

***BASIS OF CARRIER'S LIABILITY IN CARRIAGE OF GOODS  
BY SEA***



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**Abbreviations:**

Art. Article

CMI: Comite Maritime International

COGSA: Carriage of Goods by Sea Act

ISM International Safety Management

SDR: Special Drawing Rights

UNICTRAL: United Nations Commission on International Trade

# 1 Introduction

## 1.1 Subject Matter of the Study

The rules governing liability of the sea carrier are the central part of international maritime conventions. They regulate the allocation of risks and balance of rights and responsibilities between the carrier and the cargo interests. More specifically, they determine when and to what extent the carrier is liable for economic loss resulting from loss of, or damage to, goods or delay arising while the goods were in the custody of the carrier.<sup>1</sup> In many legal traditions, the carrier was strictly liable for the damage of goods during transportation of cargo by sea. In other words, the fault or negligence of the carrier was not a basis of its liability. The carrier did not seem to have much complaint regarding the strict liability (liability without fault) and did not mind being the guarantor of the safe arrival, as the only available vessels were small sailing ships and cargoes were not usually of a perishable nature.<sup>2</sup>

The practice developed through time witnessed an attempt to allocate risks between the carrier and the cargo interest in the bills of lading. Bills of lading were originally issued by carriers only to acknowledge the receipt of goods. Later on, bills of lading assumed the task of allocation of risks between the carrier and the cargo interests. Indeed, carriers started to insert clauses in their bills of lading not only to exempt themselves from liability relating to the common law exceptions but also liability arising from all perils of the sea and navigation of any kind whatsoever.<sup>3</sup> This brought about the complete reversal of the liability without fault widely recognized before. The practical effect of this practice was to exonerate the ship-owners from all liability as carriers and reduce the substantially to the condition of irresponsible bailees.<sup>4</sup>

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<sup>1</sup> Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective*, 3rd ed.,(Universitetsforlaget),2011, pp-277

<sup>2</sup> W.F. Astle ,*The Hamburg Rules*,(Fairplay Publication), 1981, pp-2

<sup>3</sup>Astle,*supra note no 2*,pp-5

<sup>4</sup>In *Crook v. Allen* (1879) 5 QBD, pp-40

Carriers used their superior bargaining power and abused the freedom of contract in their favor. This negatively affected the interests of cargo owners and necessitated the statutory intervention to provide a minimum protection for the cargo interests.

The objective of statutory regulations in international maritime conventions is to create a fair balance between carriers and cargo interest by defining the carrier's liability regime. At the core of carrier's liability regime are the basis of carrier's liability<sup>5</sup> and the allocation of burden (onus) of proof. At the common law, the carrier's liability was strict (liability without fault). However, the later statutory developments in Hague rules, Hague-Visby rules, Hamburg rules and Rotterdam rules have introduced and established fault based liability schemes.

Art. III of The Hague-Visby Rules<sup>6</sup> provides the basis of carrier's liability. It states, in very general terms, the two basic obligations of the carrier to provide a seaworthy vessel and to care for the cargo.<sup>7</sup> It imposes the duty of due diligence on the carrier to keep the ship seaworthy and 'carefully and properly' care for the cargo. If damage or loss occurs while cargo is under the custody of a carrier (within the period of responsibility), the formula adopted under the Hague-Visby rules is that the carrier is presumed at fault. As a result, the burden of disproving this presumption rests on him. Yet carriers enjoy significant immunity provided under Art. IV (2) of the Convention. This has led the convention to adopt the system that can be referred to as 'incomplete fault liability system'.

International Convention on the Carriage of Goods by Sea (1978)<sup>8</sup> also reiterates the carrier liability for the loss or of damage to the goods as well as the delay in delivery under art-4. The

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<sup>5</sup>The basis of liability refers what conduct or inaction brings in carrier's liability in the eyes of law and burden of proof of parties. It determines the grounds of compensation for the cargo interests.

<sup>6</sup>International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924

<sup>7</sup> Stephen Zamora, *International Carrier Liability for Damage or Loss to Cargo in International Transport*, *The American Journal of Comparative Law*, Vol-23, No-3(1975), pp-407 available at [http://www.jstor.org/stable/839373?\\_redirected](http://www.jstor.org/stable/839373?_redirected), accessed on 11-06-2014

<sup>8</sup>It is common to refer to this instrument as Hamburg rules

Hamburg rules make fundamental changes to the basic rules on allocation of risks between cargo owners and carriers; it for instance sweeps away the catalogue of ancient concepts.<sup>9</sup> Yet, the system of presumed fault has remained the single basis of carrier's liability under its art-5. It has abolished the catalogue of exonerations under art-IV (2) of the Hague-Visby rules. By doing so, it changed the system of carrier's liability from 'incomplete fault liability system' to 'complete fault liability system'.

A new development in the Rotterdam rules<sup>10</sup> is the formula it adopted to deal with the basic question of the carrier liability.<sup>11</sup> It has set out its own new structure of the carrier's liability and the burden of proof. Still its approach is not totally novel but extracted from the previous maritime conventions. Notably, it has kept the fault-based liability system established by Hague-Visby<sup>12</sup> and Hamburg rules under its Art-17.

Although fault/negligence is the basis of liability under the above instruments, there are significant differences between them in respect of the structure of basis of liability and the allocation of burden of proof.<sup>13</sup> The close perusal of international instruments dealing with the carrier's liability regime across Hague rules, Hague/Visby rules, Hamburg rules and Rotterdam rules reveals that fault/negligence is the basis of liability. However, the way this fault based liability system are structured considerably vary across these instruments. The allocation of burden of proving the alleged fault/negligence also follows the respective changes of the structure of the basis of liability under these instruments.

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<sup>9</sup> Robert Hallawell, *Allocation of Risk Between Cargo Owner and Carrier*, The American Journal of Comparative Law, Vol,-27, No-3,1979, pp-357(accessed from heinonline.org, June 11 2014)

<sup>10</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009

<sup>11</sup> John F. Wilson, *Carriage of Goods by Sea*, 7th ed. Harlow, Essex (Pearson Education Limited),2010, pp-232

<sup>12</sup> The Hague rules amended with 1968 Visby Protocol and the SDR protocol of 1979.

<sup>13</sup> <http://tinyurl.com/ofvftw>(visited on 31 May, 2014)



## **1.2 Aim of the Thesis**

This thesis studies the popular subject matter in the carriage of goods by sea, i.e. the basis of carrier's liability for loss of, damage to cargo or delay in delivery. Its aim is to analyze, by way of comparison, the relevant regimes adopted in the international carriage of goods by sea regarding the basis of carrier's liability. The thesis separately treats each instrument's position on the subject matter in a comparative fashion to show how they treat the subject matter. The basis of the study will be the major maritime conventions: Hague rules, Hague-Visby rules, Hamburg rules and the Rotterdam rules.

## **1.3 Method and Structure**

The research is largely doctrinal in a way as it tries to collect and analyze the rules of relevant international maritime instruments regulating the basis of carrier's liability. The lion's share of the thesis is dedicated to the description of these rules in comparative fashion. It thereby tries to show how the structure of the basis of carrier's liability has changed across the instruments under consideration.

The thesis contains five chapters. This first chapter is a sort of introduction. The second chapter analyzes the basis of sea carrier's liability under the Hague rules and Hague-Visby rules. The two instruments are treated under the same chapter as they are substantially the same and the subsequent amendments have not changed the basis of carrier's liability<sup>14</sup>.

The third chapter analyses the position under the Hamburg rules. Hamburg rules uphold similar basis of liability with Hague-Visby rules, i.e. the presumed fault or negligence of the carrier. However, it provides slightly different structure of carrier's liability. It has for instance abolished the traditional exoneration for nautical fault and fault in the management of ship and changed the way exemption for fire is invoked.

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<sup>14</sup>Besides art-VI of the Visby protocol states this protocol and The Hague rules shall be read together as one single document.

Chapter four examines the basis of carrier's liability under the Rotterdam rules. There is a significant change in the structure of the carrier liability and the concomitant burden of proof under this new draft convention. The last chapter summarizes the findings and concludes the thesis.

#### **1.4 Scope and Limitation**

First, the thesis focuses on the international carriage of cargo by sea. It does not address the liability regimes in other international transport modes. It compares the legal regimes on a basis of carrier's liability in the major maritime conventions assuming they are applicable to govern contracts for international carriage of goods by sea.

It is apparent that a cargo liability regime comprises of intricate legal questions relating to the duties, liabilities and immunities of the parties involved. One amongst those subjects are transport documents. The scope of the thesis does not include discussion and analysis concerning transport documents. Yet they may be incidentally mentioned.

The author is aware of the fact that the international contracts of carriage of goods are not immune from the national jurisdictions and laws. Indeed the practical interpretations of rules in these instruments depend on the national governing laws and the uniform construction across national jurisdictions is not realistic. Signatory states themselves do not directly apply the cargo liability regimes in international maritime conventions. They either introduce modifications under the domestic laws or take the principles in the conventions and incorporate them into their national laws. This brings dissimilarity in the ways national legal systems treat the same legal question. The basis of liability of the carrier could also be slightly different since countries adopt one or more of, or the combination of these international instruments.<sup>15</sup> The rules of civil

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<sup>15</sup> For instance, Norway, Sweden, Finland and Denmark have implemented an approach which is the mixture of Hague-Visby rules and Hamburg rules in their maritime codes.

or commercial litigations of the national legal systems do influence the standard of proof in cargo liability claims. The focus of this study is then the substantive provisions of the rules of maritime conventions as ‘internationally harmonized solutions’; with no special reference to a specific national jurisdiction. Hence, the indiscriminate references to case laws and constructions of rules in some jurisdictions are made merely to illustrate how the specific legal question could be interpreted. They by no means stand as authority to demand similar interpretations elsewhere. Yet they are useful though not binding on other jurisdictions.

Secondly, the liability covered is only the contractual liability. Other liabilities of the carrier from any other sources other than contracts are not under consideration.

Thirdly, the thesis focuses on the substantive provisions of the international maritime conventions. It does not address the historical developments of these instruments including the negotiations involved as such. The development of cargo liability regimes prior to the Hague rules is also not covered.

Lastly, the domestic transportation of goods in national states, which is often subject to the domestic cargo liability regimes, is not the focus of this work.

## 2 Hague Rules and Hague-Visby Rules: a paradigm shift on the basis of carrier's liability

### 2.1 The road to fault based liability system: a brief account

It is plainly wrong to argue that the present rules governing the carriage of goods by sea had similar evolutions before they acquired their present form and substance. Different maritime nations and merchants by sea have developed different rules at different times. Nevertheless, in general at least until the latter part of the 19<sup>th</sup> century, the general maritime law principle was that the carrier was strictly liable as an insurer of the cargo. Still this development as to the strict liability of the sea carrier is not obvious in the civilian legal systems. In contrast, there are overwhelming and consistent literatures in the common law jurisdictions.

The practice in common law was that courts held the carrier under the bill of lading contract to transport goods by sea liable for the cargo loss or damages. Whether or not the carrier was negligent, and the cause of the loss was hence, irrelevant. Carver describes the liability of the common carrier as follows.

*"The common law with regard to the liability of the public carrier of goods is strict. Apart from express contract he is, with certain exceptions, absolutely responsible for the safety of the goods while they remain in his hands as carrier"*<sup>16</sup>(emphasis added)

The justification of holding the carrier strictly liable under the common law is the common principle that the party in custody and possession of the goods must bear responsibility for the safety of the cargo since only that party could exercise control over it during the period of transportation. There were still a few inevitable events for which the carrier was absolved from liability: notably, the act of God, public enemy, inherent defects of the goods and fault of the

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<sup>16</sup> Carver's Carriage by Sea, Edited by Colinaux ,13th ed. , London (Stevens & Sons),1982 Vol.1,section-2 ,pp-1

shipper.<sup>17</sup> Even though the loss was covered by these exemptions, the carrier remains liable if his negligence has caused or contributed to the damage.<sup>18</sup>

Through time, the bills of lading started to allocate risks between the carrier and cargo interests. The advent and wider recognition of the doctrine of freedom of contract<sup>19</sup> in many legal systems, helped carriers to insert exoneration clauses in the bills of lading. This move has rendered the previous principle of carrier's strict liability (liability without fault) literally obsolete. In some ship-owning countries, the exoneration clauses were enforceable and the carrier was absolved from liability even though he was negligent.<sup>20</sup> Carriers later started abusing the freedom of contract by inserting extensive exemption clauses in the bill of lading. This resulted in resistance from shippers, bankers and underwriters which among other things, necessitated statutory interventions to provide a minimum guarantee to cargo interests<sup>21</sup>

Developments in many maritime nations beginning from late 19<sup>th</sup> century and early 20<sup>th</sup> century demonstrates legislative measures to control a considerable exoneration of liability of the carriers in the bills of lading. The middle groundside, liability accompanied by certain exceptions relating to fault dominates the laws of carriage of goods by sea today. The instruments in this study are no doubt the results of the ongoing efforts to have fair, predictable, and uniform liability regime for carriage of goods by sea. Besides, they witness that the doctrine of freedom of contract in general contract law is not absolute and can be restricted especially

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<sup>17</sup> Micheal F. Sturley, *The Development of Cargo Liability Regimes*. In: *Cargo Liability Regime In Future Maritime Carriage*, Stockholm, (Swedish Maritime Law Association) 1998, pp-11

<sup>18</sup> John F Wilson, *supra note* 11 no. pp-115

<sup>19</sup> As a principle in contractual relationships parties are free to decide their respective rights and obligations

<sup>20</sup> Michael F. Sturley, *Transport Law for the Twenty-First Century: An Introduction to the Preparation, Philosophy and the Potential Impact of the Rotterdam Rules*. In: *A New Convention for the Carriage of Goods by Sea –The Rotterdam Rules: An Analysis of the UN Convention on the Contracts for the International Carriage of Goods Wholly or Partly by Sea* (2nd ed.) Witney, (Lawtext Publishing Limited) 2009. pp-4

<sup>21</sup> John F Wilson, *supra note* no.11, pp-115

from the matters of public policy perspective. Contracts for the carriage of goods also fall in this matter of public policy

The Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (also known as 'Hague rules') appeared as the first set of rules creating a uniform international carrier liability regime, standardizing the right and liability of the parties. It allocated the risk of loss for damage to cargo carried on ocean liners in international commerce under bills of lading.<sup>22</sup>The Hague rules established the worldwide minimum obligation of the carrier's liability and the maximum immunities to the carrier. The parties retained the power to negotiate their own terms as regards those aspects of the contracts not specifically covered by the rules.<sup>23</sup> It precluded the contractual exemption of the ship-owners from liability showing the increase of carrier's liability. Various technical, economic and political advancements after the Hague rules necessitated amendments to its provisions. Through the sponsorship of CMI, the revision works and an amendment to Hague rules was approved by the Visby protocols in 1968. Hence, the name Hague-Visby rules. It was further amended by the 1979 Brussels SDR protocol. The basic features of the Hague rules however were not significantly changed. They have the same basic rule regarding the carrier's duty of care, duty to exercise due diligence to provide a seaworthy vessel and properly, equip and staff the vessel. Both are inapplicable when documents other than bills of lading are issued.<sup>24</sup>

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<sup>22</sup>Micheal F.Sturley, *The Development of Cargo Liability Regimes*. In: *Cargo Liability Regime In Future Maritime Carriage*. Stockholm, (Swedish Maritime Law Association) 1998, pp-11

<sup>23</sup> John F Wilson, *supra note* no.11 pp-116

<sup>24</sup>Samuel Robert Mandelbaum, *Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods under The Hague, COGSA, Visby and Hamburg Conventions*. In: *Transport Law Journal*, Vol.23, 1996, pp.486  
([http://heinonline.org/HOL/Page?handle=hein.journals/tportl23&div=24&g\\_sent=1&collection=journals#481](http://heinonline.org/HOL/Page?handle=hein.journals/tportl23&div=24&g_sent=1&collection=journals#481)) accessed on June 11, 2014

## 2.2 Basis of liability

Any attempt to discover the basis of the carrier's liability and the burden of proof in transportation of cargo by sea should begin with analysis of duties of the carrier<sup>25</sup> and available immunities. The breach of these duties constitutes the reason for liability. The carrier's main duties under the Hague-Visby rules are to issue a bill of lading, to exercise due diligence to keep the ship seaworthy, not to deviate from the agreed route and care for the goods.<sup>26</sup> The starting provision governing the duties of a carrier under Hague-Visby rules are Art-III (1 and 2) which specifically state:

1. The carrier shall be bound *before and at the beginning of the voyage* to exercise due diligence to
  - a) make the ship seaworthy;
  - b) properly man, equip and supply the ship;
  - c) make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.
2. *Subject to the provisions of article IV (immunities)*, the carrier shall *properly and carefully* load, handle, stow, carry, keep, care for and discharge the goods carried (emphasis added)

This provision contains very important elements of the duties of a carrier and basis of its liability. The standard of behavior, 'due diligence' utilized in this provision is a popular expression which has attracted the scrutiny of scholars and interpretations in case laws. What constitutes due diligence, when it must be exercised and by whom are essential for the understanding and application of this important rule.<sup>27</sup>

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<sup>25</sup>Under Hague-Visby rules carrier includes the owner or charterer who enters into a contract carriage with a shipper(see art-1(a))

<sup>26</sup>Lachmi Singh, *The Law of Carriage of Goods by Sea*, Sussex (Bloomsbury Professional Ltd) 2011,pp-25

<sup>27</sup>John Richardson, *The Hague and Hague-Visby Rules, Lloyd's Practical Shipping Guides*,4th ed. London (LLP Reference Publishing) 1998,pp-19

What constitutes due diligence always require the consideration of the facts of the case and is affected by changes in the level of knowledge, technology (containerization) and other factors.<sup>28</sup> In the next paragraphs, a brief discussion of the main duties of a carrier under a contract of carriage governed by Hague-Visby rules will follow.

### **2.2.1 Due diligence to provide a seaworthy ship**

Seaworthiness refers to the fitness of the vessel in all respects to encounter the ordinary perils of the sea that could be expected on her voyage, and deliver the cargo safely to its destination.<sup>29</sup> This encompasses that its body and equipment is clear of any damage, its engine is functioning properly, competency of the seamen, documentation and all other issues that might affect the fitness of the vessel and its efficiency to encounter the ordinary perils of the sea. This part of obligation is clearly embodied under art-III (1) (b) of the Hague-Visby rules.

A ship could be properly crewed, and equipped but unfit to carry certain type of cargo. Hence, seaworthiness also constitutes the fitness of a ship to carry the agreed cargo (cargo worthiness). A ship might be able to carry cargo in general, but certain cargo may need special arrangements such as refrigeration, clean holds...etc. The carrier who agreed with the cargo-owner to ship certain cargo has to ensure that his vessel is prepared to carry it.<sup>30</sup> The general rule is that a ship should not accept perishables unless sufficiently equipped to carry them safely.<sup>31</sup> The obligation of the carrier to exercise due diligence to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation is to make the ship cargoworthy. In effect, art-III (c)

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<sup>28</sup>Ibid. pp-20

<sup>29</sup>Ahmad Hussam Kassem, *The Legal Aspects of Seaworthiness: Current Law and Development*, 2006, pp-24 at <http://discovery.ucl.ac.uk/6988/1/6988.pdf>, accessed on June 07-2914

<sup>30</sup>Ahmad, *supra note 29*, pp-24

<sup>31</sup>A. Knauth-, *the American Law of Ocean Bills of Lading*, 4th ed., 1953, pp-201.



of the Hague-Visby rules demands cargo worthiness of the vessel although it must be emphasized that no such word is to be found in the rules.<sup>32</sup>

Cargoworthy vessel may still be unseaworthy, in that the cargo can be stored in safely in the hold even though it cannot travel into its destination because of the defect in the ships engine, crew, charts, etc., but uncargoworthy vessel will always be unseaworthy.<sup>33</sup> In assessing the condition of seaworthiness, one should take into consideration the nature of cargo to be carried, the weather condition, the condition of voyage etc.

At the common law, the duty of the carrier to provide a seaworthy vessel is an absolute duty.<sup>34</sup> This shows there is no exonerations from liability for loss or damage are available if the ship is unseaworthy. However, the burden of proving unseaworthiness was on the party asserting it.<sup>35</sup> Besides, there was no governing legislation and parties were at liberty to contract in such terms as they may please, subject of course to such agreements not being contrary to public policy.<sup>36</sup> The carriers had the contractual freedom to escape liability for unseaworthiness by expressly negotiating and contracting out the terms concerning the responsibility. It is submitted that the freedom of the carriers to contract out the liability for unseaworthiness had been detrimental to cargo interests.

The Hague/Visby rules made three significant changes to the undertaking of carriers in relation to unseaworthiness. First, it reduced an absolute and/implied warranty of the seaworthiness under common law to a duty to exercise due diligence to provide a seaworthy vessel.<sup>37</sup> Article III of Hague-Visby rules modified the traditional Anglo-American rule of absolute liability for damage caused by unseaworthiness of a ship to negligence

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<sup>32</sup>Astle,*supra note 2*,pp-25

<sup>33</sup>John Richardson, *supra note 27* ,pp-21

<sup>34</sup>N.J Margetson ,*The System Of Liability Of Articles III And IV Of The Hague(Visby) Rules, International Law Series, Zutphen ,The Netherlands*,2008, pp-43

<sup>35</sup> Astle,*supra note 2*, pp-14

<sup>36</sup>, Astle,*supra note 2*,pp-14

<sup>37</sup>NJ Margetson, *supra note 34*, pp-44

liability.<sup>38</sup> Under these rules of law unseaworthiness which is latent and undetectable by due diligence before the voyage commences or unseaworthiness that arises after the voyage is commenced does not make the carrier liable. Still carriers are at liberty to assume a more onerous obligation by expressly warranting the seaworthiness of a vessel in the contract for the carriage of goods<sup>39</sup>. Secondly, the contractual freedom to do away with responsibility in relation to seaworthiness was abolished. Lastly, the burden of showing unseaworthiness, which was previously upon the party asserting it, is changed. Under Hague-Visby rules the burden of showing that a carrier or his servants and agents had exercised due diligence to keep the ship seaworthy is upon a carrier.<sup>40</sup> The carrier is liable for cargo damage caused by unseaworthiness of its vessel only when it cannot prove that before and at the commencement of a voyage it exercised due diligence to discover and correct all the unseaworthy conditions.<sup>41</sup>

Is a duty of seaworthiness a delegable duty? As a matter of necessity shipping involves many people other than the carrier such as agents, servants, ship repair yards, surveyors, etc. Faults committed by these people could render a ship unseaworthy. Is a carrier then liable? This legal question was decided in one English case.<sup>42</sup> The decision of a court in this particular case has shown that faults of these persons does not exonerate the carrier of its duty to exercise due diligence to make the ship seaworthy and by its nature this duty is non-delegable. The cargo was damaged in the course of a voyage by the failure of a fitter of the ship repairers to secure

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<sup>38</sup>Erling Selvig, *The Paramount Clause*, *The American Journal of Comparative Law*, Vol. 10, No. 3 (1961), pp-205, available at <http://www.jstor.org/stable/838944>, accessed on June 05,2014

<sup>39</sup>Art.III (8) of the Hague-Visby rules invalidates any attempt by the carrier to exclude his undertaking of seaworthiness. The contrary reading reveals that it does not exclude a carrier from assuming a more stringent obligation.

<sup>40</sup>Given the broadness of the concept this burden of proof in effect should also be applicable to duties under art-III(b)and (c)

<sup>41</sup>Robert Force, *A comparison of the Hague, Hague-Visby, and Hamburg rules: Much Ado About?*, *Tulane Law Review*, vol-70,1996,pp.2063, available at [http://heinonline.org/HOL/Page?handle=hein.journals/tulr70&div=74&g\\_sent=1&collection=journals#2087](http://heinonline.org/HOL/Page?handle=hein.journals/tulr70&div=74&g_sent=1&collection=journals#2087), accessed on June 05,2014

<sup>42</sup>*Riverstone Meat Co.Pty. Ltd. V. Lancashire Shipping Co.(the Manchester Castle)* (1961) 1 Lloyd's Rep.57

the inspection cover to on storm valve. The cargo owner sued the ship-owner in the contract and recovered. It was held that the fact that the repairs had been carried out by a reputable independent contractor is no defense. The obligation to make a ship seaworthy under art-III (1) is the fundamental obligation that the owner cannot transfer to another. The rules impose an inescapable and non-delegable personal obligation. It is immaterial whether the ship-owner has entrusted the task of keeping the ship seaworthy to an independent contractor as well.<sup>43</sup> The legal position in other jurisdictions may vary.

Is the duty of a carrier to provide a seaworthy vessel under Hague-Visby rules a continuous obligation? The literal reading of Hague-Visby rules shows that the duty of seaworthiness is restricted to exercising due diligence before and at the beginning of the voyage. This literally means before loading of cargo has commenced and until the vessel weighs anchor or slips her lines to sail.<sup>44</sup> The duty does not seem continuous and ends after the voyage commences. The carrier is duty bound to provide a cargoworthy ship starting from pre-loading and during the time of loading. The provision of the Hague-Visby rules are unclear if the carrier is duty bound to provide a fully staffed, equipped and supplied vessel while the loading is in progress. It is illogical to demand a carrier to provide a fully staffed, equipped and supplied vessel at the stage of loading so long as the vessel is ready to receive the agreed cargo. Hence, it should be sufficient for fulfilling the duty under this provision to have a fully manned, equipped and supplied ship immediately before the commencement of a voyage. Normally the obligation under the Hague-Visby rules concerning the seaworthiness terminates at the commencement of voyage.

As discussed above, the literal reading of the relevant Hague-Visby rules reveals that the period of obligation is 'before and at the beginning of the voyage.' A ship, which is not fit to receive the cargo, is unseaworthy from the very beginning. The undertaking practically

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<sup>43</sup>W E Astle, *Shipping and the Law: A Practical Review of the Hague Rules and As Amended By the Brussels Protocols 1968*, Fairplay Publications, London, 1980, pp-17

<sup>44</sup>See *Maxine Footwear Co. Ltd v. Canadian Government Merchant Marine Ltd* (1959) 2 Lloyd's Rep. 105

however, applies throughout the voyage, given that the concept of seaworthiness extends to cargoworthiness and includes the duties listed out in sub-paragraphs (b) and (c) of Art-III (1).<sup>45</sup> The carrier may avoid liability for damage caused by unseaworthiness occurring after the voyage commenced by relying on art-IV (1) or IV (2) (p), unless the unseaworthiness is discoverable by the use of the due diligence before and at the beginning of the voyage.<sup>46</sup>

### 2.2.2 Proper and careful handling of cargo

The duty of carrier to look after the cargo is set out in art-III (2) of the Hague-Visby rules. The provision's wording 'the carrier shall properly and carefully' shows that the obligation for the care of cargo is stringent.<sup>47</sup> Besides, it does not repeat the expression of 'due diligence' utilized in relation to the carrier's duty of seaworthiness. It rather uses 'properly and carefully'. Courts have interpreted 'properly and carefully' as having distinct meanings and therefore creating distinct obligations.<sup>48</sup> 'Carefully' has a narrow meaning of merely taking care, whereas 'properly' is carefully plus an element of skill or the use of sound system.<sup>49</sup> However, John Richardson argues the two expressions have a very little practical difference.<sup>50</sup> These duties include the responsibility to study the cargo upon receipt and determine whether indeed the carrier is equipped to load, carry and discharge it.<sup>51</sup> Consequently, should the carrier determine that it is not able to do so 'properly and carefully', the carrier must refuse the goods.<sup>52</sup>

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<sup>45</sup>Sze Ping-fat, *Carrier's Liability Under the Hague, Hague-Visby and Hamburg Rules*, Kwel Law International, 2002, pp.34

<sup>46</sup>NJ Margetson., *supra note* 34..pp-41

<sup>47</sup> [http://www.mcgill.ca/maritimelaw/maritime-admiralty/art3-2#N\\_1](http://www.mcgill.ca/maritimelaw/maritime-admiralty/art3-2#N_1) visited on 07.06.2014

<sup>48</sup> Peter J Cullen, *Carriage of Goods and Passenger in 21<sup>st</sup> Century: Ocean-Carriage Hague-Visby Rules(Better the Devil You Know?)*, June 9,2008, Vancouver, BC, pp- 5, A paper presented on Canadian Maritime Law Association Seminar, available at <http://www.cmla.org/papers/OceanCarriageHagueVisbyRules.pdf> accessed on 09-06-2014

<sup>49</sup>Phillipe Delebecque, *Obligations of the Carrier*, In: *The Rotterdam Rules: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly By Sea*, the Netherlands (Kluwer Law International BV) 2010. pp-83

<sup>50</sup>John Richardson *supra note* no 27, pp-22

<sup>51</sup>Peter J Cullen, *supra note* no 48,pp-5

<sup>52</sup> Peter J Cullen, *supra note* no 48,pp-5

The Hague-Visby rules clearly states that the duty to exercise due diligence to keep the ship seaworthy applies to the period before or at commencement of the voyage. Concerning the duty of proper and careful handling of cargo however, there is no qualification of 'before or at the commencement of voyage'. Of course, it is impractical to put this qualification on this type of duty. This duty should be continuous. The period of responsibility under the Hague-Visby rules is from tackle-to-tackle. The duty of properly and carefully looks after the cargo is expected only within this period. It is in the period of time when the goods are in custody of the carrier regulated under art.1 (e) of the Hague-Visby rules. The fact that the duty regarding seaworthiness is not continuous from the clear wordings of Art-III, has no practical significance in relation to the damage to the cargo since many scenarios fall under the duty to properly care for the cargo. The carrier's duty under this section begins from reception of the cargo through its discharge. The duty vanishes with the proper discharge of the cargo.

In Hague-Visby rules there is no specific provision regarding liability of a carrier for delay in delivery of the cargo.<sup>53</sup> Hence, if the physical damage arises from delay in delivery of the cargo it is normally recoverable under this general duty to 'properly and carefully' care for the goods.<sup>54</sup> The rules are unclear whether the economic losses other than damage to the cargo such as a pure delay is recoverable under the Hague-Visby rules. Some countries provide express liability under their maritime codes.<sup>55</sup>

It is stated above that the duty of exercising due diligence to provide seaworthy vessel is a personal obligation and hence cannot be delegated. Similar position is established in case laws regarding the obligation of the duty to properly and carefully handle the cargo. In consequence, carriers may not be excused for improper care of cargo by arguing that the loss or damage is attributable to their having followed the advice of the competent independent contractors whose

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<sup>53</sup> This position as discussed elsewhere is reversed under the Hamburg rules.

<sup>54</sup> John.F.Wilson, *supra* note no.11, pp-220

<sup>55</sup> John.F.Wilson,*supra* note no.11,pp-220

services they retained.<sup>56</sup> In one English case, *Leesh River Tea Co. v. British Indian Steam Navigation Co.*<sup>57</sup> it was decided that the duty of keeping, caring for and carrying the cargo is non-delegable duty of the carrier. This appears justifiable construction given the paramount importance of the duty.

### 2.2.3 Obligation to issue bills of lading

The third typical responsibility of the carrier under the Hague-Visby rules is to issue the bill of lading. Art-III(3) states 'the shipper can demand the carrier to issue a bill of lading showing the leading marks, the quantity of the goods and apparent order and condition of the goods.' Its issue of course, is upon request of the shipper as the wording of art-III (3) clearly reveals. Nevertheless, once issued it serves as the documentary evidence that the goods were received in good condition. It thus, corroborates the presumed fault of the carrier for the cargo damage or loss occurred within the period of responsibility prescribed by the Hague-Visby rules. The Hague-Visby rules states a carrier issues a bill of lading without providing any penalty for non-compliance, thereby opening the way to abuse.<sup>58</sup> In practice, the carrier may not be able to verify the accuracy of information given by the shipper-in most cases cargo may be covered within packages, or packed in containers.<sup>59</sup> As the bill of lading is issued by the carrier, it is the carrier and not the shipper that will be liable to the consignee, for any discrepancies in the bill of lading.<sup>60</sup>

Bill of lading once issued has a vital importance in the carriage of goods by sea. For instance, Art-III (4) of the Hague-Visby rules states a bill of lading is the conclusive evidence between the carrier and the consignee and the prima facie evidence between the carrier and the shipper. Obligation to issue a bill of lading does not have an equivalent status with the contracts of carriage governed by the Hague-Visby rules.

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<sup>56</sup>[http://www.mcgill.ca/maritimelaw/maritime-admiralty/art3-2#N\\_1](http://www.mcgill.ca/maritimelaw/maritime-admiralty/art3-2#N_1) accessed on 07.06.2014

<sup>57</sup>*Leesh River Tea Co. v. British Indian Steam Navigation Co.* (1966) 1 Lloyd's Rep.450,pp-457

<sup>58</sup>John Richardson, *supra note* no.27 ,pp-23

<sup>59</sup>Lachmi Singh, *supra note* no.26, pp-26.

<sup>60</sup>Lachmi Singh, *supra note* no.26, pp-26

In relation to the issue of bill of lading, the shipper is bound to provide accurate information about the condition of goods. The carrier on the other hand may decline to issue a bill of lading if there is a reasonable suspicion that the goods are not in good condition.<sup>61</sup> Art-III (5) states that the shipper should indemnify the carrier against any inaccuracies provided in the bill of lading.

#### 2.2.4 Deviation

The route of a voyage may not often be determined in the contracts for the carriage of goods. In absence of such regulation, the proper route is the direct geographical routes between the ports of loading and discharge.<sup>62</sup> This presumption is however rebuttable as some other customary route could be followed. The carrier's intentional act of deviation may subject the cargo to additional risks which the cargo owner has been unable to take into account (e.g. by obtaining the insurance cover)<sup>63</sup>.The duty of the carrier not to unreasonably deviate from the route of voyage is not explicitly set out in the Hague-Visby rules.<sup>64</sup> However, it is clearly implied, in so far as art-IV (4) permits any reasonable deviation' thus implicitly prohibiting unreasonable deviation.<sup>65</sup>It logically follows that the vessel that has voluntarily deviated from its agreed route is liable for resulting damages whether it is caused by the exempted perils or otherwise. It is unclear if the carrier is liable only for delays resulting from deviation when there is no resulting loss or damage. When there is a resulting damage, it comes under the duty to properly and carefully care for the goods. Consequently, there is a liability for resulting loss or damage.

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<sup>61</sup> Peter J.Cullen,*supra* note no.48,pp-6

<sup>62</sup> John F.Wilson, *supra* note no.11,pp-16

<sup>63</sup> Hans Jacob Bull *supra* note no 1,pp-315

<sup>64</sup> Peter J Cullen, *supra* note no 48, pp-6

<sup>65</sup> Peter J Cullen, *supra* note no 48, pp-5

## 2.3 Exemptions of liability

The Hague Visby rules provide the rights and immunities of a carrier in relation to the duties under art III. Carriers are not permitted to contract out any of the duties in the Hague-Visby rules.<sup>66</sup> As the relationships in carriages of cargo by sea are contractual by their nature, they are affected by the concept of discharge in general contract laws. If there certain unforeseeable event renders a contract illegal, impossible or pointless parties are discharged and freed from their primary obligations. To this end, it provides a long list of 17 acts exempting the carrier from liability for damage or loss under art-IV (2). They are commonly referred to as 'excepted perils'. 'The unique exemptions are the exemption for fault or neglect in the navigation, fault in the management of the ship and fire exemption.

Navigation of the vessel covers steering and manoeuvring the ship (including the use of lanterns, signal and navigational equipment, as well as response to signals from other ships and marks..etc).<sup>67</sup> Sweenly explains that exemption for navigational error apparently arose out of clauses such as 'accidents of navigation excepted' introduced into early bills of lading and later required to be incorporated during the 1880's by the P&I clubs.<sup>68</sup> The origin of these defenses is believed to be during the days of the sail when the owner lost the control of the ship as soon as it vanished over the horizon.<sup>69</sup> This concept is also manifested in Art. IV (2) (a) Hague-Visby rules in the sense that the exemptions are available for errors committed by 'master, mariner, pilot, or the servants of the carrier'. This expression shows that if the carrier himself commits the errors, he cannot invoke exemptions.

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<sup>66</sup> Peter J Cullen, *supra note* no.48, pp-6

<sup>67</sup> Hans Jacob Bull, *supra note* no 1, pp-293

<sup>68</sup> Joseph C.Sweenly, *UNICTRAL and The Hamburg Rules: The Risk Allocation Problem in the Maritime Transport of Goods*, Journal of Maritime Law and Commerce, Vol-22, No-3, 199, pp-515

([http://heinonline.org/HOL/Page?handle=hein.journals/jmlc22&div=41&g\\_sent=1&collection=journals#521](http://heinonline.org/HOL/Page?handle=hein.journals/jmlc22&div=41&g_sent=1&collection=journals#521)), accessed on May 23, 2014

<sup>69</sup> R. Glain Bauer, *Conflicting Liability Regimes: Hague-Visby V. Hamburg Rules-A Case By Case Analysis*, Journal of Maritime Law and Commerce, Vol-24, No-1, January 1993, pp.54, accessed from heinonline.org (May 23 ,2014)



Management of the ship is construed to mean activities in connection with the operation of the ship, other than strictly navigational activities.<sup>70</sup>It, *inter alia*, includes the ships condition, manning and equipment.<sup>71</sup>There is often no clear boundary between the acts in the management of the ship and acts in the management of the cargo. Managerial error is an erroneous act, omission the original purpose of which was primarily directed towards the ship, her safety and well-being and towards the venture generally.<sup>72</sup>The provision under art-IV (2) (a) does not refer to acts, neglects or default in the management of the cargo. As mentioned above under art-II of the Hague-Visby rules, the carrier is bound to ‘properly and carefully’ look after the cargo. An error committed in course of caring for the cargo amounts to breach of duty under this provision. Art-IV of the Hague-Visby rules does not provide exemption for errors of this nature. Sometimes both ship and cargo can be affected by the same negligence. In this case, a carrier can usually avoid responsibility but each case will be decided on the individual facts of the case.<sup>73</sup> Hence, there is no consistency in legal literatures about how the risk should be allocated in these scenarios. In these circumstances the courts, tend to have regard to the property primarily affected by the conduct in question.<sup>74</sup>

Art-IV (2) (b) of the Hague-Visby rules exonerates the carrier from loss or damage that occurred due to fire, unless fire is caused by the actual fault or privity of the carrier. The literal reading of this provision shows unlike the above two exceptions the carrier will be liable for fire when it is caused by its own negligence. In case of the corporate ship owners, some decisions have held that only the negligence of the senior employee or officer will result in carrier liability, not that of a mere employee or agent.<sup>75</sup>Extinguishing fire very often involves the use of water resulting in damage to the cargo. For damages of this kind, there should not be liability

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<sup>70</sup> R Glain Bauer, *supra note* no 69, pp-55

<sup>71</sup> Hans Jacob Bull, *supra note* no 1, pp-293

<sup>72</sup> John Richardson, *supra note* no 11, pp-33

<sup>73</sup> John Richardson, *supra note* no.11, pp-33

<sup>74</sup> John F. Wilson *supra note* no 27, pp-274

<sup>75</sup> Robert Hallawell, *supra note* no 9, pp-359

under the scope of duty for care, unless the carrier made indiscriminate use of water in dousing fire.<sup>76</sup>

## 2.4 The relationship between the duty of the carrier and exemptions

If the cargo interest brings a claim for damages alleging a breach of art III (1) it will be for the carrier to prove that he exercised due diligence in order to rely on the exceptions listed under art-IV.<sup>77</sup> From the wordings of art-IV (1) it appears that before a carrier can invoke items in the catalogue of exceptions set out in art-IV (2) it must prove that art-III (1) has been complied with. Art-IV (1) states:

Neither the carrier nor the ship shall be liable for the loss or damage arising or resulting from unseaworthiness unless caused by due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and [.....] in accordance with the provision of paragraph 1 of art-III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the existence of due diligence shall be on the carrier or other person claiming exemption under this article.

It logically follows that the carrier is not responsible for cargo damage or loss due to the catalogues of exemptions provided that the carrier has exercised due diligence to keep the seaworthiness of the ship and carefully and properly handled the cargo. In practice deciding whether the carrier has carried out his duty under art-III (2) cannot be done in isolation with carrier's obligation of due diligence in respect of seaworthiness under art-III (1) and the exculpatory exceptions under art-IV(2).<sup>78</sup> These three key elements of Hague/Visby rules are highly interrelated.<sup>79</sup>

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<sup>76</sup>John Richardson, *supra note* no 11, pp-34

<sup>77</sup>Lachmi Singh, *supra note* no 26, pp-205

<sup>78</sup>[http://www.mcgill.ca/maritimelaw/maritime-admiralty/art3-2#N\\_1](http://www.mcgill.ca/maritimelaw/maritime-admiralty/art3-2#N_1) visited on 07.06.2014

<sup>79</sup>Ibid.

Is a requirement of seaworthiness a prerequisite for invoking immunities in practice? There is no consistency in literatures as to the exact relationship between the duties of the carrier and exemptions and the construction of this very provision of art-IV (1). One disputable view is that this provision is an indication of the overriding nature of the obligation. The principle of overriding obligation under the common law dictates that the carrier must first prove that it has exercised due diligence to make the ship seaworthy before it is entitled to rely upon the exemptions.<sup>80</sup> According to this principle of the common law, if there is any causal connection between failure to fulfill an obligation and the damage, the non-excepted peril is held to be the only relevant cause and the carrier will be liable for all of the damage, not merely for the portion that was caused by the non-excepted peril.<sup>81</sup> The exemptions are never available to the negligent carrier irrespective of the requirement of causation.

As to be seen below however, practicability of this common law approach under Hague-Visby rules is questionable. Besides the clear wordings of the provision shows in order to prevent reliance of the carrier on the exemptions, there should be the causal relationship between the loss or damage and the act of negligence. Therefore, negligence which is not an actual cause or has not contributed to the loss or damage doesn't bar the carrier from invoking the exemptions. N.J Margetson remarks that the 'overriding obligation' used in decisions regarding the Hague-Visby rules have different meaning from the one under the common law.<sup>82</sup>

In one Australian case of *Great China Metal Industries Co.Ltd v Malaysian International Shipping Corp Bhd*<sup>83</sup>, the vessel experienced heavy weather when crossing the Great Australian

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<sup>80</sup>Si Yuzhou and Henry Hai Li, *The New Structure of the Basis of the Carrier's Liability under the Rotterdam Rules*, Uniform Law Review, 2009, pp-938 ([http://heinonline.org/HOL/Page?handle=hein.journals/droit2009&div=38&g\\_sent=1&collection=journals#931](http://heinonline.org/HOL/Page?handle=hein.journals/droit2009&div=38&g_sent=1&collection=journals#931)), accessed on May 25, 2014

<sup>81</sup> N.J Margetson, *supra note* no 34, pp-73

<sup>82</sup> N.J Margetson, *supra note* no 34, pp-72

<sup>83</sup>*Great China Metal Industries Co.Ltd v Malaysian International Shipping Corp Bhd (1994) 1 Lloyd's Rep 455*, available at <http://www.i-law.com/ilaw/doc/view.htm?id=149920>, accessed on 03-June-2014

Bight and the consignment of coils in containers stowed below deck damaged. The Australian court among other things, has examined whether carriers could rely on the ‘perils of the sea’ exception while there was negligence. Finally, the court ruled that the carrier could not rely on excepted perils if negligence was a concurrent cause with the peril.

Carver also doubts the clarity of the consequences of the relationship between the duty of seaworthiness and availability of defenses under art.IV of the Hague-Visby rules.

He states:

It cannot mean that if the seaworthiness duty is not first proved to have been complied with, the exceptions of art-IV cannot be invoked at all whether or not the damage occurred in connection with unseaworthiness. Rather, it must mean that if art.III (1) is not fulfilled and the non-fulfillment causes the damage the immunities of art-IV cannot be relied on.<sup>84</sup>

Therefore, a carrier attempting to avail himself of excepted perils pursuant to the Hague-Visby rules has to demonstrate affirmatively that the latter was the real or dominant, and perhaps the sole, cause of the loss or damage.<sup>85</sup>

When the carrier violates his duty of ‘properly and carefully’ handling the cargo and it is the cause of the damage he can still invoke exceptions. The test to be applied here is whether the damage caused by the peril was avoidable<sup>86</sup>. If it was avoidable, the exemptions cannot be invoked.

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<sup>84</sup> Carver 2005, *supra note* no16 ,pp-571

<sup>85</sup>Sze Ping-fat, *supra note* no 45, pp-206

<sup>86</sup>N.J Margetson, *supra note* no 34, pp-71

## 2.5 Allocation of burden of proof

The legal concept of burden of proof serves to determine an answer to an important question, namely: if two parties argue, who needs to prove what?<sup>87</sup> In relation to the cargo liability claims, it is about the proof of carrier's having fulfilled his duties or not and the proof of the circumstances exonerating the carrier's liability or not. Very often, litigations of International commercial disputes are subject to the commercial or civil procedures of a country having jurisdiction at trial. The discussion here however is the rules of allocation of the burden of proof, as they exist under the Hague-Visby rules.

Regarding the allocation of burden of proof under Hague-Visby rules, Hellawell argues that, in many situations there is no express burden of proof provisions and the allocation of the burden is subject to considerable uncertainty.<sup>88</sup> Besides, the nature of invoked exception often determines what is to be proved. The general structure though is discussed below.

Normally the first (opening) round of proof in a cargo claim begins with the cargo interest asserting his *prima facie* case to show that he has sustained loss or damage to cargo while it was under custody of the carrier. The period of responsibility of a carrier under Hague-Visby rules is from time of shipment to the time of discharge ('tackle- to -tackle'). This round of proof is often easier for the cargo owner since he can do so, for instance, by producing a clean bill of lading issued by the carrier at the shipment evidencing that the goods were received in good condition. He discharges his preliminary burden by showing that the condition of the cargo has changed at the time of arrival (discharge). Supported by the basis of liability as a 'presumed fault', the law then presumes that the carrier was at fault. Consequently, the burden now shifts to a carrier to defend the *prima facie* case of the cargo owner.

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<sup>87</sup> Regina Asariotis, *Loss Due to a Combination of Causes: Burden of Proof and Commercial Risk Allocation*. In: *A new convention for the Carriage of Goods by Sea-The Rotterdam Rules: an analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*. Witney, (Lawtext Publishing Limited)2009.pp-139

<sup>88</sup> ,Hellawell, *supra note* no 9, pp-361

To put back the ball in the field of the cargo interest, the carrier, proves that he has acted in due diligence in keeping the ship seaworthy under art-III (1). Therefore, if the carrier succeeds in sufficiently showing that he had exercised due diligence in keeping the ship seaworthy he is exempt from the loss or damage for alleged unseaworthiness. It is submitted however that the mere fact of proving that the carrier had exercised due diligence might not exempt him from liability. In fact the carrier should be able to show the real cause of loss or damage and argue that it was either not possible to avoid loss or damage by due diligence or the cause falls under art-4(2) (q) of the Hague Visby rules. Art-4(2) (q) states:

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, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss of the damage.

The literal reading of this rules discloses that the party claiming to rely on this exemption (the carrier) should be able prove that the causation for damage or loss falls under 'any other cause' qualification of this rule. Logically it is impossible to resort to this provision without showing the real cause of the loss or damage.

Alternatively the carrier should prove that the cause of loss or damage is one of 'perils of sea' exempted under art-IV (2) (a)-(p) of the Hague-Visby rules. There are group of exemptions for which the carrier is exonerated from the liability despite the existence of fault. The carrier can resort to one of them by his choice. What he proves follow from his choice of exemption/s. The notorious defenses often utilized by carriers are the error in navigation and managerial errors. What the carrier proves here is not the absence of fault. Rather, the existence of fault or neglect the nature of which relates to the navigation or management of the ship. The distinction between the management of the ship and the management of cargo is often not clear. The exemption of the liability is not available for the carrier if the fault is of the nature that it relates to the management of cargo (commercial management) not the management of ship.

Management of the ship on the other hand refers to the ships condition, manning and equipment.<sup>89</sup>Exemption of fire is provided under art-IV (2) of Hague-Visby rules exonerating the carrier unless the fire is caused by the actual fault or privity of the carrier. It is unfair and unreasonable to hold the carrier liable where the causality falls outside his expectation and control.<sup>90</sup>Should he succeed in bringing the loss within an exception, the carrier will escape liability unless the cargo owner can then establish a breach of a carrier's duty of care within art. III (2) of the Rules.<sup>91</sup>

As to the allocation of the respective burden of proof between carrier's duty of care under art-III(2) and his reliance on the exceptions listed under art-IV(2) there has been a difficulty in allocating the burden of proof.

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<sup>89</sup>Hans Jacob Bull, *supra note no 1*, pp-293

<sup>90</sup>Sze Ping-fat, *supra note no 45*,pp-89

<sup>91</sup>John Wilson, *supra note no 27*,pp-192

### 3 Basis of Liability and Burden of proof under Hamburg Rules

#### 3.1 The starting point

The probe into International Convention on the Carriage of Goods by Sea (1978) (Hamburg rules) about the basis of the carrier liability and its concomitant burden of proof begins with art-5(1) which states:

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

In an attempt to establish the standard of care required of a carrier and his agents, the convention utilizes the phrase all 'measures that could reasonably be required to avoid loss, damage or delay.'<sup>92</sup> These measures include the basic obligations of the carrier in relation to the seaworthiness of the ship and care for goods. The level of care prescribed under this provision would reasonably leave much room for the lawyers to argue the courts to decide particular cases.<sup>93</sup> Similar to the Hague-Visby rules the carrier's duty remains a personal one in the sense that he is liable for the act or omission of his servants and agents.<sup>94</sup>

The basis of carrier liability is a presumed fault as the carrier is liable unless he proves otherwise. This is not directly stipulated, but it is found in Understanding Adopted by the

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<sup>92</sup>A typical contract of carriage under Hamburg rules is concluded between carriers and a shipper. Persons entrusted to perform all or parts of the transportation (actual carriers) are also covered.

<sup>93</sup>R Glain Bauer, *supra note no 69*, pp-55

<sup>94</sup>See Sze Ping-fat, *supra note no 45*,pp-64



United Nations Conference on the Carriage of Goods by Sea.<sup>95</sup>This annex added at the conclusion of the Hamburg rules states:

It is the common understanding that the liability of the carrier under this convention is based on the principle of presumed fault or neglect. This means that as a rule, the burden of proof rests on the carrier but with respect to certain cases, the provision of the convention modifies this rule.<sup>96</sup>

Normally what constitutes fault under this common understanding should be determined in relation to the duty imposed under art-5(1) of the convention, i.e., failure of the carrier to take all ‘measures that could reasonably be required to avoid the occurrences and its consequences.’ The burden of establishing that the carrier has exercised ‘measures that could reasonably be required’ is on the carrier. This establishes similar burden under art-IV (2) of the Hague rules.<sup>97</sup>

As it will be covered under the allocation of burden of proof later, successfully defending the liability requires the carrier to prove that he has exercised the level of care required of him and the actual cause of the loss or damage. When the actual cause happens to be the event for which the convention exonerates the carrier, it could be invoked as a defense. In the next section I will try to discuss if there have been substantial changes to duties of the carrier with the advent of this new convention.

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<sup>95</sup>Hannu Honka, *New Carriage of Goods by Sea: The Nordic Approach*. In: *New carriage of Goods by Sea: The Nordic Approach Including Comparisons with Some Other Jurisdictions*, Åbo (ÅboAkademistryckeri) 1997, pp-36

<sup>96</sup>Annex to Hamburg Rules

<sup>97</sup>See Sze Ping-fat, *supra note no 45*, pp.64

## **3.2 Changes to duties /liabilities and immunities of the carrier under Hamburg rules**

In the subsequent discussion under this sub topic, I will try to probe into whether with the advent of Hamburg rules the duties/liabilities and immunities of carrier is substantially changed. Comparison will be made to the corresponding rules of the previous international maritime convention (Hague/Hague-Visby rules).

### **3.2.1 Undertaking as to seaworthiness**

One of the basic obligations of the sea carrier under Hague-Visby rules as discussed above is the undertaking as to the seaworthiness. The Hague-Visby rules under its art-III impose the express obligation of the seaworthiness upon the carrier. Unlike Hague-Visby rules, the Hamburg rules do not impose the express responsibility to make their vessel seaworthy on vessel owners.<sup>98</sup> The only express obligation imposed on a carrier under Hamburg rules is not to negligently damage the cargo.<sup>99</sup> The omission of express provision in Hamburg rules is based on the ground that it is sufficient for the purpose of establishing the liability of the carrier to adopt the principle of the presumed fault and place on the carrier the burden of proving that it acted with due diligence.<sup>100</sup>

Does lack of express duty make any practical difference as to the undertaking of the carrier in relation to seaworthiness? Despite the absence of the express duty of seaworthiness, the carrier assumes extensive responsibility equivalent to obligations under art-III of the Hague-Visby rules. Contrast to the position under the Hague-Visby, which requires seaworthiness before and at the beginning of the voyage<sup>101</sup>, the obligation of the carrier in relation to seaworthiness is continuous. This undertaking literally is broader than the corresponding duty under Hague-Visby rules. Art.III of the Hague-Visby rules restricts carrier's duty of exercising

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<sup>98</sup> Robert Force, *supra note* no 41, pp-2063

<sup>99</sup> Ibid.

<sup>100</sup> Phillipe Delebecque, *supra note* no 49, pp-87

<sup>101</sup> See art-III(1) of Hague-Visby

due diligence to keep the ship seaworthy ‘before or at the commencement’ of the voyage. In general, however, it became quite clear that this was compatible neither with the general and unrestricted duty to care for cargo throughout the voyage nor with the developments in the telecommunications.<sup>102</sup> The new convention recognizes the same duty, which is continuous throughout the voyage.<sup>103</sup>

### 3.2.2 Duty to look after the cargo

The duty to look after the cargo has remained among the basic obligations of the carrier. Art-5(1) states:

‘The carrier is liable for loss [.....] 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’(emphasis added)

The Hamburg rules have introduced few changes to the carrier’s duty of care for cargo. The standard of care imposed by the new rules of law and the period of obligation of this duty are relevant to understand changes introduced by the Hamburg rules.

Unlike the corresponding rule of the Hague-Visby rules, this provision does not use the expression ‘properly and carefully ’in describing the level of care expected of the carrier. This is a clear manifestation of the uniform test liability based on fault. It is not clear whether this level of care imposed by the Hamburg rules is slighter or heavier than the corresponding standard under the Hague-rules. William Tetley argues that this is slightly lighter degree of care than properly and carefully of the Hague/Visby rules.<sup>104</sup>

The period of responsibility under Hamburg rules has shown a considerable extension. So does the period of the duty to look after the cargo. Under Hague-Visby rules as a principle, the

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<sup>102</sup>Erling Selvig, *supra note* no 38, pp.337

<sup>103</sup>Art 14 of Hamburg rules

<sup>104</sup>[http://www.mcgill.ca/maritimelaw/maritime-admiralty/art3-2#N\\_1](http://www.mcgill.ca/maritimelaw/maritime-admiralty/art3-2#N_1) accessed on 07.06.2014

carrier is not liable for any damage occurring during the pre-loading time or after the discharge of the goods.<sup>105</sup> This period of responsibility is often called ‘tackle-to tackle’. Yet, it should be mentioned that under the art-V of the same convention a carrier could assume a more stringent obligation under the bill of lading by expressly assuming responsibility before loading or after discharge. The Hamburg rules under art-1(6) extend the scope of application of the rules and the period of responsibility to port-to-port.

Under Hamburg rules, the principle of ‘tackle-to tackle’ is dropped and the carrier cannot exclude liability with regard to damage that occurs in the warehouse at the loading port or when the cargo is being moved from the warehouse to the ship (pre-shipment damages).<sup>106</sup> The period of responsibility of the carrier is only while the carrier is in charge of goods at the port of loading, during the carriage and at the port of discharge. The carrier takes charge of the goods at the port of loading from the time he has taken them from the shipper, or a person acting on his behalf, an authority, or other third party to whom, pursuant to local law or regulation at the port of loading, the goods must be handed over for the shipment.<sup>107</sup>

### **3.2.3 Introduction of specific liability for delay in delivery of goods**

The Hague-Visby rules impose express liability only for loss or damage to goods. This is apparent from its art-III (5) which refers to liability of the carrier only in terms of the loss or damage. There are however, arguments that the duty of the carrier in ‘properly and carefully’ handling the cargo and duty not to unreasonably deviate from the voyage route could either impliedly impose or accommodate liability for loss or damage to cargo due to delay. The remedy as to the pure delay, i.e. delay which is not the cause of loss or damage, but other economic loss is somehow blurred. It is unclear if the Hague-Visby provides a remedy for this legal problem. Under the Hamburg rules, the rules governing liability for loss or damage are

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<sup>105</sup> Art 1(e) of the Hague-Visby rules.

<sup>106</sup> Hans Jacob Bull, *supra note* no 1, pp-280

<sup>107</sup> Hamburg rules, art-4(2)

made applicable to liability for delay in delivery of goods.<sup>108</sup> Hence, there is a remedy in case of delay for the delivery of the cargo

### **3.2.4 Elimination of the nautical and managerial fault defenses**

This is probably the greatest change to responsibility of the carrier introduced with the Hamburg rules. Some claim that, it is unreasonable to allow a carrier to invoke its own negligence to escape liability, while others argue that it helps a carrier to avoid a huge risk. There is an extensive literature on the arguments against and for the deletion of these traditional exemptions. Hence, it will not be addressed here. The immunity for the fault in the navigation and management of a vessel of art-IV (2) (a) of the Hague-Visby rules has no counterpart under the Hamburg rules. Most cases regarding the rights and corresponding immunities of a carrier under Hamburg rules greatly depends on the interpretation of 'all measures that could reasonably be required to avoid the occurrences and its consequences' of its art-5. It indeed abrogates the nautical and managerial fault defenses. The matters have been significantly debated during the negotiations for the preparation of this convention and the final consensus was to abolish this aforementioned defenses. In this respect the Hamburg rules provides less protection to the carrier than the Hague-Visby rules.<sup>109</sup>

It has literally the effect of diminishing immunities of the carrier. This change is as an improvement to the cargo interests, if not also substantial disadvantage to for ship owners.<sup>110</sup> Hamburg rules have not maintained the catalogue of exceptions under art-IV (2) of Hague-Visby rules as well. The formula here is then the carrier is not endowed with immunity for the faults committed by himself and persons responsible to him. Owing to the removal of these exemptions, the liability of the carrier appears to be extensive.

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<sup>108</sup>See art.5 (1) and (2) of the Hamburg rules.

<sup>109</sup>Robert Force, *supra note* no 41, pp-2069

<sup>110</sup>UNCTAD *The Economic and Commercial Implications Of The Entry Into Force Of The Hamburg Rules And The Multimodal Convention* (TD/B/C.4/315/Rev.1) (United Nations New York 1991)...pp- 22(cited in Sze Ping-fat. *supra note* no,....pp-68)

### 3.2.5 Art-IV (2) (d)-(p) defenses of the Hague-Visby rules

What happened to the other long list of immunities under art-IV (2) (d)-(p) of the Hague-Visby rules? Unlike Hague-Visby rules, the Hamburg rules do not provide a list of exceptions and carrier's liability is generally determined upon the question of whether or not he has taken all the reasonably required measures to avoid the occurrences and its consequences.<sup>111</sup> Does this mean all the immunities under the Hague-Visby rules are no longer available to a carrier under Hamburg rules? This part analyzes some structural and substantive differences from Hague-Visby rules regarding these exemptions.

Due to the fault based liability system adopted by the convention, it is unsound to argue that they are not available as defenses to a carrier under the Hamburg rules. If the cause of loss, damage or delay is proved to be one of the causes listed under art-IV of the Hague-Visby rules other than those expressly removed by the Hamburg rules, it is clearly incorrect to deny a carrier's exemption from liability. It is submitted that most of the 17 exceptions, other than the nautical and managerial fault defenses under the Hague-Visby rules are impliedly retained in the Hamburg rules. In fact, the catalogue of exceptions under Art-IV (2) (d)-(p) of the Hague-Visby rules, do not involve faults on the part of the carrier and abolishing them is nothing more than removing unnecessary uncertainties surrounding their definition and the extent of such exceptions.<sup>112</sup>

As it will be shown later under the allocation of burden of proof part, once the cargo interest establishes the *prima facie* case by showing that he has sustained damage while cargo was in the custody of the carrier, the Hamburg rules presume the carrier is at fault. In course of rebutting the presumption a carrier may show the real cause of the loss, damage or delay was the act of war, public enemies, riots or civil emotions or any other similar cause enumerated under article IV(2) (d)-(p). By doing so, the carrier is showing it was not at fault. It the

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<sup>111</sup> Sze Ping-fat, *supra note no 45*, pp-99

<sup>112</sup> John F Wilson *supra note no 11*, pp-216

conclusion is failure to specifically innumerate those immunities listed under (d)-(p) and the substitution of liability based on the carrier's presumed fault doesn't preclude the carrier from asserting as a defense under the Hamburg rules the circumstances that under the Hague rules would have been offered to establish an immunity defense.<sup>113</sup> Sze Ping-fat also argues that the carrier will be relieved from liability under Hamburg rules in most of the situations stipulated by the Hague/Visby rules.<sup>114</sup> Therefore, despite lack of equivalent provision expressly providing exemptions, the same exemptions under article IV (2) (d)-(p) of the Hague-Visby rules are available to carrier under the Hamburg rules.

### **3.2.6 Modification to exemption of fire**

The Hamburg rules have made a radical change to the fire defense. Immunity for fire is replaced by the liability for negligence in causation of a fire or in putting out the fire.<sup>115</sup> If fire is caused by his fault or if he has failed to take all the necessary measures required to put out the fire or reduce its consequences, Art 5(4) makes the carrier liable. This rule is applicable also to his servants and agents. The way this exemption of liability is stated apparently differs from the one under the Hague-Visby rules. First, it is no longer necessary to establish the carrier's knowledge of the risk. Besides, the burden of showing the fault or negligence of the carrier or persons he answers for in causing the fire on board is expressly allocated to the cargo owner. It is submitted that owing to the requisite of the cargo owner to show the negligence of the carrier or his servants and agents in causing or extinguishing the fire the defense may not be effective as it is used to be under the Hague-Visby rules.

The carrier is liable if the fire causes loss, damage, or delay in delivery. However, the burden of proving carrier's fault in causing or extinguishing fire is on the claimant. In fire cases, if the

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<sup>113</sup>See Robert Force, *supra note no 41*, pp-2066

<sup>114</sup>Sze Ping-fat, *supra note no 45*, pp-67

<sup>115</sup>Hamburg rules Art-5(4) (a) (i&ii)

claimant or the carrier so desires a survey in accordance with 'the shipping practices'<sup>116</sup> must be held to determine the cause and circumstances of the fire.<sup>117</sup>

### 3.2.7 The doctrine of deviation

Under Hague-Visby rules, the doctrine of deviation<sup>118</sup> permits a carrier to escape liability for a reasonable deviation.<sup>119</sup> It is applicable to deviation made for purpose of saving life or property as well. There is no express reference to 'deviation' under Hamburg rules. However, because the liability under the Hamburg rules is based on fault, damages that occur during a reasonable deviation to save life or property would seem to be 'without fault' and, thus provide a defense for the carrier.<sup>120</sup> An exception to the general rule of liability under art.5 (1) Hamburg rules is provided under art-5 (6). This rule excuses a carrier for the loss, damage or delay caused by measures to save life or 'reasonable measures' to save property at sea. Besides, this rule puts a qualification 'reasonable' in case of salvage of property. The reason behind this qualification is to prevent a carrier from getting a substantial gain from salvage to the detriment of the cargo carried on his ship thereby avoiding a possible abuse.<sup>121</sup>

Art.5 (6) of Hamburg rules corresponds to an exemption under art-IV (2) (1) of the Hague-Visby rules. In this respect, neither Hague-Visby nor Hamburg rules deal with the effect of carrier negligence while carrying out the life saving measures.<sup>122</sup>

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<sup>116</sup>Hamburg rules Art-5(4) (a) (i&ii)

<sup>117</sup>Benjamin W. Yancey, *The Carriage of Goods: Hague, COGSA, Visby, and Hamburg*, Tulane Law Review, Vol-57 1983, P-1253, available at [http://heinonline.org/HOL/Page?handle=hein.journals/tulr57&div=41&g\\_sent=1&collection=journals#1274](http://heinonline.org/HOL/Page?handle=hein.journals/tulr57&div=41&g_sent=1&collection=journals#1274), accessed on June 11, 2014

<sup>118</sup> This theory dictates that if the carrier unreasonably puts the cargo under the unexpected risk he loses all the defenses and insures the safe arrival of the good

<sup>119</sup>R Glain Bauer, *supra note* no 69, pp-55

<sup>120</sup>Robert Force, *supra note* no 41, pp-2069

<sup>121</sup>John F Wilson, *supra note* no 11, pp-219

<sup>122</sup>Robert Force *supra note* no 41, pp-2068



Mere deviation not involving any damage or loss to the cargo could fall under liability for delay under art-5(2) of the Hamburg rules unless the carrier is able to show that it is made to avoid loss, damage to the cargo.

### **3.2.8 'Complete and/unified fault' liability system?**

The most noticeable change made under the Hamburg rules is the shift in the basis of carrier's liability from 'incomplete fault based liability' to 'complete fault based liability'. Art-5(1) read in conjunction with the annex II made after the Hamburg rules clearly reveals that the system of liability adopted is the fault-based liability system.

The system of liability is 'complete and unified' in the sense that it is based on fault without any exception. This means the carrier is not endowed with immunity for the faults committed by himself and persons responsible to him. The opportunity for the carrier, if any, to escape the liability is only when there is no negligence. The nature of negligence matters under Hague-Visby rules. If for instance it is negligence in the navigation or management of a ship or fire, the carrier is exempt from liability. The change in approach introduced under the new regime witnesses the material shift of liability from cargo interest to carriers, or more realistically from cargo insurers to Protection and Indemnity clubs.<sup>123</sup> This shift is a response to the long stand by the cargo interest calling for the complete fault based liability system without any exception.

Hamburg rules have imposed the continuous obligation of seaworthiness and abolished the navigational error and error for management of a ship. This establishes the unitary concept of liability, i.e. they provide a carrier with a single opportunity for exoneration based upon lack of negligence throughout the voyage.<sup>124</sup>

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<sup>123</sup>Leslie Tomasselo Weitz, *The Nautical Fault Debate (The Hamburg Rules, The US.COGSA 95, The STCW95 and the ISM Code*, Tulane Maritime Law Journal, Vol-22, pp-585 (accessed from HeinOnline.org)

<sup>124</sup>Rand R. Pixa, *The Hamburg Rules Fault Concept and Common Carrier Liability Under US Law*, Virginia Journal of International Law, Vol-19, No-2, pp.444 (accessed from HeinOnline.org)

The fire exemption of the Hague-Visby rules is not structured in the same manner under the Hague-Visby rules. Hamburg rules literally abolish the catalogue of exceptions under art-IV (2) of Hague-Visby rules.

### **3.2.9 The relationship between the duty of the carrier and exemptions**

Under Hague-Visby rules, the literal reading of the provisions appears to imply that a carrier must be blameless to invoke exemptions of liability under art-IV. The arguments in literatures and case laws in some jurisdictions clarify that if the default of the duties and the damage or loss got no connection or contribution to their materialization, the mere fact of default should not exclude the carrier from invoking the immunities. There is no logical reason not to uphold a similar position under Hamburg rules. Thus, if the carrier's fault is combined with another cause to produce the cargo loss, carrier is bound to prove the amount of loss not attributable to his fault.<sup>125</sup> This raises the matter of apportionment that is an ultimate indication that there should be an element of causation between the default of duties and the materialized loss, damage or delay in delivery of goods. By implication, if the carrier cannot prove how much of the loss was attributable to its fault and how much was attributable to other causes, it will be liable for the entire loss.<sup>126</sup>

### **3.3 The allocation of Onus of Proof**

In an attempt to achieve uniformity and simplicity the Hamburg rules adopts a unified burden of proof rule.<sup>127</sup> The system is a unified one in the sense that, once the cargo owner proves damage or loss/delay while the cargo was in the custody of the carrier, Hamburg rules places presumption of fault on the carrier in all cases of loss, damage or delay except the case of fire. The new law presumes fault of the carrier. The burden shifts to the carrier to explain the loss

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<sup>125</sup> Art 5(7) of Hamburg rules.

<sup>126</sup> Robert Force, *supra note* no 41, pp-2067

<sup>127</sup> John F Wilson, *supra note* no 11, pp-217

and prove his freedom from fault for any loss other than fire. In doing to this new regime has purported to adopt the uniform burden of proof on the carrier by avoiding the complicated allocation of burden of burden of proof adopted by the Hague-Visby rules.<sup>128</sup>

The allocation of burden of proof for alleged unseaworthiness and failure to ‘properly and carefully’ care for the cargo under the Hague-Visby rules have not been uniform and at times, caused uncertainties and difficulties. The Hamburg rules have clearly removed the difficulty of the cargo owner seeking to establish fault, which can be difficult given the fact that he will not have the full knowledge of the circumstances, on board the vessel.<sup>129</sup> Yet this formula does not cover the loss or damage arising from fire at sea as it is often difficult to determine the cause of fire onboard.

As stated above the Hamburg rules utilize the phrase 'all measures that could reasonably be required to avoid the occurrence and its consequences' in prescribing the duties of a carrier. Despite difference in wording, it is submitted that the Hamburg rules recognize equivalent standards of care under the Hague-Visby rules. The burden of proving the standard of care is on the carrier. As a result, once the carrier has proven that all the reasonably required measures were in fact taken, he may invoke one of the excepted perils of the Hague-Visby rules rules.<sup>130</sup> To do so, he must prove what caused the loss or damage, save those that have been deleted (such as the nautical fault) and those that have been regulated by a special provision (e.g. the fire defense).<sup>131</sup> Under the Hamburg rules, the carrier will incur liability if he cannot identify the cause of the loss and prove his freedom from the proximate negligence.<sup>132</sup> In fact, if the loss or

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<sup>128</sup>Ibid. pp-218

<sup>129</sup>Lachmi Singh, *supra* note no 26, pp-40

<sup>130</sup>Francesco Berlingieri, *The period of responsibility and the basis of liability of the carrier*, 95IL DIRITTO MARITIMO 925,933-34(1993)—cited in Leslie Tomasselo *supra* note no 124, pp-583

<sup>131</sup>Ibid.

<sup>132</sup>Rand R. Pixa, *The Hamburg Rules Fault Concept and Common Carrier Liability under the US Law*, Virginia Journal of International Law, Vol-19,1979,p-451(downloaded from,

damage or delay result from measures to save life at sea or reasonable measures taken to save property at sea the carrier is not liable.

The general rule of presumed fault that shifts the burden of proof to the carrier to establish his freedom from the fault does not work for the claims in which the cargo is damaged by the fire. This follows from the wording of Art-5(4) of Hamburg rules that states the carrier will be liable for the loss of or damage to goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of that carrier, his servants or agents. It is true that fire is one of the grounds of exemption of liability for the carrier under the Hague-Visby rules. Unlike the navigational error and fault in the management of the ship management error, the case of fire is not totally removed. Nevertheless, it is an exception to the presumption of fault recognized by the Hamburg rules in the way putting the cargo owner to prove the fault or neglect of the carrier. It follows that if the fire was a result of fault of the carrier or persons for which he answers there will be no exception of liability.

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([http://heinonline.org/HOL/Page?handle=hein.journals/vajint19&div=22&g\\_sent=1&collection=journals#443](http://heinonline.org/HOL/Page?handle=hein.journals/vajint19&div=22&g_sent=1&collection=journals#443)), accessed on May 29,2014)

## 4 The New Structure of carrier's liability under Rotterdam Rules

### 4.1 Introduction

The Rotterdam rules<sup>133</sup> constitute the latest attempt to update the international carriage of goods by sea regime to accommodate developments in the maritime trade. The legislative developments of cargo liability regime in general and those regulating the basis of carrier's liability and its concomitant burden of proof in particular have common goals. First, they strive to catch up with the developments in transportation technology by having up to date rules of law. Secondly, they attempt to achieve the fair balances of risks between the cargo interests and the carrier. The technological development of the container revolution has demanded the application of the rules in the Rotterdam rules to carriage by other modes of transportation. Consequently, the convention is applicable to the transportation leg outside the sea as per art-26 of the code if the preconditions for extension of the Rotterdam rules to the other leg/s of transportation are satisfied. The carrier duties have shown readjustment to meet the multimodal aspect scope of the instrument and the period of responsibility of the carrier (door-to-door).<sup>134</sup>

When it comes to the subject matter under analysis, the Rotterdam rules constitute fairly lengthy and complicated rules of the basis of liability and burden of proof under its art-17. Nevertheless, it has not changed the fault-based liability scheme already recognized by existing maritime conventions. Alexander Von Ziegler states: Concerning liability issues, the convention is a revision, modernization, re-organization, and clarification of the current and

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<sup>133</sup>The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009 available at [http://www.uncitral.org/pdf/english/texts/transport/rotterdam\\_rules/09-85608\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/09-85608_Ebook.pdf) accessed on June 11,2014

<sup>134</sup>Theodora Nikaki, *The carrier's duties under the Rotterdam rules: Better the Devil You Know?* Tulane Maritime Law,(2010),Vol-35,No-1,pp.7 , available at, [http://heinonline.org/HOL/Page?handle=hein.journals/tulmar35&div=4&g\\_sent=1&collection=journals#5](http://heinonline.org/HOL/Page?handle=hein.journals/tulmar35&div=4&g_sent=1&collection=journals#5), accessed on June 05,2014

well-known principles as applied under the Hague and Hague-Visby rules.<sup>135</sup> This chapter probes into this concept and shows how the basis of liability and the corresponding allocation of burden of proof has changed under this new cargo liability regime. The discussion unsurprisingly begins with duties of the carrier under the new liability regime.

## **4.2 'The three balls' and adjustments to them under Rotterdam rules**

Si Yuzhou and Henry Hai Li describe the seaworthiness obligation, obligation for the care of goods and the exemptions as 'the three balls.'<sup>136</sup> These three concepts together with the allocation of burden of proof are in fact the pillars of cargo liability regimes of the existing maritime conventions. Rotterdam rules also manifest them, of course in slightly different fashion than those under its counterparts in the former maritime conventions. There are apparent changes to their interrelation ship, forms, and substances under the Rotterdam rules.

### **4.2.1 The seaworthiness obligation**

One of the clearly prescribed basic obligations of the carrier under Hague-Visby rules is the undertaking as to the seaworthiness.<sup>137</sup> The Hamburg rules have no express provision imposing the duty of seaworthiness. Owing to the overwhelming importance of the fitness of a ship in any voyage however, it is established beyond doubt in literatures that the instrument imposes duty of seaworthiness equivalent to the Hague-Visby rules. Hamburg rules omitted the provision on the ground that it is sufficient for the purpose of establishing the liability of the carrier to adopt the principle of the presumed fault and to place on the carrier the burden of proving that it acted with due diligence.<sup>138</sup> The Rotterdam rules preserved the traditional duty of the carrier to exercise due diligence to keep the vessel seaworthy. Under its art.14, the convention

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<sup>135</sup> Alexander von Ziegler, *Liability of the Carrier for Loss, Damage or Delay*. In: *The Rotterdam Rules: Commentary to the United Nations Convention on Contracts For the International Carriage of Goods Wholly or Partly By Sea*, The Netherlands (Kluwer Law International BV) 2010. pp-94

<sup>136</sup> Si Yuzhou, Henry Hai Li, *supra note no 80*, pp-938

<sup>137</sup> See art-III of Hague-Visby rules

<sup>138</sup> Philippe Delebecque *supra note no 49*, pp-86

reintroduces the duty of seaworthiness equivalent to art-III of the Hague-Visby rules. It imposes the three distinct aspects of seaworthiness recognized in maritime law, namely, the physical condition of the ship, the efficiency of the crew and equipment, and cargo worthiness of the vessel.<sup>139</sup>As the Rotterdam rules are aimed to apply to other modes of transportation other than the sea leg, the provision has a title ‘specific obligation applicable to the voyage by sea.’ Hence, this specific rule unlike the duty to care for the cargo is applicable only to the sea leg of transportation.

There are apparent changes to this undertaking under Rotterdam rules. Contrast to the Hague-Visby rules position, the duty to exercise due diligence to make the ship seaworthy is a continuous obligation. This is obvious from its expression of ‘during the voyage by sea’ under art-14. This is a significant extension of the period of duty. If for any reason the vessel becomes unseaworthy it is probable that such obligation would require the carrier to take all the reasonable steps to restore the ship to a seaworthy state.<sup>140</sup>Taking into consideration the advances in communication technology the extension of this duty throughout the voyage is reasonable. Hague-Visby rules have restricted its period of obligation to ‘before and at the beginning of the voyage. Owing to the longer period of undertaking (throughout the voyage) contrast to ‘before and at the commencement of voyage’ of the Hague-Visby rules, the undertaking of the carrier under Rotterdam rules is extensive.

The obligation of the carrier for seaworthiness under the Hague-Visby rules-art-III is a basic obligation that parties cannot contract out. Art-14 of the Rotterdam rules places the duty on the carrier to exercise due diligence to keep the vessel seaworthy throughout the voyage. I have discussed elsewhere that there is a contention about the concept of overriding obligation under the Hague-Visby rules is different from the one under the common law. In any case, the obligation of the carrier regarding the seaworthiness under art 17(5) of the Rotterdam rules is no

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<sup>139</sup>Phillippe Delebeque. *supra note* no 49,pp-86

<sup>140</sup>Anthony Diamond, *The Rotterdam Rules*, Lloyd’s Maritime and Commercial Law Quartely,2009,pp.470 <http://tinyurl.com/ltgfsen>, visited on 10-06-2014

longer an overriding obligation.<sup>141</sup> Under Rotterdam rules seaworthiness is relevant only when the cargo claimant could prove unseaworthiness as a cause of damage to rebut the carrier's invocation of one of the excepted perils.<sup>142</sup> This is in sharp contrast to the doctrine of overriding obligation under the common law. Under this doctrine once the unseaworthiness is proved, the fact that the damage or loss is resulted from it or otherwise is immaterial. It had the effect of banning the carrier from invoking the exempted perils irrespective of the causation. The relationship between the duties of the carrier and immunities under Rotterdam rules is discussed under separate sub-topic (4.3.9)

#### **4.2.2 Duty to care for the cargo**

The basic obligation of carrier in contracts of carriage by sea to carry and deliver the goods to its destination<sup>143</sup> implies the proper and careful carriage. Art 13-(1) of the Rotterdam rules enumerates the 'specific obligations' of the carrier. It states 'the carrier shall during the period of responsibility...properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods'. The duty to care for the goods is contained as one of the enumerated duties.

The duties of the carrier in relation to goods are not radically different from the former conventions. It imposes a comparable duty under art-III (2) of Hague-Visby rules. It utilizes the same expression of 'properly and carefully' made under the Hague-Visby rules. The difference between the two expressions is discussed elsewhere.<sup>144</sup> The period of responsibility has shown a consistent increase from the Hague-Visby's 'tackle to tackle' through the Hamburg's rules of 'port-to-port' to the Rotterdam rules 'door-to-door'. With the change in the scope of application of this convention, art-13(1) makes some slight difference from the corresponding obligation under art-III (2) of the Hague-Visby rules. The duties to receive the goods and deliver them to

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<sup>141</sup> Si Yuzhou, Henry Hai Li *supra note no 80*, pp-938

<sup>142</sup> Si Yuzhou, Henry Hai Li, *supra note no 80*, pp-938

<sup>143</sup> See art-11 of the Rotterdam rules

<sup>144</sup> Cf. Philippe Delebecque *supra note.no.49*



the consignee were not part of the carrier's obligation under the former rules. Under this new convention, the duty of care extends to the place of destination, not only the place of delivery.<sup>145</sup>

Rotterdam rules cover the other legs of transportation other than the sea leg. The duty of carrier as to seaworthiness is applicable only to the sea leg, while the duty of care extends beyond that to other modes of transport involved. In other words, this duty of care is a continuous obligation.

#### **4.2.3 Exemptions: The substantive contents of art.17 (3)**

Rotterdam rules reintroduce the catalogue of exemptions that resembles its counterpart under the Hague-rules. The justification is the courts, lawyers, insurance companies and the international maritime trade is familiar with the main content and the list of exceptions.<sup>146</sup> On the other hand, the element of the Hamburg rules is also reflected in this new rule of law. The Hamburg rules have abolished the carrier's exemption of liability due to nautical error of master and crew. The Rotterdam rules maintained the same. The nautical fault exemption is also deleted. The continuous obligations of the carrier to exercise due diligence to provide a seaworthy vessel and duty of care for goods are intact. The Rotterdam rules did not incorporate the exception in navigation or management of the vessel nor did it incorporate the 'catch all' exception found in Art-IV (2) (q) of the Hague-Visby rules.<sup>147</sup>

Other exemptions under art –IV (2) (a) of the Hague-Visby rules, have undergone some changes. Many of them were either moved or combined with the familiar exceptions, art-IV (2) (q) being the only one moved out of the catalogue and put under art-.17(2) of the Rotterdam

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<sup>145</sup> The Rotterdam rules 2008,pp-77

<sup>146</sup> Alexander von Ziegler, *Liability of the Carrier for Loss, Damage or Delay*. In: The Rotterdam Rules: Commentary to the United Nations Convention on Contracts For the International Carriage of Goods Wholly or Partly By Sea, The Netherlands (Kluwer Law International BV) 2010. pp-103

<sup>147</sup>Lachmi Singh *supra note* no 26, pp-47

rules.<sup>148</sup> Whatever the justification for this exception in the past, it could not be defended and its abolition may have the effect of depriving the carrier of any defense to the great majority of cargo claims caused by major casualties at sea, collisions with fixed objects or other stationary vessels or stranding in the shallow water or striking the submerged reefs.<sup>149</sup>

The fire exemption has been restructured under art-17(3) (f) of the Rotterdam rules.<sup>150</sup> It has shown a significant change from the system under the Hague-Visby rules in several ways. One of the major changes introduced by the Rotterdam rules is that the presumption of fault on behalf of the carrier for the cases of fire is reversed. This new rules of law considers fire as the cases of non-fault by the carrier.<sup>151</sup> Consequently, the carrier who is able to show that fire was the cause of loss, damage or delay will be entitled to partial or total exemption of liability. Now it remains for the cargo interest to show the fault/negligence of the carrier in relation to the fire or the total/partial cause of damage in fact was something else, notably the unseaworthiness.<sup>152</sup> This issue of allocation of burden of proof is treated under separate sub-topic below. The other distinction from the equivalent rules under Hague-Rules is the qualification of actual fault and privity of the carrier' in relation to fire is removed. In rebutting, the case established by the carrier above the cargo interest can in addition to the fault of the carrier invoke the faults of his agents.

### **4.3 The relationship between the basic obligations of the carrier and the available immunities**

As stated elsewhere the relationship between the basic obligations of the carrier and the available immunities under the Hague-Visby rules is not clear. There are opposing arguments as to whether a carrier who failed to exercise due diligence to keep the ship seaworthy should be

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<sup>148</sup> Alexander von Ziegler, *supra note* no 146, pp-103

<sup>149</sup> Anthony Diamond, *supra note* no 140, pp-468

<sup>150</sup> Corresponding rule under Hague-Visby rules art-IV(2)(b)

<sup>151</sup> Alexander von Ziegler, *supra note* no 146, pp-104

<sup>152</sup> Art-17(5) of the Rotterdam rules.

excluded from invoking the available immunities irrespective of the actual cause of loss or damage. This view is influenced by the common law principle of the overriding obligation. The competing view is the mere failure to fulfill the basic obligation will not exclude the carrier from invoking the immunities if it has nothing to do with the real cause of the loss or damage. These arguments will not persist with the clear wordings and structural arrangement of art-17(5) of the Rotterdam rules. It suggests that the exemptions are no longer subjected to the seaworthiness obligation.<sup>153</sup>The mere failure on the part of a carrier to exercise due diligence has no effect of totally excluding the carrier from invoking immunities unless the unseaworthiness has actually caused or contributed to the damage, loss or delay in delivery.

#### **4.4 The basis of liability and allocations of burden of proof**

As stated at elsewhere this convention has made a new structure of the basis of the carrier's liability. The allocation of burden of proof follows this new structure. The central rule of carrier's liability is provided under art.17 of the Rotterdam rules. This rule is quite lengthy and complicated compared to the corresponding provisions of other maritime conventions. Yet it makes a clear indication that 'fault' is a basis of the carrier's liability. The main rule under the first two sub articles is that liability is based on fault attributable to the carrier or by someone, he is liable for pursuant to art-18, but the burden of proof is reversed.<sup>154</sup>

Art-17 provides:

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay or the event or circumstance that caused or contributed to it took place during the period of the carrier responsibility as defined in chapter 4
2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18
3. The carrier is also relieved of all or part of its liability pursuant to paragraph 2 of this article, if, alternatively to proving the absence of fault as provided in paragraph 2 of this

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<sup>153</sup>Si Yuzhou and Henry Hai Li, *supra note* no 80, pp-938

<sup>154</sup>Falkanger, Bull, *supra note* no 1, pp-282

article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage or delay [.....].(Emphasis added)

Reading through the lines of this rules one can easily discover that the Rotterdam rules have preserved the 'presumed fault-based' liability system as the basis of liability. In this respect, there is no significant change in approach to Hague-Visby rules and Hamburg rules. Nevertheless, the text is significantly different, both in structure and in wording.<sup>155</sup> The Rotterdam rules have clearly incorporated damages arising from delay in the scope of carrier's liability.<sup>156</sup> Still the rules are a derivation of relevant rules in the previous conventions and are indeed based on them. One manifestation of such dependence is that it has preserved the liability of a carrier for faults of agents and servants of the carrier under art-18.<sup>157</sup> It attempts to remove the drawbacks of the Hamburg and Hague-Visby rules while it reflects elements of both instruments.

The allocation of burden of proof kicks in once the claimant establishes 'damage, loss or delay' in delivery of goods (*the prima facie case*). The burden of proof in maritime cargo cases swings back and forth between the claimant and the carrier until the case stops somewhere. Consequently, it involves series rounds of burden of proof. At each round the result of success in proving the relevant matter is that "the carrier is liable (art 17.1, 17.4 and 17.5) or that the carrier is relieved of all or part of its liability (art.17.2 and 17.3).<sup>158</sup>

Once the claimant establishes the existence of loss, damage, or delay within the period of responsibility, the law presumes the default/negligence of the carrier or persons for whom he answers. It is stated elsewhere that the liability regime under Rotterdam rules covers liability for

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<sup>155</sup> Svante O. Johansson, *The impact of Rotterdam rules on the general average*, Scandinavian Institute Of Maritime Law Year Book (2010) ,Marius no-400,pp-275

<sup>156</sup> Art-21 of the Rotterdam rules

<sup>157</sup> Agents and servants under this provision includes: 'any performing party', 'master or crew', 'employees of the carrier or a performing party', and 'any other person falling within the definition in art-1(6)(a)

<sup>158</sup> Anthony Diamond, *supra note* no 140, pp-472

delay while the cargo is in the custody of a carrier. Under art-17, it is quite simple for the claimant to show a factual prerequisite of a *prima facie* delay, to prove actual damages and the quantum resulting from this delay could be difficult and more controversial.<sup>159</sup> In the course of proving *the prima facie case*, the claimant often produces the clean bill of lading showing that goods were shipped clean onboard and its condition has been changed at the destination. Now the burden of disproving this presumption shifts to the carrier. The carrier has two options.

Firstly, the carrier might follow no-fault path by trying to establish the absence of the fault (negligence). For the system based on fault it is logically possible to escape liability by showing the expected standard of care has been properly discharged. He then escapes partial or total liability. This follows from 17(2) of the Rotterdam rules 'absence of fault or causative relationship between the action and result'. The content of this provision is similar with the one stated in art-IV (2) (q) of the Hague-Visby, rules and the carrier who insists on his lack of responsibility and liability then had the burden to prove no fault as per this test.<sup>160</sup> Nevertheless, under Hague-Visby rules the carrier had to prove absolutely no fault of the carrier contributed to the loss or damage.<sup>161</sup> In other words, even the slightest contribution by the carrier would render the (q) clause exception inapplicable.<sup>162</sup> The wording under art-17(2) of the convention that states 'the cause or one of the causes of the loss, damage, or delay is not attributable to its fault' appears to allow the apportionment of responsibility.

Alternative to the above path of establishing no fault, the carrier has an option of invoking that the loss, damage or delay was in fact caused by events listed under art-17(3). This provision enunciates similar list of exempted perils under art-IV (2) of the Hague-Visby with a few deletions and additions.

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<sup>159</sup>Alexander von Ziegler, *supra note* no 146,pp-99

<sup>160</sup> Ibid. pp-100

<sup>161</sup> Ibid. pp-101

<sup>162</sup> Ibid. pp-100

## 5 Concluding Remarks

One major task of the rules of international maritime conventions is the allocation of risks between the carrier and the cargo interest. The basis (the reason for liability of the carrier) and the associated burden of proof are the major areas of concern in the task of allocation. In the past century the basis of sea carrier's liability for loss of, damage or delay in delivery of goods has shifted from the traditional strict liability (liability without fault), where the carrier was liable irrespective of fault, to the system of liability based on fault.

The historical evidences of allocating risks between the two was started in the bill of lading. It was originally issued only to evidence the receipt of goods by the carrier. Through time, it started the allocation of liabilities between a carrier and cargo owners. The carriers, by using their greater bargaining powers, started to incorporate extensive exemption clauses in the bill of lading under the guise of freedom of contract. These exemption clauses were enforced by courts of many jurisdictions. This had inevitably affected the cargo interests. The resulting imbalance required the statutory intervention with the objective of striking the balance of rights and duties between them. The aim of the resulting legal regimes is to ensure the fair allocation of risks between the carrier and the cargo interest by laying down the irreducible minimum obligations and liabilities of the carrier. Within these minimum bounds of law parties enjoy significant freedom to determine the terms of their contract of carriage by sea. This is clearly the manifestation of public policy through statutory interventions.

The statutory intervention at international level started with the meeting of a few maritime nations in Brussels in 1924. They agreed on some international rules addressing the contract of carriage of goods evidenced by bills of lading. Their efforts culminated in the making of the Hague rules with its later protocols. The substantive contents of the rules contained in these instruments reflected that the liability regime forms the heart of international transport convention/s. The pivotal areas these liability regimes regulate, *inter alia*, include determining the basis of liability and the concomitant allocation of burden of proof. The Hague-Visby rules literally abolished the system of absolute liability (liability without fault) for the loss of, or damage to the cargo. The core duties of the carrier under Hague-Visby rules are the duty to

exercise due diligence to provide the seaworthy vessel before and at the commencement of the voyage, care for the goods, issue bills of lading and not to deviate from the contractual route. Thus, if the carrier or a person for whom he answers breaches these duties, the carrier is liable. The Hague-Visby rules established a fault based liability as the basis of carrier's liability. However, there are excepted perils of the sea for which a carrier assumes no liability. Some of the immunities are maintained either expressly or impliedly in the cargo liability regimes of the later maritime conventions. Owing to its peculiar exemptions for nautical fault, fault in the management of cargo, and fire it provides, literatures designate the system of liability in the Hague-Visby rules as 'an incomplete fault liability system'.

The burden of proof under the Hague-Visby rules are constricted based on the interrelationships of the carrier's duty, the specific duty breached by the carrier or his agents and the exoneration invoked.(art III and IV of the Hague-Visby rules).The clear cut formula hence, cannot be stated as the allocation of the burden of proof. Normally the burden of proof kicks in once the cargo interest establishes his *prima facie* case by showing the damage or loss has occurred while the cargo was in the custody of the carrier. The system adopted under the Hague-Visby rules is the presumed fault liability system. Hence once *the prima facie case* is established the burden of destroying the presumption shifts to the carrier. The carrier tries to put the ball back in the court of the cargo interest by showing he has exercised the due diligence to keep the ship seaworthy (if there is an alleged unseaworthiness) and show the real cause of loss or damage. In addition he has to show it was either not possible to avoid loss or damage by due diligence or the cause falls under art-4(2) (q) of the Hague Visby rules. Alternatively the carrier should prove that the cause of loss or damage is one of 'perils of sea' exempted under art-IV (2) (a)-(p) of the Hague-Visby rules. There are group of exemptions for which the carrier is exonerated from the liability despite the existence of fault. The carrier can resort to one of them by his choice and what he proves follow from his choice of exemption/s

The International Convention on the Carriage of Goods by Sea (1978) (the Hamburg rules) that purported to replace the Hague-Visby rules in fact maintained the fault based liability system. The Hamburg rules do not pose the express duty of seaworthiness on the carrier.

Nonetheless, it has maintained the basic obligation of a carrier to look after the cargo for extended period of time (port-to-port). The standard of care is not clearly prescribed. It is based on the interpretation of the phrase 'measures that could reasonably be required to avoid loss, damage or delay' of art-5(1). Furthermore, the Hamburg rules do not follow the Hague-Visby rules of listing the catalogue of immunities of the carrier. It unequivocally abolishes the traditional exemption of the navigational error and error in management of the vessel. It has also changed the way immunity for the fire could be invoked. By doing so this new rule of law adopts a 'complete and/ unified fault' system of liability.

The new International Convention for the Carriage of Goods Wholly or Partly by the Sea (2009) (the Rotterdam rules) had not made any drastic changes in the duties of the carrier. It however, has set its own (new) structure of the basis of liability. Its basis of liability designed in lengthy paragraph and more complicated fashion is submitted to take elements of both Hague-Visby rules and Hamburg rules. Yet it maintained fault as the basis of carrier liability. The duty of the carrier to exercise due diligence to keep the seaworthiness of vessel throughout the voyage and the duty of care for the cargo has remained nearly unchallenged under this newest instrument.



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