionPaper.pdf 1-5 (Accessed: 17/11/2011).

⁵⁷⁶ Article 80

⁵⁷⁷ Mukherjee & Bal 2009 *Journal of Maritime Law & Commerce* 599 <http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=47882772&site=ehost-live>.

⁵⁷⁸ *Supra* 582.

⁵⁷⁹ *Supra* 606.

⁵⁸⁰ Edmonson 2009 *Journal of Commerce* 10-14 10 <http://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=44455364&site=ehost-live>.

⁵⁸¹ Sturley MF "Modernizing and Reforming U.S. Maritime Law: The Impact of the Rotterdam Rules in the United States" 2009 (44) *Texas International Law Journal* 427-455 454 <http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=42325052&site=ehost-live> (Accessed: 17/11/2011).

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