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Massaia M'Baye

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THE EVOLUTION OF CARRIERS LIABILITY
IN THE INTERNATIONAL CARRIAGE OF GOODS BY SEA

BY

MASSATA M'BAYE
SENEGAL

A paper submitted to the
World Maritime University
in partial fulfilment of the
requirements for the award of
the MASTER OF SCIENCE DEGREE in:

GENERAL MARITIME ADMINISTRATION

The contents of this paper reflect my personal
views and are not necessarily endorsed by the
World Maritime University or the International
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ACKNOWLEDGEMENTS

I feel immense pleasure to offer my sincere thanks to my seniors who are conducting the maritime affairs not only in the Merchant Marine Direction but also in the Ministry of Equipment and the Government of Senegal at large for providing me with an opportunity to improve and advance my academic qualification as well as my professional knowledge through this unique center of maritime education.

I am also heavily indebted to the Carl Duisberg Gesellschaft E. V. (Germany) for offering me the necessary scholarship to avail this great opportunity to know and learn about Maritime Affairs through the World Maritime University (WMU).

The International Maritime Organization (IMO) has really installed through the WMU the milestones of a global cooperation concretely designed for a common, safe and fair use of the sea resources in providing to the world community a relevant knowledge of that area.

The continuous improvements of the educational standard of the University is due to all professors and lecturers who are very obliging, helpful and courteous to meet our needs and demands as well as the other members of the academic and the administrative staff's devotion.

I also find it my duty to wholeheartedly express my gratitude to my course professor Mr. Jerzy Mlynarczyk who has tried to make us better educated person.
The visiting professors and the field trips have heavily contributed in the acquisition of experience and knowledge with respect to our field of interest.

Grateful thanks to the Government of Sweden and specially the City Council of Malmö for extending all the necessary facilities to give us a pleasant and memorable stay in Sweden.

Let us pray and wish that this spirit of cooperation grows, ad vitam eternam.
The extent to which the international legislation and practices conform with the balancing of equities between the owners and carriers of cargo, with particular concern to developing countries is one of the topics that has been raised through the U.N. Commission of International Trade Law (UNICITRAL) operating under the auspices of the U.N. Commission on Trade and Development (UNCTAD).

Indeed, the increasing reliance of shippers on ocean transport produced a new awareness of the necessity for developing formalized international solutions to the problem of allocating the risk of loss of the goods between owners (shippers) and carriers.

The aforesaid assumption qualify enough situations of countries like Senegal where 90 to 95 percent of the external trade is carried by sea. But its flag accounts only for 1.5 percent of the total sea transport capacity calling its ports and the share in the carriage of the seaborne trade generated by the country itself is only about 1.2 percent. (1)

Therefore, the United Nations Convention on the Carriage of Goods by Sea (so-called the Hamburg Rules) adopted in 1978 has been ratified by the Senegalese Government in order to enjoy a risk allocation system that respond to its status of shipper.

However, because legislative implementation of the Hamburg Rules would require a radically different judicial
analysis of maritime carrier liability than the one currently prevailing under the Hague Rules (1924), a detailed comparison of two schemes is of large interest.

That is the aim of this study.

Note:

The value of the present study is also due to:

- Mr. Edgar Gold, Visiting Professor at the World Maritime University who has been correcting the first draft.

- Mr. Yves Boixel, Lecturer at the World Maritime University as Reader.

- Mr. Richard Poisson, Librarian at the World Maritime University for his untiring support to the researches needed by this study.

- My colleagues: Mr. Mac Donald Tamakloe -TMS '90 (Ghana) and Mr. Dwight Gardiner (MSA '90 Antigua) who has given large assistance for the English writing.

- Mrs. Birgitta Bergelin (WMU secretary) and Mr. Jorge Delgado (Panama) for their help in the typing of this document.

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(1) Statistics extracted from a paper submitted in 1987 to the faculty of the World Maritime University by Mr. Yerim Thioub (TMS 1987) from Senegal.
DEDICATION

To my Family
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INTRODUCTION

LEGAL PATTERNS IN SHIPPING TRANSPORT

In view of the high and sensitive debate arising from "regulating properly" the shipping transport, it is of interest to identify those legal supports it is basically related to. Since its very inception, transport of goods by sea has been defined as being an adventure, involving so high perils that it would be pretentious assigning to it any kind of compulsory norms as to regulating the behaviour of the sea carrier.

So privity and freedom of contracts were the principles which governed the relationships between shipowners and cargo owners.

Indeed till the nineteenth century it was the practice of shipowners to enter into contracts of carriage with cargo-owners that excepted them from responsibility of many events, including the carrier's own negligence.

The validity of such clauses (inserted in the bills of lading) - as well as the multiplicity in shipping documents used - had of course been discussed by courts since they mostly led to an abusive exclusion of the carrier's liability.

Courts were also asked to interpret them, and this led to various interpretations ending in a distressing lack of uniformity in shipping practice, Law and documentation.

As to solve that urgent need of defining the rights and
duties of the sea carrier with uniformity and its normal implication on shipping documents, though setting up a standard form for bills of lading, many countries did react even before the end of the nineteenth century, e.g. UK Bills of Lading Act 1855 in Great Britain—the Harter Act 1893 in the United States.

In the early century other countries did follow early in the century the same trend enacting legislations on the same field such as Australia in 1904, New Zealand in 1908, Canada 1910 etc.

The Charter parties contracts were left under the control of the Freedom of parties' principle. The contracts of carriage of goods by sea to the extent that they were performed under bills of lading or other documents of title have been regulated on some of their specific aspects.

To comply with the international character of shipping the world community obviously felt that it was also pressing to harmonize those separate State enacted legislations through an agreement on certain minima. That was in 1921 the main purpose of the International conference convened in the Hague (Netherlands) which afterwards ended positively in the adoption of The International Convention for the Unification of certain rules of law relating to bills of lading August 25, 1924 in Brussels (Belgium).

— These so called "the Hague Rules" were not conceived as a complete code sufficient to regulate the carriage of goods by sea; It was merely intended to unify certain rules of law relating to bills of lading.

All bills of lading covered by the Convention were made
subject to minimum standards that define both the risks assumed by the carrier that cannot be altered by contrary agreement and the immunities the carrier may enjoy unless otherwise agreed by the parties.

The Hague Rules brought at an international level a uniform system of liability in which any clause relieving the carrier from liability, for negligence in the loading, handling, stowing, keeping, carrying and the discharge of goods was null and void.

But, on the other hand the carrier has been relieved from liability in seventeen cases (so-called "excepted perils") such as the error in the management and in the navigation of the ship, a kind of "catch all" exemption of liability which is still not yet clearly defined.

Assessing the Hague Rules application over years, observers have found out from that "real compromise" an indiscriminate persistent use of invalid clauses in bills of lading - an abuse of jurisdiction clauses - a wide exception allowance and a low monetary limit of liability leading to conflicts, uncertainties plus a vague and ambiguous wording in certain areas of the rules; that latter point being subject to complaints from both carriers and cargo owners. This confusing situation was certainly one among those reasons which led States to adopt in 1968 the protocol amending the International convention on the unification of certain rules of law relating to bills of lading so called "Visby Rules" as an subsidiary attempt to correct and/or complete some unsatisfactory provisions of the Hague Rules related to the per unit package limitation (newly based on gold) and to the liability system (See articles III(4) IV (5) - IV Bis - IX - X etc...).
Unfortunately by the time the "Visby Rules" came into force in 1977 there was already a lack of support to their proper application because in 1971 through an international agreement gold lost its monetary functions and no longer has an official price.

In 1979, however, a protocol to the "The Hague Visby Rules" was adopted introducing the Special drawing rights (SDR) as a unit of account – that unit of account which is used by the International Monetary fund (IMF), has a fluctuating value based on values of a basket of currencies. Furthermore as such protocol was only applicable by those who are members of IMF, many countries who have ratified the Hague/Visby Rules have adopted a "gold clause agreement" or other mechanisms to fix the package limitation formula to a specific amount of their own currency.

As a matter of fact, even among states that have ratified the Visby Rules different limitations may apply.

Therefore optimism that prevailed when the Hague/Visby Rules were signed has severely gone down.

As it has been revealed by the Study made by UNCTAD on bills of lading all the grief named aforesaid has affected the application of the Hague/Visby Rules over fifty-four years.

Besides the technical problems, here was also a need to give more consideration to the cargo generator rights in the shipping business. Shippers in developed countries as well as shippers in developing countries have asked for a fair balance of interest in their relations with the ship-owners.
Quite apart from the arguments of shippers and the change of the entire "political-economic background in the maritime field" shipping itself has nowadays been granted with high technology in navigation, in treatment of cargoes, in communications and with a fair level of trained manpower; among other things that have strongly reduced errors and perils. (See IMD Documentations on safety standards).

Since a very long time the cargo share of developing countries is far from being unimportant from a statistical point of view, their real status of shipping nations should at least be regarded constructively in the international shipping community.

That was the purpose of the decennial study and work done by UNCTAD and UNICITRAL (organs of the UN System) from which came out in 1978 the United Nations Convention on the carriage of goods by sea (the so-called Hamburg Rules) - That Convention which will be in force one year after the twentieth ratifications has already got seventeen ratifications. It is a wide spread belief that the Hamburg Rules might be in force by 1992-93.

Unlike the Hague/Visby Rules, the Hamburg rules cover all types of contracts of sea carriage of goods, not only those evidenced by a bill of lading or a document of title but also those evidenced or expressed by other types of shipping documents such as waybills.

Again the Shipping world community expects from these latter regulations to solve most of the difficulties shown up from the Hague and/or the Hague/Visby rules.
It is the purpose of the following chapters just to identify and discuss how far changes have been made as to the carrier's liability and related matters.
PART I

SCOPE OF APPLICATION OF THE LIABILITY RULES

Entities - Periods and Acts covered by the Conventions relating to International sea carriage of goods.

CHAPTER I

IDENTIFICATION OF PERSONS INVOLVED IN A SEA CARRIAGE AS RESPONSIBLE

When looking at a complete operation of carriage of goods by sea someone might find very many and various entities providing their services. However, among those people some are acting as legally responsible for the performance of such operation. Others are acting either as subordinates (servants) or as agents. Furthermore there might be some cases where the same person (physical or legal) originally known as a subordinate can be found acting simply as an agent and vice versa. Consequently the various and complex combinations of persons and services involved in an international sea carriage of goods have often led to difficulties of identification of suitable persons in cases where unfortunately a dispute did arise among parties.

Taking benefit from the experience gained through the sizeable application of the Hague/Visby Rules combined with the modern trend in shipping transport, the Hamburg Rules makers have tried to approach the aforesaid questions with more accuracy. It is of interest to study
the various criteria used by these existing international transportation rules to that respect. In such attempt to identify who the person is to sue in case of dispute one should distinguish the persons who laid down the main or basical relationship from those who simply performed a service within that frame.

SI Sea carriers and their servants and agents

PI) Sea Carriers

Both the Hague Rules (article 1 a) and the Hamburg Rules (Article 1.1) give a definition of the sea carrier. But whereas these two conventions agree on including in their definition a common criterion which is that the carrier has to be the "co-contractor of the shipper as principal" they still vary somewhat in their approaches. Indeed the Hamburg Rules through article 15(1) implicitly complete the formal definition of the carrier (article 1) by the additional requirement of mentioning the name of the carrier onto the Bill of lading. The Hague (and Hague/Visby Rules) simply insist on the "shipowners and charterers" as necessarily being carriers when contracting with a shipper.

The Hamburg rules have also brought up a new concept in article 1(b). The so called actual carrier is defined as the one performing totally or partially the sea carriage itself.

A) The Common Criterion of "co-contractor of the shipper as Principal"
Although expressed in different ways this is the same criterion used by international rules. It is not restrictive.

It simply requires that whoever it is, the carrier must be the signatory of the sea contract of carriage as principal.

Therefore besides the shipowner and the charterer (expressly named by the Hague Rules) anyone can be contracting carrier, e.g. freight forwarder - Non vessels operating common carriers - ship agents etc. However, when analyzing article 1 of the Hague Rules, some observers exclude the stevedores definitely from its scope.(1)

Actually the real problem in the application of this criterion when the Hague or Hague/Visby Rules are applied arises in cases where the carrier is not directly himself signing the document which evidences the contract or the contract itself.

In such cases, if there is no precision as to the name of the carrier in the bill of lading (not required by the Hague/Hague Visby Rule), there are many difficulties to identify the carrier, e.g. in cases where there is a shipowner and a charterer coexisting in the same sea carriage contract with a bill of lading signed by the master.

The standard solution given to such cases through the court practice of Hague Rules was to consider that "When a charter party does not amount to a demise of a ship and when possession of the ship is not given up to the
charterer, then it is probable that the contract contained in a bill of lading signed by the master is made with the shipowner and not the charterer". (2) But this rule is not always applicable, and courts have to refer themselves to facts and documents. (3)

The question of knowing on behalf of whom the master signed a bill of lading and which more or less is the same even in some cases where the bill of lading has been signed by a charterer has never received a definite solution under the application of the Hague Rules. (4)

An attempt to solve it has been the use of clauses such as the demise clause by the charterers or the "Indevinity clause" by the owners to try to exclude their liability. But that attitude did not help because most of these clauses have been deemed to violate Article III of the Hague/Hague Visby Rules (as to the minimum obligations and liability to be supported by the carrier).

Therefore one can assume that the precision given by the Hamburg Rules article 15 (requirement to name the carrier in the bill of lading) combined with the criteria of Article 1 of the same convention will to a great extent solve matters arising from Article 1 of the Hague Rules as to the identification of the sea carrier.

B) The performance of the sea carriage.

An additional criterion helping to identify a sea carrier or at least to give more possibilities to a shipper to get indemnification in case of loss is contained in the Hamburg Rules Article 1(b): the so called actual carrier. He is defined as being the one who
actually performs partially or totally the sea carriage already contracted by another person.

He is therefore third party to the original contract of carriage but he can be sued by the shipper on the basis of that contract (see article 10 Hamburg rules).

One positive aspect of this "sui generis" concept is actually to solve the problems connected with transhipments of goods; one of the confusing problems faced by shippers under the Hague Rules. Although new comer in the terminology of the shipping transportation the concept of actual carrier does not seem to be very far from the concept of carrier's agent with respect to their "Third party" common characteristic or status.

However, eventhough any part of the sea carriage (under which the Hamburg rules comprise other subsidiary activities in port areas) can be entrusted to the actual carrier, a sound of logic would let me believe that such person will be involved meaningfully in the sea leg of such sea carriage operation.

P II) Servants and Agents of Sea carriers

A) Servants

The ordinary meaning of the word "servant" is subordinate, that is to say he is the person who acts as an employee of the carrier. Such concept does not suffer from large difficulty.

The servant is supposed to be continuously acting with
transparency for the carrier. Therefore the latter is deemed to be liable in case of damage caused by the servant. This is named the vicarious liability. Its effect is that the shipper claimant in such cases enjoys a direct action against the carrier.

It might however happen that the servant in given circumstances, although acting within the scope of his employment, has wrongfully missed to comply with his specific duties. In that case the shipper can claim directly against him. The problem at this stage was whether or not the servant can rely on the defences legally available to the carrier. The same positive answer has been given buy the two conventions see article 4 (Bis)2 of the Hague Visby rules and 7(2) of the Hamburg Rules.

B) Agents

The agents of the sea carriers also benefit from the defences and limits available in the aforesaid named convention. But here the problem is to define and select who is the agent or not?

In comparison with the term servant the agent is not subordinate of the sea carrier but simply someone who is punctually employed by the sea carrier for providing services that the latter cannot perform himself. As a matter of fact it does happen that in a given situation a person who is ordinary known as being a servant acts as an agent (usually the master of a ship does in case of repairs contract to sign). However, when it comes to defining the agent the Hague Visby excludes the independent contractors - finally the problem is not anymore to
define the term agent but to study. How the independent contractor can enjoy the advantages granted to agents of sea carriers.

Here again the independent contractors have tried to benefit from these advantages by inserting different varieties of clauses tending to extend the protection of the provisions of Art 4 Bis(2) of the Hague Visby Rules to their activities, e.g. the so called Himalaya clause. But such attempt did most of the time fail before courts even if the provision of the bill of lading covering the sea carriage with the package limitation has been carefully inserted in the independent contract.(5)

Within the scope of the Hamburg Rules the "Independent contractor" is not excluded anymore. It is therefore clear that Article 7(2) does not differentiate among the agents of the sea carriers those who will or will not be covered by its provisions on limitation. Such attitude is logically linked with the extension of the period of responsibility of the sea carrier of Article 4. Because by this extension covering port area operations the debate on whether such activities ought to be qualified maritime activities and as such be covered by admiralty jurisdiction is solved. Indeed under the Hague and Hague Visby Rules stevedores (usual or traditional example of independent contractors) whose activities are located before or after the tackle-to-tackle period were as such exposed to the first (or a priori) matter of jurisdiction that is the barrier to overcome before any application of the aforesaid rules.
S II Cargo Interests

Among others, two problems might show an interest to identify cargo interests. Because of the transferability of the bill of lading which has not to engender necessarily a transfer of ownership on goods, someone would appreciate to be able to determine the rights of its holder. It is also for sea carrier claimants a major question to identify the owner of the goods either for the payment of the freight or simply to claim for damage to their ship or other cargo carried on board. The latter point is very sensitive in oil transportation where the cargo can be sold several times before the ship arrives at destination. Sea carriers would also know if the claimant suing them is the real owner of the goods or has been entitled to do so by the real owner of goods.

So far, originally in the shipping transportation the so called shipper was either the owner of the goods or simply a person acting on his behalf like a consignor.

P I) The Owner of the goods

Through the Hamburg Rules it has been made clear or simply legalized that the sea carrier can sue the cargo owner for damage caused to his ship or to other cargoes carried on board. See Part III "Liability of the shipper" Article (19/7). When the Hague/Hague Visby Rules apply the answer to the question of whether the sea carrier can sue a cargo owner originates simply from a pretorial and/or a doctrinal support whereas in the new convention such suit is legally allowed (Article 12).

Another problem is whether on the basis of the rules
of both conventions any holder of a bill of lading or a similar document of title on the goods can be sued as owner. Who among the holders of the Bill of lading is not to be considered as owner and consequently is not covered by the provisions of the existing rules.

A) Definition of "Shippers" and rights of the holders of a bill of lading.

Is anyone who receives the document of title on the goods through an indorsement entitled to claim ownership on goods and consequently able to bring suit under application of the existing rules. If not the shipper himself, is any holder of the bill of lading entitled to do so. A regular simple holder of a bill of lading has to be designated by its rank as the last one who receives it through a chain of indorsement starting from the so called shipper or a person acting on his behalf. At the very beginning what is a shipper?

The Hague/Hague-Visby rules do not define it. The consequences of this lack of definitions will disappear with the entry into force of the Hamburg Rules. Indeed that new convention defines in its Article 1(3) the term shipper as being the co-contractor of the sea carrier as principal or the one who (as principal) has ordered the delivery of the goods to the sea carrier. The terminology "as Principal" is expressed in the convention by the formulae "any person by whom or in whose name or on whose behalf ... "

Since the definition of the word "shipper" or simply of the cargo owner" is given, the other element for a regular holder to claim ownership on goods is to know if
in the indorsement Parties involved have intended to pass such ownership or to pass a temporary possession of the goods. Thus the rights of the holder of a bill of lading if not clearly expressed will have to be characterized by courts on the basis of the aforesaid criterion. However and contrary to the Hague/Hague Visby, the Hamburg Rules as an attempt to lessen difficulties met at this stage has decided that if the charterer is the Holder of the Bill of lading its provisions do not apply. (See article 2-3) (See also in this project the paragraph entitled "Bill of lading on a chartered ship").

B) Consignee - Consignor

These two words have not been defined by the Hague/Hague Visby rules. The Hamburg rules Article 1(4), define the consignee as being the "person entitled to take delivery of goods". By applying the so called "Rule of parallelism" one can assume that the consignor should be the person entitled to deliver the goods to the carrier for the intended sea carriage.

Although these words and their definitions do not appear in the Hague/Hague Visby provisions, they do not sound new or redressed by the Hamburg Rules. However some uncertainty is expressed as to the relationship of the sea carrier and the consignee. Indeed quoting the report of the working group (seventh session) published in Unicitral yearbook, volume VI, 1975, at p 201 the writers of the Book "the future of Canadian carriage of goods by water law" (op. cit.) worry about the aforesaid relationship (sea carrier - consignee) lacking of specific regulations susceptible to define rights and duties of the consignee in case where the Hamburg Rules have to apply to a contract based on a document other than a bill of lading.
and in case where the Hamburg Rules are applicable. People are afraid that if no legislation is enacted to that respect, the common law (and/or the continental) which will then apply might have some negative effect on the consignee's rights because the principle called in continental law "effet relatif des contrats" will prevent the transferability of rights and rights of action as well. (6) 

With full respect to the opinion explained above, I would think that the consequential possession of goods by consignees (that is admitted by the common law/continental law as support of its rights and duties) would to the same degree, but positively, affect the question of the relationship sea carrier consignee under the Hamburg Rules when the document issued is not a bill of lading.

Also the Hamburg rules makers did concentrate on the sea carriage contract and the identification of the co-contractor as sea carriers and owners of goods more than on persons acting on their behalf. The reason is not only the fact that the objective of the relation owner of goods and consignee is not to generate any full transfer of rights (i.e. it is a limited subrogation) and that a contract might already define the content of such relations so that the sea carriage contract will not really be needed to define the rights of the consignee toward sea carrier (consignee being either servant or agent of these co-contractors). The reason is also that basically if the consignee does not accede to all rights that allow him to act against the sea he still has full right, however, to claim against his principal if it is the owner of the goods.
NOTES


(6) Edgar Gold, William Tetley, op. cit. p 13 and 14
CHAPTER II

LEGAL ACTS DEFINING THE SCOPE OF COVERAGE

§ I. The exclusion of charter party contracts from the International legislation on Sea carriage of goods

P I) Legal approach of the principle of exclusion

One of the most heated matters in the field of carriage of goods by sea is to define the nature and the content of the relationships between the shipowner and the cargo owner. Indeed the real obstacle to a static definition of that scope is found in the will of shipowners to enjoy a margin of maneuver not only in relation with the cargo but also in relation with the ship itself. Since the progress in shipping transactions allow other entities, such as the freight forwarders or the so called "non-operating vessel common carriers" to enter into a contract of carriage with cargo owners. Shipowners are not always the carriers legally bound toward cargo interests. So the shipping transport involves a variety of contracts from those whose purposes are to furnish a ship with different possible uses to those whose purposes are the specific performance of a sea carriage.

The distinction between these two typical groups of contracts, respectively known as "charter parties" and as "contracts of carriage", is not that easy. In reality in the family of charter parties we find the so-called voyage charter party, which is practically a contract of carriage as it is defined as being "a contract to carry specified
goods on a defined voyage or voyages, the remuneration of the shipowner (who is carrier in that case) being a freight calculated according to the quantity of cargo loaded or carried .... "(1)

Therefore a proposal to include the charter party voyage in the scope of application of the Hamburg Rules has been made — but it has not been successful. For Erling Selvig this rejection is partly because UNCTAD is working on a project relating to charter parties.(Ibis)

Thus, definitely the Hague/Visby Rules and the Hamburg Rules do not deal with charter parties (Demise Charter, Time Charter, Voyage Charter) which will remain under the freedom of parties and the other principles of common law.

However, these two conventions have edicted solutions when pursuant to a charter party, a bill of lading related to the carriage has been issued. But while the Hague Rules Articles I(2) and IV(2) simply say that they apply when under such circumstances a bill of lading or any other document of title is issued, the Hamburg Rules Article II(3) indicates with precision that for their application under such circumstances the Holder of the Bill of Lading should not be the charterer. However they are applicable to any contract of carriage evidenced or not by a bill of lading, the Hamburg Rules in their aforesaid cited article say that they apply only when under such circumstances" ... a bill of lading is issued".

Taken strictly to their wording the Hamburg Rules let me feel that they would not apply when pursuant to a charter party, the other issued document is not a bill of
lading. If such a feeling is true then implicitly the principle of application of the Hamburg Rules to any contract carriage would be suffering from a limit to bills of lading (only), when there is a pre-existent charter party.

Nevertheless such worry might not exist if the issued document states clearly that it stands for a contract of carriage.

Authors, we know, have not mentioned that point which could lead to confusion when interpreting the Hamburg Rules on the question of bills of lading issued on a chartered ship.

Still it seems interesting to have a look at such hypothesis into detail.

P II The use of Bills of Lading on a Chartered Ship

A) Bill of lading held by the charterer

In some cases the charterer himself is the shipper and as such receives a bill of lading, or the charterer has become indorsee of the bill of lading as principal. When in such cases the "terms and conditions" of the bill of lading and the charter party are different it has been originally held that: "Unless there be an express provision in the documents (charter party and bill of lading) to the contrary, the proper construction of the two documents taken together is, that as between the shipowner and the charter the Bill of lading, although inconsistent with certain parts of the charter, is to be taken only as an acknowledgement of the receipt of the
goods". (2)

So where the charter is the holder of the bill of lading the bill of lading is treated only as being a receipt of goods.

To make it clearer shipowners used to insert in bills of lading some clauses such as "bill of lading signed without prejudice to this charter party".

One other common case was the situation in which the charter party was incorporated in the bill of lading issued by the shipowners by means of stipulations, like for example the clause "all other terms and conditions as per charter party".

The solution given by courts in case of incorporation of a charter party in a bill of lading was to disregard any stipulation of the C/P inconsistent with the Bill of lading. (3)

That solution was based on the Idea that in such case the bill of lading was not only a receipt of goods but the contract of carriage itself regulating the relations between shipowner and charterer. In other words uncertainties remain, because the application of the Hague/Visby Rules, if not expressly agreed by parties, is suspended to the definition to be given to the bill of lading whether it is the contract of carriage or just a receipt of goods in the given case submitted to appreciation of courts.

On the other hand, where neither such clauses were inserted in the bill of lading for a clear cut, nor an express contrary agreement was existing between the
shipowner and the charterer (holder of the bill of lading) it has been difficult to define the impacts of bills of lading on charter parties as to matters related to applicable laws and liability regimes.

As an attempt to reduce uncertainties in cases where bills of lading have different terms from preexistent charter parties, the Hamburg Rules specify that they apply only where the holder of the Bill of lading is not the Charterer.

B) Bill of lading held by a third person to the preexistent charter.

When the holder of the bill of lading ignores the terms of the charter party he should only be bound by the terms and conditions of the former document as far as the owner of the chartered ship or the charterer recognises the master authority to sign such document (if they do not sign it themselves).

The owner or the charterer has to recognise the terms of such document held by a bona fide third party, who ignores the charter party content. It has been held that even when the bill of lading includes a clause indicating the pre-existence of a charter party such as "All conditions as per charter" the Holder (not being the charterer) will not be supposed to have constructive notice of such terms.(4)

The Hamburg Rules by inserting the precision "Holder not being the charterer" do intend to solve the difficulties arising from the speculative attitudes of
carriers combining the terms of the Bill of lading and the terms of the charter party to escape from the compulsory liability regime and from the provisions protecting cargo interests.

As a fact, when a charterer holds a bill of lading as a principal he is not entitled to claim benefit from application of the Hamburg Rules. Reasonably as signatory he has agreed to be bound by the charter party and consequently the bill of lading is in such case only a receipt of goods. That is implicitly the reasoning on which the Hamburg Rules have based the exclusion of the Charterer holding a bill of lading from their provisions.

S II The Contracts of carriage of goods by Sea

Since there is no compulsory provision in the existing international rules edicting a specific form, these contracts can be agreed verbally. But when it comes to proving their existence and defining their content (obligations, rights and duties) the international conventions dealing with this type of contracts adopt different attitudes. Indeed while the Hague/Visby Rules will apply only to contracts evidenced by a bill of lading or a similar document of title, the Hamburg rules will apply to all contracts whether evidenced by a document or not. (5)

There is also different attitudes observed by these two conventions when setting up the obligations of the sea carrier.

Whereas the Hague/Visby enumerate the compulsory obligations to be identified under a sea carriage contract, the Hamburg rules run a new formula consisting
of considering "all reasonable measures" the Sea carrier has to take as being a global obligation or duty.

P I) The Existence of a Contract of Sea carriage of Goods

A) Contracts as evidenced by a bill of lading or a similar document of title.

For their application the Hague/Visby Rules require a bill of lading or a similar document of title to be issued. However, they do not give a definition of these documents.

The doctrine defines usually the Bill of lading as a document which is signed by the carrier or his agent acknowledging that goods have been shipped on board a specific vessel that is bound for a particular destination, and stating the terms on which the goods are carried. Furthermore such document is often issued in a set of three or four originals duplicated and a copy, contains the name of the consignee, a description of the goods, stipulations for the payment of freight, and other details of the carriage.

The bill of lading acts as a receipt of goods, a document of title, and an evidence of the contract of carriage.

A document of title is not defined on the basis of the form under which it has been elaborated but on the basis of the criterion of transferability and negotiability.

Originally such documents have to be issued for the application of the Hague/Visby Rules. But in some
countries it has been held by courts that "since there was an intent to issue a bill of lading", the Hague/Visby rules apply no matter whether or not the contract of carriage is actually covered by a bill of lading.(7)

- Many types of bills of lading exist in the international sea traffic because shipping lines used to have their own made according to the specific purposes of their activity e.g. in case of shipping lines performing a through carriage. (See Chapter III: "Period of responsibility of carriers").

- Usually issued after shipment of goods (shipped bill of lading) and in some cases before shipment of goods (received for shipment bill of lading). That document is the most common shipping document that evidences contracts of carriage of goods.

The other so called "similar documents of title" which normally include any negotiable shipping document that might evidence a sea contract of carriage, are still undefined.

Bills of lading when issued to a named and fixed consignee are non-negotiable (straight) and as such will not be a document of title, but they fully remain a complete proof of the contract for cargo interests.

B) Contracts of carriage as evidenced by another Document

Some contracts of carriage of goods by sea are evidenced neither by a bill of lading nor by a document of title but by different types of document among which the
most common is the waybill.

A contract of sea carriage might also exist without being evidenced by any document. With the Hamburg Rules, these two types of contracts of carriage of goods are covered by International legislation on sea transport.

- Contracts evidenced by way-bills

The United Nations Conference for Trade and Development commended waybills as one of the main instruments against documentary fraud. Since there has been an increased use of sea waybills in international trades where bills of lading are not especially needed e.g. the Non negotiable General sea waybill of BIMCO, Nedloyd’s Non Negotiable Sea Way bill (straight bill of lading) PLD Containers Non Negotiable Waybill for Combined transport or Port to Port Shipment etc.

The waybill is a document which performs the functions of evidence of contract of carriage by sea and receipt of goods by the carrier. But unlike the bill of lading, the waybill is not a document of title and therefore is not negotiable and transferable. On the other hand, such document has been found extremely safe and with an advantage of fast transmission. Such positive aspects go well with the development of containerization of cargo and the door to door style of transportation.

Indeed, in order to take profit from those aspects of the waybill the Comite Maritime International did start to draft some rules to facilitate the use of such document. (8)

It has been discussed: (a) whether or not the waybill
ight be covered by the Hague/Visby Rules in which article VI provides for special and particular goods a freedom for parties to enter into special agreement; (b) if in a common transportation of goods by sea one can insert a clause incorporating the application of the Hague/Visby Rules to a Seaway bill evidencing the contract.

The answer was no in the former hypothesis where reference is made to Article VI of the Hague/Visby rules obviously because that article itself is not intended to cover common sea carriage.

In the latter hypothesis the attitude of some courts were to refuse to give any priority to the application of the Hague/Visby Rules over the other clauses of the issued waybill as in such case the incorporation of these rules were done by a clause having the same legal value as the other clauses.

The application of the Hague/Visby Rules would be taking precedence over the other clauses of the waybill only when in such case the clause inserting them in the sea waybill document states clearly that these rules will take precedence over the other clauses. (9)

In other words the contract of carriage when evidenced by a waybill or by a document other than a bill of lading (or a similar document of title) is only covered by the Hamburg Rules.

C) Contracts of carriage not evidenced by a document

Since the Hamburg rules apply to all contracts of carriage by sea, their scope includes contracts not evidenced by any document. Such situation which should be
rare enough does exist. It has already happened that after refusing to sign a bill of lading, a master has however performed the carriage of goods received to their named destination. In such or similar cases the Hague/Visby Rules would not apply because there is not even an intent to issue a bill of lading.

In such situation it would not either be fair to apply the national law of one party if the parties involved have different national laws.

Another hypothesis could be found where by force of law the document issued to evidence the contract of carriage is null and void and consequently disappears retroactively.
So either deliberately or de facto a contract of sea carriage could exist without being evidenced by a document.

To regulate the minimum compulsory obligations and liability of the carrier the Hamburg rules will apply if proof of the existence of a contract of carriage is given by the party who actually wants to benefit from its existence; such proof, could be given, by all means allowed in the common law general principles.(10)

II) The Obligations of the carrier based on the contract of carriage

The Hague/Visby Rules Article II enumerates the statutory obligations of the sea carrier. To the contrary, the Hamburg Rules Article V approaches the obligations of the sea in another way using the criterion of reasonableness. Instead of listing specifically any
obligation the new convention considers that the carrier has to take "all reasonable measures" required for safe transport and delivery of goods.

It is almost obvious that the intent of the Hamburg Rules is definitely not to remove any of those standard obligations contained in the Hague/Visby but on the other hand the Hamburg Rules seem to enlarge them or otherwise add new obligations on the carrier's side. An interesting question could be to try to know what is in the concept of all reasonable measures:

A) The minimum obligations of a common sea carrier.

Expressly in the Hague/Visby Rules or implicitly in the Hamburg Rules the obligations of the sea carrier are those below:

1) The obligation to make the vessel seaworthy and to provide a proper ship.

The provision of a seaworthy vessel at the beginning of the voyage was at common law implied in every contract of carriage and was a type of strict liability without regard to fault or negligent conduct. The Hague/Visby Rules have substituted it by an obligation of due diligence. But still, the carrier cannot contract out of it (Article III(8)). As expressed in Article III(1) of the Hague/Visby Rules "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
Article III(1) is connected with Article IV(1) which provides as follows.

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit for their reception, carriage and preservation in accordance with the provision of article III(1). Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

So if the shipper proves a prima facie case and there is evidence of unseaworthiness, the burden of proof will shift to the carrier to show either the absence of causation or the exercise of due diligence.

If the carrier cannot show one of these, he will be liable. (11)

Since the determination of unseaworthiness is a matter of fact and facts the shipper, under the Hague Visby Rules, will face difficulties as to prove at the same time the undue diligence of the carrier in the unseaworthiness of the vessel and its causation with the
cargo loss or damage. But "facts" are usually entirely within the knowledge of the shipowner (carrier), shippers not being usually aware of the technical aspects of ships. At the end of the day even if the Shipper succeeds giving the aforesaid proofs, the shipowner will always try to get into one of the seventeen excepted perils of the Article 4(2) of the Hague Visby Rules.

Such difficulties will disappear with the application of Article 5(1) of the Hamburg Rules where once the shipper proves his cargo loss, the carrier will have to prove that he or his servants and agents "took all reasonable measures" to avoid it.(12)

The duty to provide a proper and seaworthy vessel at the beginning of the voyage is non delegable, and as confirmed in the court case Riverstone Meet Co. v Lancashire Shipping Co. (the Mancaster Castle). The carrier is accordingly responsible for acts of any servants repairyards or experts he uses to fulfil this duty.(13)

Under the Hague/Visby Rules the "duty to make the ship seaworthy" operates "before and at the beginning of the voyage".

So during the voyage no such duty or warranty is required unless the doctrine of the so called "stages of seaworthiness" applies. But since we know, or we can assume, that such doctrine seems to be inconsistent with article 4(2) of the Hague Rules and as such tends to disappear, the shipper will not be allowed to claim unseaworthiness of the vessel on the basis of a fact that happened after the beginning of the voyage. In other words during the essential part of the carriage of goods which is at sea, the shipper finds himself completely deprived
of any warranty of seaworthiness, that is to say no respective duty of the carrier who furthermore enjoys the possibility to invoke the excepted perils of Article 4(2) of the Hague/Visby Rules. Such legal reality was deemed to be quite illogic and abusively protective for the carrier by the Hamburg Rule makers, who consequently thought that what must be proved was that the carrier or his agents or servants had done all times what reasonably could have saved the goods.

The result is that the due diligence to provide a seaworthy ship is extended to the complete sea voyage.

Coming to the definition of the concept of seaworthiness itself through courts cases which have dealt with this, it has not been surprising that seaworthiness is more and more defined on the basis of technical requirements rather than commercial aspects. According to studies made separately by Thomas J Schoenbaum and William Tetley (14) the legal Test for seaworthiness reveals that there may be conditions of unseaworthiness for a vessel, where there is:

- fault in the vessel’s construction or equipment

  See Jones and Laughlin Steel, Inc. V. SCND Barge lines Inc. AMC 300

- inoperability of navigational aids, such as a radar (See Irish Spruce 1975 AMC p 2568) or charts

- improper cleaning of tanks or input lines

- improper loading, bad or poor, stowage see the frisc 1980 Lloyd’s report at p 476; See also May, 4, 1972
See the Matter of Ta Chi Navigation 1981 AMC 2350,
The Makedonia (1962) 1 Lloyd's rep. at pp 334-338;
The Roberto (1937) 58 Lloyd's rep. 159;
The Forandoc (1967) 1 Lloyd's rep. 232.

In conclusion, the Seaworthiness does exist only when
the vessel is reasonably and in all respects fit to carry
the cargo. It means that a seaworthiness includes
cargoworthiness.

B) The carrier's obligation to properly and carefully
load, handle, carry, and keep the cargo.

Like the duty to provide a seaworthy ship, the care
of cargo is a non delegable duty. But unlike the previous
obligation, the duty to care for the cargo covers the
whole period the goods are in the custody of the carrier
and not only the period before and at the beginning of the
voyage.

- The duty to care for cargo is also an absolute
obligation, different from the duty to provide a seaworthy
ship which is only a due diligence based duty. The meaning
of the wording "carefully and properly" has been analysed
by F J J Cadwallader as being a "sound system" according
to which goods are to be carried using the "requisite
care". (15)

* The duty of care is to be exercised in the loading
and discharging of goods as well as in the handling and
stowing of goods.

* Under the Hague/Visby Rules the "period of responsibility of the carrier defined on the basis of the "tackle to tackle" principle that refers to the ship's rail as a starting point. But when it comes to care of cargo, courts have decided that the carrier's responsibility covers the whole operation of loading and discharging of goods. Indeed the leading court case "Pyrene Co. v. SCINDIA Navigation Co." expresses that extension of such period of responsibility by saying that "the objective of the Hague/Visby Rules is to define not the scope of the contract service but the terms on which that service is to be performed". So any lack in the way the service is done in loading or in discharging goods will bring liability against the carrier under the Hague/Visby rules.

* The duty of care is also to be exercised in the handling and stowing of cargo. The problem of poor or bad stowage is sometimes analyzed as being a condition of unseaworthiness of a vessel. The stowage ought to be done according to a correct plan, involving the stability of the ship as well as the protection of goods. The carrier cannot relieve himself from liability for incorrect stowage even if the stowage arrangement has been performed by an independent contractor like a stevedoring company. But on the other hand when such stowage has been performed by the shipper himself, or if the shipper is warned how the cargo is going to be stowed, then the carrier will not be faced with any liability on that basis.

The handling of cargo follows the same rule.

As to carry and keep safely the cargo the real
problem is when a given cargo requires a special treatment. In such case courts have decided that "Where cargo is offered for transportation and the carrier cannot give it the type of stowage or ventilation its nature requires, the accepted practice is for the carrier to refuse it, or in the alternative to notify the shipper of its inability to provide proper ventilation and obtain its authorization to carry the cargo under the available stowage and ventilation". (16)

But even if the shipper does accept his goods to be carried without a special treatment lacking from the ship, it sounds logic that the carrier will not, however, be relieved from liability if he just relies on the insufficiency of his ship's equipment and does not use all his knowledge and skill for the safety of goods.

P III The Hamburg Rules approach to the carrier's obligations

The fundamental idea of a bona fide carrier acting reasonably for the safe carriage and delivery of goods to cargo owners which is found in Article 5(1) of the Hamburg Rules has always been the back mind motivation of judges when safely applying or interpreting the Hague/Visby Rule. Therefore it is correct to consider that the Hamburg Rules have implicitly kept running the standard and minimum obligations of the Hague/Visby carrier.

Of course criticism has been done against the wording "All measures that could reasonably ..... " which sounds at the same time imprecise and unspecific leading probably for its interpretation to possible unexpected decisions or even contrary decisions. It has also been thought that
courts might get back to old cases taken before them under the Hague /Visby Rules simply to secure an uniform interpretation of the "Broad approach" of the obligations or duties of the Hamburg Rules carrier.

But what should be positively assessed is the flexibility given by Article 5(1) as to the definition of what should be or should have been done by the carrier according to its knowledge and possibility. Indeed the evolution of marine technology since 1924 is to be taken into account as to "knowledge and possibility" of the present sea carrier in the "safe and timely" carriage and delivery of goods. In that respect the institutions dealing technically with safety matters, like the International Maritime Organization, have accordingly set in terms of recommendations, codes and practices to avoid accidents and/or incidents that could lead to loss or damage to cargo. (17)

Although these recommendations are not binding, in some countries the courts have already started looking upon them as a standard of reasonableness. That is the case in the United States. (18)

The criterion of "Reasonableness" which permits such attitudes from courts becomes legally an element of appreciation of the obligation of the carrier with Article 5 (1) of the Hamburg Rules. So seaworthiness of vessels and care of cargo are, or will be, defined with less speculations since existing "safety standard" give more accurate grounds for such purposes.

In fact the Hamburg Rules do not create any new obligation for the carrier but simply enlarge the means to assess the standard obligations of the sea carrier.
already existing in the Hague Visby Rules and deals with these obligations under a global unified formulae.

NOTES


(3) Scrutton on Charter Parties op. cit. p 519

(4) Scrutton on Charter Parties op. cit. p 72

(5) Erling Selvig, op. cit p 17

(6) Thomas Schoenbaum. Admiralty and Maritime Law p 296,

(7) Edgar Gold, op. cit. p 29


(9) Edgar Gold, op. cit., pp 335-336


(12) William Tetley, op. cit., p 146


(17) International Maritime Organization Publications, (IMO) publications 1989 listing the various regulations on safety and technical matters.

CHAPTER III

DETERMINATION OF THE PERIOD OF RESPONSIBILITY OF THE SEA CARRIER

S I Basic Principles

The intention of the Conventions on International carriage of goods by sea is to define the period covered by the contract of carriage so as to confine the obligations of the carrier. The Hague/Visby Rules as well as the Hamburg Rules have set up Basic principles - as Tool of measurement of what some authors call now-a-days the "contract period".

For the purpose of their study references are made on:

Articles I - III Hague Rules
Article IV Hamburg Rules

P 1) The "Tackle to tackle" principle

The said principle based on the article I of the Hague Rules means that the period of responsibility of the carrier starts when the ship’s tackle is hooked on to the goods for loading, covers the performance of the carriage and ends when the goods are unhooked from the lifting gear after discharging.

When in a given operation the ship’s tackle is not used, the period of responsibility of the carrier is fixed by the movement of goods over the ship’s rail.

However, in case where the equipment used for the
loading and discharging operations under the responsibility of the carrier, the named principle will also cover these operations. (1)

With respect to liquid cargoes the application of the Tackle to Tackle will follow the same reasoning.

— When the Tackle to Tackle principle applies, the first consequence is that the period before loading (preload) and the period after discharging should be covered by the national law of the country where the operation occurs.

Therefore, if there are not public law policies dealing with these two extra periods, parties involved in a carriage can make an agreement so as to define at liberty their respective responsibilities in relation with custody - care - handling of goods (see Article VII Hague Rules).

However, it is very difficult to draw exactly the line separating the "extra-periods" from the period covered by the "Tackle to tackle" principle - Many courts cases have revealed the very many uncertainties striking the logic in the application of the "tackle to tackle" e.g. The famous "Pyrene. Co.v. SCINDIA STEAM Navigation Co. 1954 .(2)

In that case, so far quoted by William Tetley in "Marine Cargo claims" op.cit.chapter 14, cargo was attached to ship's Tackle and was being loaded on board when it fell outside the ship. Surprisingly it was held that although the goods had not crossed the ship's rail, the Hagues Rules apply - because damage occurs during the loading operation.
Various critics against that principle led the Hamburg Rules makers to draw another principle, the so-called "Port to Port" principle.

P II) The "Port to Port" Principle

Trying to correct or otherwise to circumvent the difficulties arising from the "Tackle to tackle" Principle, an attempt to unify the regime applicable to goods during the whole contract of carriage operation is expressed through the "Port to Port" Principle that holds the carrier responsible for the goods the whole period they are under his control and supervision.

The "Port to Port" Principle relies on two main elements:

- The carrier should be liable for the entire period during which he is actually in charge of the goods whether afloat or ashore.

- The period of responsibility should not begin prior to the carrier's custody of goods at the port of loading and should not continue beyond the port of discharge. (3)

Though Article 4 (3) of the Hamburg Rules did not name them, implicitly all cargo handlers will be covered by these legal rules when they act on behalf of the carrier while goods are in his charge.

Article 4 (2) indicates that a carrier is deemed to be in charge of the goods when he takes them over from the shipper or from an authority to whom pursuant to the law of the port, the goods must be handed for shipment.
But, at what moment the carrier will become in charge of the goods or will have taken over the goods is not defined. The proof of this moment might be given by all means since it is a matter of fact.

Still is, Article 14 of the Hamburg Rules states that: "When the carrier or the actual carrier takes the goods in his charge, he must, on the demand of the shipper, issue a bill of lading".

So in case where a bill of lading is issued there will be no difficulty as to the precise starting point of the responsibility of the carrier.

Interpreting by analogy such statement, for cases where another shipping document is issued, we can consider that if such document stands for the goods its date and specifications will indicate the starting point of the taking over of goods by the carrier. But in cases where the existing shipping documents have been issued after the "taking over" of goods by the carrier or simply no document has been issued the question remains without clear solution.

S II Evaluation of the "Tackle to tackle" and the Port to Port principles

- Although problems could show up as to the specific starting point of the period of responsibility when not stated in the transport document issued between parties, some improvements have been noted from comparing these two principles as to handling of goods in Port areas, transhipment of goods and through carriage.
P I) Cargo operations in port areas

One weak point of the "Tackle to tackle" principle is that courts have never reached uniformity in its interpretation.

(*) Indeed most of damages or losses of cargo occur while cargoes are loaded - or discharged or handled in the ports' areas and precisely from ship to shore. The New Convention in defining the period of responsibility of the carrier relies on terms such as "taking over" and "delivery" which are not material but legal terms and as such are easier to fix. If the Bill of lading, or the other shipping documents issued, do not state or correspond with the date of "taking over" of goods, the carrier's period of responsibility will start when he will be able to exercise his right of checking the quantity and the quality of goods.

The exercising of that right to check the goods takes place in the port area where he is usually taking over the goods from the shipper or any other person acting on his behalf such as the freight forwarder, or an administrative port authority.

According to Article 23, stating the compulsory character of the Hamburg Rules, any clause derogating directly or indirectly from that designated period is null and void.

"As a result all the operations after taking over are part of the performance of the contract of carriage". (4) In detail cargo care handling loading/discharging, even cargo conveyance from warehouse to ship and vice versa are
under the responsibility of the carrier.

So it is quite clear that the extent of the right of supervision and control of the carrier of goods in ports (of loading and of discharging) will determine his period of responsibility unless when an other date and place are agreed with respect to article 4 of the Hamburg Rules. It is nowadays accepted that when an inland transport is considered as supplementary to a sea transport, it falls within the period of responsibility of the Hamburg Carrier whereas for the Hague/Visby Carrier the question remains with divided opinion. (5)

As to persons acting in the performance of the cargo operations in Ports such as servants, agents and independent contractors of the carrier, the attitude of the Hamburg Rules in deleting the word "stevedores" gives a solution to the old problem of the status of Independent contractors (See article 7(2)). Indeed in the new convention the term "agent" covers the situation where a carrier uses the services of an independent contractor (e.g. stevedores, terminal operators etc.).

Because even if the Independent contractor cannot be considered as a servant, since he is independent in performing his work, he could always be considered as agent of the carrier as he is acting on behalf of the carrier (see article 10).

P II) Trans-shipment of goods and through carriage

Permutations of carriers or groups of contracts in a single operation of carriage of goods are common practices in the shipping transport operations that have always
installed the cargo interests in doubts as to who is the suitable person in case of cargo loss or damage. In reality, carriers often disclaim all liability outside the time when they are actually in charge of goods since no provisions in the Hague/Visby Rules are dealing with these problems. Carriers were taking advantage from that "silence", either passively or actively by inserting exemption or "liberty" clauses in the Bills of Lading usually in case namely of trans-shipment of goods and through carriage of goods.

These two concepts are in terms of definition different one from the other. As said W.Tetley (op cit. p 937) "Trans-shipment is the transfer of goods to another carrier during the voyage because of a peril or some acceptable clause (?)" whereas "through carriage is a carriage by two or more carriers, one after another, agreed upon or acquiesced in by the shipper in advance."

However, a common material element to these two different hypotheses is that the same goods are passing from one carrier to another without any intervention of the shipper in between the two or more legs of their carriage. Furthermore these legs could be performed by combined means of transport e.g. Sea/Rail or Sea/Road or air etc. This latter formula being used with the worldwide development of containerization.

Defining the various types of Bills of Lading issued under a through carriage with respect to the liability/responsibility of the carrier, Carlos Moreno says that the pure through Bill of Lading as well as the combined Bill of Lading are issued with intent to see the carrier bearing the responsibility of the whole carriage of goods.
whereas when an Ocean through Bill of Lading is issued the carrier is responsible only for the part of the carriage he has assumed or performed himself (See lecture given in the first week of May 1990 at WMU on shipping documents).

This latter type of Bill of Lading differentiates from the formers through the fact that it contains the so called "liberty clause" which allows the carrier to transfer the cargo to other carriers for performance of another leg of the single carriage of the same cargo.

Observers of the situations in which the carriage of goods if not sustained by one of the aforesaid named bills of Lading have included a trans-shipment have found out many difficulties when damage or loss of cargo occurs.

And it is not only that cargo interests have to find the suitable carrier when the damage occurred at sea but also they have to determine the law applicable as well as the persons responsible when damage occurs in Ports areas while cargoes are handled or even loaded/discharged because the Hague/Visby Carrier considers himself responsible exclusively for the "Sea carriage".

With the compulsory regime of the Hamburg rules (See article I-IV-X and XXIII combined) a solution is definitely given for the numerous litigations and their consequences which arose or trans-shipments and through carriage by introducing. The new introduced concept of "Actual Carrier" comes to cover any person who, besides the entitled carrier, has performed part of the carriage of goods and cargo interests have the right to sue both carrier and actual carrier together or independently no matter whatever contract or clauses govern the
relationship between them, no matter also if the actual carrier is an "independent contractor" or not (It is already known that the concept of "Independent contractor" which was mainly expressed by the use of the word "stevedores" in the Hague Visby Rule does not exist anymore and the Hamburg Rules treat them as agent of the entitled carrier) — the Hamburg Rules have adopted exactly the same attitude toward cargo operations in port areas by including them in the period of responsibility of the carrier regardless of who actually performs those operations.

So without affecting the need of flexibility that carriers and other shipping operators wish to keep on running for their business, the Hamburg Rules do organize an extended uniformity for the sea carriage and its consequential activities "a priori" and "a posteriori" on the care of cargo.

NOTES


(2) Pyrene Co. V. Scandia Steam Navigation Co. 1954-QBD. Lloyd's p 402.


PART TWO

LIABILITY REGIME IN THE INTERNATIONAL CARRIAGE OF GOODS BY SEA

LEGAL BACKGROUND

One great source of the rules dealing with the international sea carriage of goods consists of the so called "Common Law" and "Continental Law", two bodies of general principles or norms which similarly give three types of liability including:

- the contractual liability and
- the tortuous liability

Although the relationship out of which a carrier’s duties with respect to cargo come about is almost created by contract, the tort concept often comes into play. Indeed the Hague Rules as well as the Hamburg Rules have a scope of application based on the existence of sea carriage but they do also cover tortious based actions against sea carriers. Article 4-b of the Hague Rules and Article 7 of the Hamburg Rules allow the carrier sued on a tort basis to benefit from all defenses available in these international conventions. That means implicitly that tort liability is not excluded from the relationship between shipper and carrier.

However, the application of the tort theory to the international sea carrier is very much controversial especially when the damage or loss of cargo is localized within the period of responsibility of the sea carrier as defined by the international conventions. In fact the
rules seem to give priority to a full contract coverage of the sea carriage operation. More and more, the period of responsibility is defined as a period-contract with much concern to duties performed than the time factor. The legal trend tends to a definite exclusion of the use of the tort based liability against carriers.

Besides the aforesaid point, anyone has noticed that the traditional basis of tort action which is "Negligence" is legally used by the international rules as a mean for suing carriers on a contractual liability basis; so far another basis of liability also differently approached by the Hague/Visby Rules and the Hamburg Rules.
CHAPTER I

LIABILITY BASIS

§ I. The general "Fault liability based principle" ruled by the Hague Rules and the Hamburg Rules

According to the doctrine, fault is a positive idea which tells us the precondition which must exist before liability is imposed. Strict liability is a negative idea which informs us that liability can exist without fault but does not tell on what ? liability is based(1).

In the International Conventions relating to the Carriage of by Sea, the liability is fault based. Indeed The Hague Rules 1924 and the Hamburg Rules 1978 rely respectively on the "actual fault or privity" and the "fault or neglect" of the sea carrier.

P. I The Concept of Fault and its Extent

The legal word fault is mainly divided into three categories:

- negligence
- intention
- recklessness

Recklessness is also referred to as advertent negligence and negligence itself as inadvertent negligence. The intention is referred to as dol. Within the frame of the international conventions relating to the carriage of goods by sea the terms "fault or neglect " and "fault or privity" refers to the concept of in its various aspects.
On the other hand, when these conventions want to deprive the carrier of the right to limit his liability, they qualify his attitude as being done with "intent to cause damage or recklessly and with knowledge that damage will probably result". (see Art. 4(5) of the H.R. and Article 8(1) of the Hamburg Rules.

It seems interesting to study these various aspects of the concept of fault that governs the whole liability regime of the International Law of the carriage of goods by sea.

A) Negligence

Negligence may have two theoretical forms. It can be an advertent negligence or inadvertent negligence. In the case of an advertent negligence, the consequence of the guilty person action is foreseen but not desired. To the contrary, in the case of inadvertent negligence, the person who is guilty has failed both to foresee and to avoid the consequences of his action.

Actually, even when a person has tried but has felt below socially required standards of behaviour and has caused damage, he is legally liable. The concept of negligence is, therefore, more and more dealt with in a practical way. Both the Common Law and the Continental Law define the negligence through concepts such as "the Reasonable Man" or other objective factors.

1) The Reasonable Man

How does a reasonable person have to behave is in fact the reference taken as basis to define the negligence. Fictionally, an objective standard judged by external manifestations of conduct is applied. That standard of
conduct is supposed to be reached by any reasonable man. Such analysis of the concept of negligence, done "in abstracto", permits a more flexible approach to the various factual situations and the changing of ideals, human capacities and abilities that a court has to consider in case of claim based on negligence. As it is said in the Continental Law, a person has to be "normal and diligent".

2) Other factors determining the negligence

The other factors that would base the definition of negligence are simply sustained by a global idea which is, that in principle a person who acts in conformity with a standard practice is not negligent. E.g. in the shipping transportation, the so called "use of a particular trade" can stand for a standard practice.

Within that concept of standard practice four factors are to be considered viz: the degree of probability that damage will be done; the magnitude of the likely harm; the utility of the object to be achieved and the burden in time and trouble of taking precautions against the risk."

(2)

To a certain extent, these factors are found in the formulae of Article 5 of the Hamburg Rules which introduce in the liability system the idea of preventive and curative measures through the foreseeability of events. Its wording (...measures that reasonably have to be taken or should have been taken to avoid ... the damage and its consequence.) reveals that negligence might exist even after the occurrence of the damage.

B) Intent and Recklessness

1) Intentional acts or omissions
An intention consists of willing the result of an act or being aware of an omission and desiring its consequence. Such situation, also called dol, is heavy enough to qualify a "faute lourde". However, it is a situation difficult to prove. That a carrier misstatement in a bill of lading or a deviation, etc. has been done with an intent to cause damage is almost impossible to establish because it is a state of mind.

However, when dealing with the sea carriage on the basis of the Hague Rules, courts have set some reasoning by means of assimilating certain attitudes of carriers to an intent to cause damage, e.g. unjustified deck carriage, over-carriage, unreasonable deviation, etc .... (3) Before courts, intentional act or omission equals to a fundamental breach.

2) Acts or omissions recklessly done

Recklessness is defined to be an advertent negligence. That is to say, the person has foreseen the consequence(s) of his act or omission although he did not desire them. According to the Hague and the Hamburg Rules and, for a carrier to lose the right of liability limitation, his act or omission should be done "... recklessly and with knowledge that damage would probably result ". When these two criteria are joined together, the attitude of the carrier is taken to be a "faute inexcusable". (4) Because of the terminology "probably", one could have though that it would be enough to qualify the carrier's attitude to be a faute inexcusable when a damage could have resulted but did not actually result. However, since in the international carriage there is no liability without actual damage, such though is irrelevant.
C) Privity or knowledge

As stated above, the privity or knowledge is combiney used with recklessness to deny any right of liability limitation to. The determination of whether the sea carrier has established lack of privity or knowledge is a task of inquiry. Privity or knowledge exist where the carrier has actual knowledge, or could have obtained the necessary information by reasonable inquiry or inspection. (5)

This definition of privity or knowledge is so far the one developed in the two conventions. It is actually a test of a reasonable man or a person normal and diligent. The real problem is to determine whether the sea carrier or persons acting on his behalf has acted reasonably under the circumstances of each specific case. But, although such analysis has to be done case by case, a principal reason to proving the existence of privity or knowledge can be found in the failure of the sea carrier to provide proper procedures for the maintenance of equipment, the training of the crew or adequate checks to ensure the implementation of established maintenance and safety procedures.

P II The Fault Based Liability and the Rules of Proof

A) The burden of proof

The rules controlling the proof of the carrier's liability are different from the Hague rules to the Hamburg Rules. The latter rules place upon the carrier the burden of proving his freedom from fault for any loss other than fire loss. The provision of their Article 5 is specified in the "Common Understanding" (another provision of that convention) as being based on a presumed fault or neglect. In the Hague Rules and the Hague/Visby rules the burden
of proof is not systematically laid out. Under these rules the burden of proof shifts to the shipper as soon as the carrier draw himself into an excepted peril of Article 4(2). It means that to the contrary to the Hamburg Rules where the shipper is only required to prove his damage, in the Hague Rules the shipper has not only to furnish that prima facie evidence of his damage, but also to establish actual fault or privity of the sea carrier. So under the Hague rules the shipper will lose his case whenever he does not succeed to show the specific negligence of the carrier when this latter has drawn himself in an exception. The non-obvious burden of proof orientation is due to the existence of the so called excepted perils. Rather than carrying the affirmative proof of one of the excepted perils which do not exist any more the Hamburg carrier is bound to prove non fault attitude in the causation of the loss. On the other hand these rules may also require the shipper to contribute to such proof because beside the proof of his damage he may have to prove that the loss or damage occurred while the goods were in the charge of the carrier. He will have then to prove the time of the incident.

B) Means of proof

The means that anyone who bears the burden of proof has to use if he wants to succeed in showing the fault of the defendant are the same through the Hamburg rules and the Hague rules. Indeed whenever there is a damage or loss of cargo, the one in charge of proving has to identify the cause of the loss or damage and to explain it through the negligent attitude of the defendant. The only difference will be mainly that under the Hague Visby Rules if the claim is made against the carrier, the shipper has to establish the actual fault of the sea-carrier himself and personally because of the Legal effect of the so
called "error of navigation or management" that exonerating him from his servants and agents fault. Normally because of their common fault based liability, both the Hamburg rules and the Hague Visby Rules put the ultimate charge of proving on the carrier except for error in navigation and fire defenses.

P III The fault based liability and the excepted perils.

Although inconsistent with the fault liability on which they are based, the Hague / Hague Visby have enacted seventeen excepted perils exonerating the sea carrier from liability see Art 4 (2) with specially the exception which is carrying the role of a catch all exemption.

The Hamburg Rules convention have deleted all the excepted perils, maintaining only "fire" but putting it under a special regime.

The contrary attitudes of these two conventions with respect to the excepted perils do not however mean that the Hamburg rules deny any value to all of them. Indeed and as it has been stated by the Maritime Law Association of the United State. The only traditional defenses that would effectively be abolished are the error in navigation or management defenses.

All other Hague Rules defenses, such as perils of the sea Act of Good, Act of War, Strikes, Insufficiency of packing etc. would appear still to be available. They are causes over which the carrier may not have control and which therefore would not likely be caused by his negligence". (6)

Therefore, as far as "fire" has been taken into con-
sideration by the Hamburg Rules, the only excepted perils that brought strong opposite opinions is the error in navigation or management. However, it is not worthy reminding to the world shipping community that the removal of the error in navigation and management, represented one side of a compromise between shipper and carrier nations achieved by the working group at the suggestion of Nigeria (7). Indeed the carrier nations agreed to this provision in exchange for the retention of the fire exception.

A) The error in navigation or management of the ship exception

During the nineteenth century, the carriers enjoying a superior bargaining power, forced more and more exceptions clauses into bills of lading and the formal strict liability placed upon them by the Maritime Law became totally out of date. Indeed by 1890 carriers were inserting into bills of lading clauses that were even exonerating them from their negligence. (8) by 1893.

By 1893 the Harter Act came to legalise the assertion that the carrier who provides a seaworthy ship and fulfill the cargo care would not be liable for fault in the management or the navigation of the ship.

Actually that is this Harter Act exemption of liability that has been afterward taken by the Hague rules in 1924 through its article 4 (2) in these words: Act, neglect or default of the master, mariner, pilot or the servants of the the carrier in the navigation or the management of the ship.

This exception has been taken away by the Hamburg
Rules through Article 5 (1). Since the shipowning nations, although having agreed on a compromise relating to its abolishment, still raise an opposite opinion tending to have such exception back into the future law of the sea carriage. Shipowning nations mostly have sticked to the aspect "error in navigation" called elsewhere "nautical fault". But as repeatedly recognized by many observers, it has always been difficult to draw a separation-line between what constitutes seaworthiness, care of cargo and what is a fault in the management or the navigation of the vessel because the Hague Rules themselves failed to do so.

(9) In reality the Hague Rules and all their subsequent amendments did not succeed to set clear cuts with respect to that exception simply because such exception is inconsistent with the fault based liability principle that supports the convention. The Hamburg Rules are also based on the same fault liability principle and furthermore, the new convention has formulated a unitary system in which the global duty of the sea carrier is consisting of reasonable measures to be taken continuously during the performance of the whole contract of carriage.

A fortiori, the "error in navigation or management" could not be accomodated with the new convention principles.

B) Fire

Fire exception is also one of those excepted perils borne in the nineteenth century and which has been reconducted by the Hague Rules 1924 in its Article 4 (2) clause b: "fire, unless caused by the actual fault or privity of the carrier". The Hamburg Rules have also been dealing with "fire" in their article 5 (4) but in a more detailed way. In the new convention the rule of presumed fault or neglect does not apply to a damage caused by fire.
So there is at this level a common point between the Hague Rules and the Hamburg Rules. The claimant will have to prove the sea carrier's fault under Hague Rules and or the sea carrier or servants and agents fault under the Hamburg Rules. Fire is in fact continuing to have a status of exception under the Hamburg Rules; although it is, like the "error in navigation or management", inconsistent with the fault liability principle.

But on the other hand, vicarious liability may arise both from the actual causation of the fire and from the inadequacy of the measures used to extinguish it. It is also important to note that the new convention allows the claimants to choose between:

- either proving the fault of the carrier and/or his servants and agents as proximate cause of the fire
- or, when there is no fault at this stage, proving the fault in the post-fire fighting stage.

So in the new convention "fire" is a double-sized-proof option for the claimant (shipper).

However, the proof of a fault of the sea carrier in case of fire requires a priori from the claimant to clearly identify the proximate causes and the circumstances in which it has happened and its effect on the cargo. That is to say that a claimant would have to fairly know the ship's technology, the rules to operate it as well as (or eventually) the fire fighting procedures. (10)

Such a specific knowledge would be quite a lot to require from an ordinary shipper. Therefore, it has been stipulated by the Hamburg Rules Article 5-4(b) that at the instance of either claimant or carrier, a survey can be carried out by marine surveyors on "the cause and circumstances of" fire "affecting the goods" with copies of the
ultimate reports to be given to the parties. The rules, however, are silent concerning the source of payment for this survey. This silence creates various potencies which include a possibility for carriers to burden cargo interests with the cost of surveys required by them or to treat such costs as added freight to be paid before release of surviving cargo.

P IV The Fault Based Liability and the Vicarious Liability Principle

In an operation of sea carriage mostly performed nowadays by "common carriers" they are many people acting under the umbrella of the contracting carrier based ashore. By application of the latine principle of law named "Respondeat Superior" when an individual is a servant or an agent of the sea carrier, the latter is vicariously responsible for his acts.

But within the Hague/Hague Visby Rules the exception to carrier liability for act neglect or default in navigation or management of the ship excuses the negligence of the master mariner or pilots employed by the carrier in the operation of the ship herself. So if the carrier can distinguish his general duty of care to cargo, the aforesaid exception will exonerate him from any liability. As a result the vicarious liability principle is contravened by this error in navigation or management exception of the Hague Visby Rules. Therefore, the application of that convention will deprive the "Respondeat superior" principle of its substance and as a consequence common carriers based on shore will escape from liability whenever they succeed to prove the own fault of their servants and agents.

Besides its legal questionability, that exoneration of
sea carriers from liability on the basis of the exception of "error in navigation or management of the vessel" seems to be unfair because the sea carriers themselves are supposed to recruit their sea personnel on the basis of appropriate standard and to control their selection and training.

The vicarious liability principle which tends to disappear in the Hague and Hague Rules has however been reaffirm specifically by the Hamburg Rules convention in its Article 5: (... unless the carrier his servants and or agents...) And, in conformity with that principle of liability, the seventeen exceptions have been abrogated.

S II) Fault Based Liability Principle and specific types of cargo

With respect to their nature, some cargoes are drawing a very high risk exposure to harm viz. "Dangerous Goods". Other goods are difficult to carry because of their inherent risks e.g. the "Live Animals".

On the other hand, according to the place of the ship where they have been loaded for carriage purposes, cargoes are deemed to be exposed to a higher risk of being damaged e.g. "Deck Cargo".

When referring to these types of cargo, the International Conventions relating to Sea Carriage agree on applying their common principle of fault liability in a way different from the usual one. However, between themselves, the Hague Rules and the Hamburg Rules do have different views as to the scope of application, the burden of proof and other punctual questions.

Most of the reasons that explain the changes made by
the new convention have been simply motivated by the real technology progress which took place from 1924 to 1978 and also by the increase of safety considerations in the sea transport.

PI) Dangerous Goods

In the fifties, the United Nations Committee of Experts has drawn Recommendations giving an achieved classification of the identified Dangerous Goods in nine classes.

Following those Recommendations, the International Maritime Consultative Organisation (nowadays called the International Maritime Organisation IMO) has 1965 established the International Maritime Dangerous Goods Code (IMDG CODE) for the same purposes. By the adoption of the 1974 International Convention on the Safety of Life at Sea (SOLAS 74), a binding effect has been given to the classification of Dangerous Goods and the corresponding stowage requirements on board ships. (see Chapter VII)

So a wide knowledge of the so called Dangerous Goods were made available to carriers before the adoption of the Hamburg Rules in 1978. That process of regulating this type of goods continued through the IMO which has also made Recommendations on the Safe Transport, Handling and Storage of Dangerous Goods in Port Areas in December 1980.

That is why the Hamburg rules (articles 13-15 (1a)) have been more specific than the Hague rules (article IV (6)) by creating a special regime for the dangerous goods.

Indeed Hamburg rules re-state the principles of the
Hague rules in as the duty of the shipper to inform the carrier of the "Dangerous character" of goods to be carried but also the former convention require the shipper to inform the carrier on "the precautions to be taken". Also the Hamburg rules after stating clearly that the shipper has to mark, label the Dangerous goods require finally the Bill of Lading to "include particulars as to nature, marks, weight, packages, quantity of the dangerous goods to be carried.

A more favourable regime is given to the carrier who can exclude his liability if ever the shipper does not fulfill any of his obligations which so far have been increased.

P II. LIVE ANIMAL CARGOES

The same idea of getting closer to the specific characteristics of the cargo to be carried led the Hamburg rules' makers to elaborate a regime for live animals in order to avoid carriers to impose their own terms to cargo-owners as it is (in fact) under the Hague/Visby rules where such type of cargo not being covered (See article I (c)) was dealt with by means of clauses if not was definitely out of the liability of the sea carry.

The Hamburg rules deals with the live animals and organize (see article V (5)) the way their carriage have to be performed, but with a real protection of the sea carrier.

Indeed when loss damage or delay in the delivery of the live animals is caused by the "special and inherent risks" of such cargoes, the sea carrier is not liable. There is liability of the sea carrier only if it is proved that he has been in fault or neglect. In situations
where he (sea carrier) has previously given the proof to have followed the shipper’s instructions its is presumed that damage, loss, delivery suffered are caused by the inherent special risks.

It is important to note that the fault or neglect of the sea carrier in this field is not presumed and ought to be given by the shipper.

P III. DECK CARGOES

Cargoes involved are those carried on the "weather deck" and which as such are subject to exposure

A) Different Approaches

The Hague/Visby Rules exclude Deck Cargo from their coverage. (see Article I-c)

So when cargoes are carried on deck with the knowledge of the shipper who has agreed on such type of carriage through the issued Bill of Lading the liability question is solved open to negotiation.

Consequently the sea carrier is free to disclaim any liability in case of loss or damage suffered except contrary agreement.

But cargo carried on deck on an agreed basis between shipper and carrier is to be distinguished from cargoes carried on deck without agreement between shipper and carrier. In the latter case the Hague/Visby rules apply and the carrier in case of damage or loss bears a full liability without enjoying the privilege of the right to limit. Its attitude is deemed to be a "Deviation" or a "fundamental breach. (10)

Discussing the carriage on deck, the Hamburg Rules distinguish situations where such carriage has been agreed
or allowed by statutory obligations or by the usage of a particular trade, from situations where such carriage has been performed on the basis of any of the aforesaid criteria and from situations where such carriage has been done against an "express agreement to carry below deck".

In the first situation
(i) the agreement of the shipper (criteria already known in the Hague/Visby Rules) or
(ii) the usage of a particular trade (criteria not precisely defined but willing certainly to designate old practices and technological abilities to do so) and
(iii) the statutory obligations (technical requirements usually based on minimum standards of safety) allow the sea carrier to carry on deck the designated cargo.

Article IX (1) of the Hamburg rules extends the right of the sea carrier to carry goods on deck in two new cases where there is no agreement of the shipper.

But whereas the compliance with the statutory obligations on safety are of common interest to goods and ship and its crew, the criteria of the "usage of particular trade" seems to rely on a commercial benefit for the sea carrier exclusively. Such criteria which so far ought to be differentiated from the criteria of "particular goods" (used in article VI of the Hague Rules as to allow a specific agreement between shipper and carrier) gives to the carrier the maximum ability to exploit the carrying capacity of his ship for a maximum profit.

Such ability depends on the type of ship operated, the type of packing of cargo (containers) the resistance of goods to the weather and other elements.
Whether, besides the case of a carriage on deck on a basis of an agreement, the carriage on deck on a basis of compliance with statutory obligations or usage of a particular trade ought to be stated in the Bill of Lading is not legally required by article XV (m) of the Hamburg Rules through its wording "... if applicable ..." that is only connected with agreed deck carriage cases.

*In the second situation: that is to say in cases where the deck carriage is neither agreed by the shipper (or even if agreed has not been stated in the Bill of Lading for purposes of proof) nor based on statutory requirements or on the usage of a particular trade, the deck carriage is not allowed and therefore becomes a basis of liability (article IX (3) Hamburg Rules). If in such situation damage, loss or delay in delivery of cargo occurs the sea carrier. He might even lose the right to limit his liability depending on whether or not there has been "intent to create such loss" or if such carriage on deck has "recklessly" been done with "knowledge" of a probable resulting loss.

*In the third situation: that is to say in cases where an express agreement not to carry on deck has been violated by the sea carrier, he will be deemed to be under the circumstance of article 8 Hamburg rules: precisely he will lose the right to limit his liability. There is an absolute or conclusive presumption of bad intent against the carrier.

B) The New Reasoning as to Deck Cargo

Looking at the terminology used in the new convention, observers have had to discuss the difference between "agreement" and "express agreement" saying that the word
So, although a compulsory liability regime is created for the carriage on deck, carriers are given wider opportunities to use that possibility without fearing to be in fault.

In comparison with the Hague/Visby system where the sea carrier is always liable (with definite loss of right to limit liability), limit when without the shipper’s agreement he carries goods on deck) the Hamburg rules punish the sea carrier by such liability qualification only where he has expressly agreed with the shipper not carry goods on deck.

As a matter of fact the provisions of the Hamburg Rules on deck carriage are globally more profitable to the sea carrier than those of the Hague/Visby Rules because they have accepted and extended the right of the carrier to carry on deck and they also have required from the shipper to expressly and literally show his will to have his cargo carried under deck as a sine qua non condition of the systematic loss of the right of limitation.

The reasoning of the Hamburg Rules makers has been very much influenced by the avenement of the Containerisation from the 1950-60’s.

C) Remarks on the Container Carriage Influence on Deck Cargo Regulations

The container revolution is one of the main reason that has led to the new provisions on Deck Cargo. Indeed the efficiency of that means of transport with respect to cargo handling and transportation ended in a continuing growth of containerized trade volume and accompanying changes in the structure or patterns of the sea-trade logistics. This new orientation had to be taken into consideration by the legislation on shipping transport.
The present spirit of the Hamburg Rules as to deck cargo has been designed by courts' reaction.

One of the most famous decisions is the (Encyclopaedia Britannica Inc. V) "Hong Kong Producer" 1969. (12)

In that court case, containerized goods (eight containers of cartons of bound books) stowed on deck were damaged. The courts rejected the claims by deciding that: "There were no breach of contract by defendant because bill of lading provided that carrier should ship on deck unless notified to contrary by shipper or its agent."

Applying the U.S. COGSA 1936 (equivalent of the Hague Rules), the American court that has taken the case, by validating implicitly such clause, has set a step towards the new Deck Cargo Rules.

NOTES AND REFERENCES


(2) Idem


(4) Idem


(9) See in Law of tug tow and pilotage, p 59, the subject "Error in Navigation and Management of the Vessel versus fault in the care, custody and control of the cargo.


CHAPTER II

CARGO DAMAGES

Under the international rules of carriage of goods by sea, damages to cargo are recoverable by the shipper unless he did not declare the real nature and value of goods with an insertion of it into the Bill of Lading (see article 4.5 of the Hague Rules as amended by the Visby protocol) or if he has committed a "fault or neglect" (see as implied by article 5.7 of the Hamburg Rules). However, the principle of recoverability of damages to cargo will depend on its character and extent as well as on some rules of procedure the shipper will have to comply with in relation to the so called "notice of loss".

Damages are, as to their nature, governed by two latine a assertions namely the "damnum emergens" and the "lucrum cessans". These concepts means respectively the actual proved loss and the gain of which the claimant has been deprived (1). Interpreting these concept the common law as well as the civil law have set rules defining the various original characters of damages or losses specially when they arise out of the performance of a contract. Examples are found in common law through the famous rules of Hadley V. Baxendale that establish three types of loss viz expectation loss reliance loss. Restitution - example are also found in civil law through the French civil code article 1150 that combines damages and interests for the question of recovery (2). Although in case of need of interpretation of their provisions the Hague rules and the Hamburg Rules would rely on these original rules cited above, these two conventions approach the question of damages in relation to their
manifestations with respect to cargo and as follows:

S I. Loss or non delivery and damaged cargo

PII Presentation

If the goods are not delivered because the carrier has lost them or have delivered them to a wrong person or if goods which are supposed to be delivered have lost their merchantable character because of the misconduct of the sea carrier. The shipper is fully entitled to claim for loss of cargo on the basis of the Hague rules or the "Hamburg rules". In such cases we are faced with the so called physical damage the physical damage can be either a total or partial loss of goods or damaged goods that is to say goods having lost their original physical appearance and consequently their value. In practice the terms cargo loss and cargo damage tend to have the same meaning. Except in case where damaged goods can be repaired and brought back to their original characters by diligence of the sea carrier, cargo loss and cargo damage are both compensated for in the same manner.

PII Compensation Rules

The compensation in case of liability will be done in monetary terms and on the basis of the commodity exchange question or the current market price or the value of the goods at the time and place where they should have been delivered. Beside the material damage aspect to property, appears an additional element of assessment in the same point which is the so called "economic loss" or loss of profit. From the famous court case Hadley .V. Baxendale a
distinction has been drawn between the "normal losses" (e.g. material damage to property) which were recoverable and the abnormal losses (e.g. loss of profit) that are recoverable only when the defendant had knowledge of the special circumstances giving rise to the possibility of such loss at the time the contract was made (3). This distinction is however not expressed in the existing international Law on carriage by sea as to damage recovery extent. As to loss or damage to cargo, the only new element that has been put forward is stipulated in article 5.3 of the Hamburg Rules. It relates to the definition of loss of cargoes on the basis of the lack of delivery of cargoes sixty days after they should have been delivered.

Although quite old (1854) the common law case Hadley v. Baxendale which was related to economic losses caused by delay in transporation of "a broken crankshaft for mill owners" has raised the global problem of loss due to delay in delivery.

S II) The damage or loss due to delay in Delivery.

PI-The Concept of Delay in Delivery

The non physical damage or the implied loss of cargo when not delivered within a certain period of time have not been clearly dealt with by the Hague/Visby rules as a distinct breach of sea carriage contract, even though by means of interpretation it would have been logic enough to consider such prejudice as being either a damage or a loss (only words used by the Hague/Visby rules to define a ground of claim) consecutive to a physical deviation - a lack of due dispatch etc... from the sea carrier's side.

The delay in delivery of cargo can generate either
alternatively or cumulatively:
- loss by being deprived of the use of the goods or their value.
- loss by their deterioration or wasting owing to the delay
- loss by a fall in the market value of the goods at their destination.
- loss of profit and habilities incurred upon a sale or contract for the use of the goods which the delay has frustrated.
- loss being prevented from using other property through want of the delayed goods.

(see carvey—carriage of goods by sea 30 edition Vol 2 p2182)

PII. The Hamburg Rules approach

The real problem to solve has not been simply to introduce the word "delay" to give a meaning or a title to the aforesaid category of damage or loss but to set up criteria that would permit to qualify it reasonably and consequently to define accordingly a liability regime related to the time factor in the delivery of goods. The time factor when expressly agreed in a sea carriage contract does not bring "difficulty". Its violation is to be defined as a clear normal breach of contract. But when no time has been agreed as to the delivery of the goods it became quite unclear how to evaluate or to define the period over which the shipper is reasonably entitled to claim compensation for delay.

The analysis of the Hague/Visby rules have often though that "Delay is not actionable in the sense of a breach of a duty, to prosecute a voyage with reasonable
dispatch unless the slowest anticipated voyage time is exceeded negligently" (quoted from John A. Maher Jr and Joan D. Maheer article (4). Such attitude consisting in comparing the given voyage with a "normal" voyage in the same route as to "time spent" is a solution also used by the Hamburg rules (article V (2), (3) to regulate the concept of "reasonable voyage time".

But this convention adds another criterion named "the circumstance of the case". So far the Hamburg rules makers when no specific time is agreed there is delay in delivery if: 1) the time spent before any delivery is longer than a normal time any carrier could have spent for the same voyage and 2) has not been allowed by the specific circumstances the sea carrier was faced with in the given voyage. These respective criteria (called in "Continental Law" "appreciation in abstracto" and "appreciation in concreto") have always to be combined. What might be questionable in the future is the content of the words "circumstances of the case" - the standard criteria of reasonableness does not play a role in the definition of such "circumstances" which so far are supposed to varying in each case.

However since priority is given to the reasonable voyage time the shipper can always rely on the estimated departure time and/or the estimated arrival time to assess what time his goods should have been delivered to him with a fair accuracy.

Actually there should not be a "great deal" as to such time since the shipper cannot make any claim for cargo delayed before the expiry of sixty days after (See Article V (3) Hambury Rules).
Indeed sea carriers are granted with an additional legal protection. Even though delay in delivery might let them worry about bearing an added type of claim (such idea not being exactly or absolutely true because delay has already been in one way or another sanctioned even if named otherwise) they have sixty days added to the normal time they should have delivered the cargo. The shipper cannot sue for loss of cargo before the expiry of such period and without previously giving a notice during that specific period: See Articles V (3) and XIX (5).

Furthermore the sea carrier enjoys in case of loss implied from delay in delivery a specific mode of calculation as to the amount of limitation — article VI — para I (b).

SIII Impact of damages appearance on the rules of procedure.

Shipper’s claims for damage, loss or delayed delivery of cargo have to comply with some procedural rules out of which they cannot enjoy any suit or action before courts. The existing international rules on transportation by sea have dealt with such questions but in different ways. Hague rules article III (6) and Hamburg rules articles 19 and 20 give the related time and other formal requirements.

The so called "notice of loss" is the document by which an official complaint on the goods status is notified by the cargo interests to the sea carrier.

The effect of the notice of loss, a document normally written, is to deny or erase the prima facie evidence that goods have been safely carried and discharged or delivery to cargo interests at their destination or at the
conditions stated in the bill or loading. The result of
the issuance of such document by the shipper will be to
keep enjoying the right to sue the carrier for cargo
damage. However the benefit of such right when notice is
given is stated in terms of time. Indeed, even though no
specific formula is legally required for the issuance of
the notice of loss, such document has to be given in a
specific number of days according to the degree of
appearance of damage affecting the goods.

A) Apparent Damage

When goods have suffered from an apparent damage or
loss the notice of loss is to be given according to
article III (6) para 1 or Hague rules before or at the
time of the removal of the goods by the person entitled to
do so and according to Hamburg rule Article 19 para 1 not
later than the working day after the day the goods are
handed to the entitled person (usually the consignee).

B) Non apparent Damage

In that case, notice is to be given not later than
three days after regular removal of goods (Hague rule III
(6) para 1, and according to Hamburg rules article 19 para
2 within fifteen )15) consecutive days after regular
delivery. The attitude of the Hamburg Rules tends to solve
matters arising from containerized goods which damages are
usually found quite a time after delivery.

C) Damage due to delay in delivery

Such case is regulated only by Hamburg rules in article
19 para 5 which provide that notice is to be given within
sixty (60) days after goods were regularly delivered.
NOTES AND REFERENCES

(1) and (2) Contract Law Today (Anglo-French Comparisons) edited by Donald Harris and Deniss Tallon, p 274-275.


CHAPTER III

THE RIGHT OF THE SEA CARRIER TO LIMIT ITS LIABILITY AND ITS CHARACTERISTICS

S I. The Benefit of the Limitation of Liability

Limitations of liability are dated from the sixteenth century statues in Europe. Originally they were designed to encourage investment in shipping. However, they became mandatory at an international level by the adoption of the Hague Rules of 1924. One of the main reasons supporting survival of the right of limitations of liability has been to protect sea carriers against unexpected high cargo claims which were somehow deemed to be excessive. Therefore, regardless of the type of action (contractual or tortuous) initiated against them by sea carriers they are given the right to limit their liability or precisely to limit the amount of "compensation damage" under certain conditions.

Such right which is so far extended to their servants and agents has progressively been improved as to its financial aspects according to economic world trends. Similarities as well as differences are found in the manner the international conventions on sea transportation are dealing with that subject. Both physical and economical damages are covered by such right of which the carrier however could be deprived totally a priori or a posteriori i.e, in case of higher declared value goods or unreasonable fault.
It is known from article IV (5) of the Hague and the Hague/Visby Rules that when the shipper has declared the actual value of the goods with an insertion of that declaration in the Bill of Lading (or the document of transport covering the goods), the carrier has no right to limit his liability in case of damage.

The Hamburg Rules do not express any opinion on that question of declared value goods; perhaps it would be difficult to accommodate such exclusion of the right to limit liability with, for example, the case of "delay in delivery of goods compensation scheme", or simply it was the intent of these rules to allow the use of "clauses" which will limit the carrier's liability to an agreed value - or even if it was a "tacit acceptation" of the Hague/Visby Rules related attitude.

Seemingly the none systematic appearance of such questions in the body of this new convention reveals that the Hamburg rules makers had not been preoccupied by the Hypothesis of "Compensation matters" for damage affecting High declared value goods. As a consequence of the silence of this new convention, carriers and shippers will deal with such questions on an agreed basis unless otherwise provided by an applicable national law.

Implicitly, the aforesaid assumption could be based on an interpretation "a fortiori" of Article VI (4) of the Hamburg rules. Indeed the possibility to increase limits of liability means also the possibility for the carrier not to limit at all his liability if he is paid accordingly, that is to say "paid ad valorem rate". But in
case where under a sea contract of carriage the sea carrier properly remunerated agrees on a full liability such agreement has to be inserted in the Bill of lading, see Article XV (0). Indeed Hamburg rules makers have implicitly adopted the solution given by the Hague/Hague/Visby rules Articles IV (5). It means on the other hand that problems arising from the application of Article IV (5) of the Hague/Hague/Visby Rules will survive over the Hamburg rules, e.g. the burden on the sea carriers to prove that he has given a "fair opportunity to the shipper to declare higher value of his goods". Since there is no provision in the Hague/Hague/Visby rules and in the Hamburg rules that requires from the carrier to notify the shipper the right to declare higher value, it becomes quite difficult to fix or identify those elements which might be showing how such "fair opportunity ... ought to be given. As a consequence, courts are very much hesitant on that point. Indeed, whereas before some courts "where the face of the bill of lading contains a space designated for declaring high value the carrier’s prima facie burden will be met if the bill of lading incorporates the Hague rules or COGSA" before other courts "the opportunity to declare higher value must be stated in the bill of lading".

In other various courts views, the sea carrier’s publication of a tariff giving a choice of valuations is found to be enough to prove that "fair opportunity ..." has been given to the shipper.

But at the same time, there have been cases where shippers have claimed a lack of "fair opportunity" because the tariffication given by the sea carrier is too high and costly. Such a case might be sharper in countries where no
regulations as to tariffications exist and where the given case is far out of liner shipping and/or conferences as it is the case usually with private carriers.

Analyzing the question through the American court decisions Jerome C. Scowcroft shows the lack of uniformity in the solutions given in conflicts arising from the so called "fair opportunity to declare Higher value". (2)

However, studies made on the application of the "fair opportunity" principle under COGSA (equivalent of the Hague rules) reveal that such principle which basically is a Judicial encuistration" (and not a legal requirement) tends to disappear. (3)

In France the trend as noted by Rodiere in his book "Droit maritime francais" at p. 368 is that shippers prefer to insure their goods rather than to proceed to a declaration of higher value. In that country the "Fair opportunity to declare higher value" does not exist although it is not exclude either.

PII Inexcusable Fault or Willful Misconduct

Whereas in the aforesaid hypothesis discussed (A) there is exclusion of the right of the sea carrier to limit his liability, here, the problem is to study the case where the sea carrier is granted with such right but has lost it because of faulty behaviour "a posteriori".

Indeed there is a common attitude of the Hague/Visby rules article IV (5E) and the Hamburg rules Article VIII (I) expressed in these words: there is no limit of liability when "damage resulted from act or omission of
the carrier done with intent to cause damage or recklessly and with knowledge that damage will probably result. The problem therefore is to define the content of such clause according to each case brought before court, that is to say, to know when does a sea carrier willfully damages goods or when he has acted with "disregard to their loss. The loss of the right to limit liability requires a "heavy" irregular attitude of the sea carrier who either should have acted in a manner which "indicates a decision to run the risk or a mental attitude of indifference to its existence" or "could have and should have obtained the necessary information by reasonable inquiry or inspection".

These concepts have been discussed under the heading "concept of fault".

S II. The Elements of the Right to Limit Liability

The right of limitation is composed of two elements:

- The legal amount as basis of calculation of the maximum liability.

- The quantitative unit of the goods as multiplier of the basic amount for the establishment of the maximum liability fund to be paid to the claimant.

P I The Amount Basis

A) Monetary and Gold Developments

When entitled to limit its liability the carrier has to refer, for the calculation of its maximum liability to
the following amounts.

a) In accordance with the Hague rules Article 4(5) the amount of limitation is fixed to 100 pounds sterling per package or unit. Article 9 of that convention provides that the monetary units are in this convention "to be taken to be gold value. However the same article allows countries which are not using the sterling currency to translate the previous amount into their own national currency, e.g. in dollars, by that time it was amounting for five hundred U.S. dollars.

b) According to the Visby rules 1968, the amount of limitation is fixed to 10,000 francs Poincare per package or unit or 30 francs Poincare per kilo of gross weight of goods lost or damaged, whichever is the higher. That was in 1971 equivalent to 275 pounds per package and 0.842 pound per kilo. The franc Poincare is a unit of account consisting of 65.6 milligrams of gold at a standard fineness of 0.00009.

c) The Brussels protocol of 1979 fixes the amount basis into different ways for countries which are members of the International Monetary Fund (I.M.F.) -Article 4(5.a.d.) fixes the amount of limitation to 666.67 special drawing rights (S.D.R.) per package or unit or 2 S.D.R. per kilogram of gross weight, whichever is the higher. For countries not members of the IMF the same provision fixes the amount of limitation to 10,000 monetary units per package or unit or 30 monetary units per kilogram of gross weight of goods lost or damaged.

For the purpose of clarification, the SDR mentioned above is a unit of account of the IMF. Its value
fluctuates. The SDR value published daily is based on the weighted average of the values of a basket of key currencies such as Yen, Deutsche Mark, US Dollars, etc.

The reference to SDR is due to the fact that in 1971 gold itself has lost its original value as well as its monetary functions, even before the entry into force of the Visby Rules in 1977.

d) According to the Hamburg rules adopted in 1978, the amount of limitation basis has been set up to 835 units of account per package (equals 12,500 monetary units) or other shipping unit or 2.5 units of account 37.5 monetary units per kilogram, whichever is the higher.

So far in the same Article 6, the Hamburg Rule has introduced a covering damage due to delay in delivery of cargos, i.e., to two and a half times the freight payable but not exceeding the total freight payable under the contract of carriage of goods by sea. See also article 26.

So, from 1924 to 1979 and though the rules were adopted internationally, the amount of limitations basis has changed in nature (from gold pound to SDR and to unit of account) as well as in value and level (from 100 gold pound to 10,000 francs Poincare. 666,67 SDRs; 835 units of account, etc.

Most of these changes and developments have been motivated by the lack of uniformity in the application or interpretation of these financial provisions by countries. But the world inflation has also contributed to them to a great extent.
B) Inflation’s Effect on the Amount of Limitation Basis

By 1924, the real value of 100 pound was substantial and motivating for shippers who considered such amount of limitation as a gain for them in the negotiations of the Hague Rules. But by the 1970’s the limit of liability expressed in real value was less than than 1/10 of what it originally was. Today, the Visby rules limit is also less than half of its real 1968 value.

That is due to the combined effect of the amounts being fixed in gold Poincare francs and the prevailing policy of maintaining the official gold price in US Dollars in spite of the substantial world inflation. When in the 1970’s the gold franc was ultimately substituted by the Special Drawing Rights (SDR) as the basis for the international monetary system, it was time for another protocol (date December, 18, 1979) to fix the Visby limits in SDR’s. But that was merely a technical operation based on the ratio 15:1. Thus, the Visby limits became 667 SDR per package or two SDR per kilo of the goods lost or damaged, whichever is the higher. (5)

Another fact is that the value of the SDR itself has declined. Indeed, according to a study made by UNCTAD, the International Monetary Fund deflator’s based on the relative value of the value of the currencies making up the SDR basket has gone from 1 in 1979 to 1.4936 in 1987. (6)

As a consequence of the 1979 protocol’s SDR 667 were at the end of 1987 only worth SDR 447 that is to say 67% of its original value. The same UNCTAD studies revealed also that the Hamburg rules limits of liability represented
only 62% of the real value in 1987.

However, when comparing the Hamburg rules with the previous rules, it is clear that the Hague Rules suffer from the gold problem, and the Visby protocol which pretended to solve that gold has used the Franc Poincare, a unit of account that is now obsolete. As to the protocol of 1979 amending the Hague/Visby rules the limits amount (666.67 per package) is still low in comparison with the Hamburg rule limits (835 SDR per package) and the Comite Maritime International did not consider any possibility of increasing it at its last yearly meeting in Paris in 1990. (7) They have been satisfied enough with the problem of the conversion of the Hague/Visby rules into national currencies has been solved by the 1979 protocol.

The Hamburg rules, although higher in terms of limits of liability amount, provide in Article 32 a special limit adjusting procedures that would probably lessen the effect of the world inflation on the real value of their amount of limitation for the future. And fairly enough such procedure has to be operated on the basis of agreed attitudes from signatory countries.

The inflation effect is not the only element that threaten the limits of liability because and specially for the Hague/Visby rules an improper interpretation of the concepts package and or package and unit is also harmful.

In reality with the introduction of container in the 1950-60's, the substance of a limit per package or unit is reduced in direct proportion to any increase in terms of goods of the unit itself.
A) The "Per package or unit" concept of the Hague Rules

The Hague Rules (1924) Article IV(5) fix the amount of liability limitations to 100 gold pounds sterling per package or unit. However, that convention did not define the concepts of "package or limit". The implementation of that rule in signatory countries led therefore to different redefinitions at national levels. Indeed, according to comparisons made by E. Selvig as to national regulations of some developed countries, it appears that the work package have had a slightly different meaning in the Scandinavian regulations whereas in the Italian Code of Navigation (Article 423) it has been simply deleted.

On the other hand the COGSA Rule 1936 of the United States have assumed another expression of the "per package or unit" concept of the Hague rules. Article 4(5) of the US COGSA Rules says: "Package ... or in case of goods not shipped in packages, per customary freight unit ()

1.) What is a package

The real problem in the definition of the word package arose with the advent of containers as article of transport and the inflation that has reduced the value of the 100 gold pound sterling. Normally, "a package is a wrapper, case, bag, envelope or platform, etc... in which or on which cargo has been placed for carriage. (8) Whatever named in other countries (Colis in France, Packung in Germany, Kolli in Scandinavia), the ordinary meaning of the word package, from the Hague Rules, includes goods
that are packed and also goods that are in wrapping or containers without actually being packages. In Article IV (5) the term package is of little interest of unit means shipping unit because a package is necessarily a shipping unit. (9)

But so far as we consider the judicial constructions of the term to be definitions, the term package has suffered from a lack of uniformity in its definitions in connection with large items shipped as single pieces and with outer and inner realities of containerized goods.

Difficulties have also stricken the case of goods that are actually only partially packaged.

*) Courts criteria of a package: like the Hague rules, the 1936 United Sates COGSA did not define the term package. However, US courts are generally in agreement that items which are fully created or boxed will qualify as package. (10) — and items, which are free standing with no packaging or appurtenances having been attached to prevent damage as facilitate transportation, will not qualify as package. So, the package is not necessarily meaning goods completely covered. But, although the European courts agree on such criterion, they do not rely on the same basis of reasoning as the Americans. Indeed and with respect to goods not packed, European courts will mainly rely on the intention of the parties and the elements of individualization inserted into the bill of lading (11) whereas American courts will base their qualifications on the surrounding logistics that accompany the good itself, e.g. use of skids (12) None of these criteria has drawn uniformity when pallets or containers are used for transportation.
**) Containers and pallets and the "Per package limitation"

The problem raised by containers and pallets is whether one should consider the container or the pallet as packages themselves or should each one of the units of goods charged in (or on) be considered distinctly as packages?

The 100 pounds sterling limitation of the Hague Rules would be of low value if today it has to be applied for a container.

To compensate for the weakness of Article 4(5) of the Hague Rules, some developments have been made on the basis of article 3(3) of that convention saying that shipper may reach an efficient application of the 100 pounds limitation per package simply by listing packages on to the face of the bill of lading.

According to that idea, the shipper could specify the units of goods in the container or on the pallet.

Such theories do not, however, deny that the carrier can disagree with the declaration of the shipper. So they do require also another condition which is the common agreement of parties or otherwise their common intention.

But even if the carrier knows about the value of the goods from information, by the shipper, he is nevertheless entitled to limit his liability. It is not enough, that he understand that on the basis of the information obtained, the goods greatly exceed the amount of limitations.

The declaration of higher value goods normally
followed by a payment of a freight ad valorem is not to be mixed with the ordinary listing of goods that a shipper could or usually does by using for example the "one container said to contain" clause.

Indeed one container said to contain 100 typewriters does not mean that it really does (13)

The Hague Rules does not cover their "per package limitation" the so called containerized and pelletized goods because, these forms of article of transports were not even ideally concerned in 1924. Therefore the Hague Rules needed to be amended accordingly.

2.) What is a Unit

The wording "per package or unit" does bring also a need to define the concept of unit.

Does unit mean unit of goods that is to shipping unit or does it mean the weight or the volume unit by which the freight is calculated that is to say freight unit. That is the question to solve when goods are shipped in distinct unpacked or uncovered units.

The US COGSA refers expressly to the freight unit provided in its article 4(5) "... or per customary freight unit". In Europe the tendency is to define the term "Unit" to be a shipping unit. (14)

The word "unit" has been mainly established from covering goods shipped in bulk so that the liability limitation of the Hague Rules could apply to all types of
cargoes. However, the bulk shipments still raise the question of whether the calculation of the limit of liability amount has to be based on the weight or volume unit used in calculating the freight or on the weight or volume unit in which goods are described in the Bill of Lading?

It would be logic to apply the second alternative as the Hague countries refer to "shipping units" in their application or interpretation of the concept "per unit".

B) The Visby Amendment on the "per package or unit" concept

The 1968 Visby protocol in Article 2 amending Article 4(5) of the Hague Rules has added a provision dealing with goods shipped in containers, pallets or a similar article of transport. The Rule c of Article 2 states:

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

Therefore, once the real figure of the units of goods into the container or on the pallet is listed on the bill of lading, e.g. list of 54 cartons of televisions, then that figure is the operative figure for purposes of limitation that is to say the multiplier will be 54 and
Although a real improvement of the liability limitation rule of the Hague 1926 has been made by the Visby protocol 1968, there are still some problems left apart.

*) The Visby Rules have maintained the wording "... Per Package or Unit" of the Hague Rules without defining the words package and unit. Therefore many difficulties remained, especially for the meaning of the word "unit" and its interpretation with respect to claims for loss or damage to bulk cargoes.

Indeed, for the application of the limitation of liability rule to bulk, one would have to rely on the freight unit, in the absence of a shipping unit.

The Visby Rules did not define with accuracy the meaning to be given to the word unit. This lack of definition of the word unit will also affect the understanding that one would have about the term package. The 1990 yearly meeting of the Comite Maritime International (CMI) stress also on that lack of definition from the Hague Visby Rules attitude.

*) With respect to Rule c of the Visby Rules introducing the container and the pallet as articles of transport to refer to the application of the Visby Rule, there is a practical problem arising from the application of the exception provided by that rule, i.e.,

"... Excepted as aforesaid such article shall be considered the package or unit".
Indeed, most of the cases where transportation of goods by sea is performed by means of containers or pallets, the shipping companies supply to shippers that article of transports, e.g., when foreign students of the World Maritime University, after two years of study and life in Malmoe, Sweden, are going back to their countries, it happens that goods belonging to different students of the same country, are loaded into the same container are damaged.

So, if such was the case, would it be fair to apply the amount of limitation basis to the whole container as one package or unit?

The Hague/Visby Rules have not solved that question. The case could also arise in a case of a fully loaded container (FLC) but for which the carrier who has supplied that article of transport did not or refuse to list the units of goods which are loaded.

On the other hand, when the carrier receives the container already packed by the shipper, he will not be bound by the declaration that a shipper can perform under the clause "container said to contain". The important aspect is that the listing of goods that the shipper can do is not anymore covered by the presumption that the goods loaded are really as they have been described in terms of number, weight, quantity, goods, conditions, etc.

So, for the protection of the shipper and the carrier, the application of the new Rule (c) dealing with containers and pallets would be more effective if the Visby amendment had dealt with the question of the supplier of
C) The Hamburg Rules and the Per Package Limitation Rule

The Hamburg Rules have in a way followed critics that have been made against the Hague Visby Rules System by its own makers that is to say for example at the CMI.

Indeed, the Hamburg Rules in Article 6 use the wording "... per package or shipping unit ... ". It is made clear that the proper concept of unit that fits with the present realities of the various types of cargo is the "shipping unit", that is to say, the unit of goods.

When the term which so far means unit, does not technically fit with the type of cargo damaged or loss, (e.g., for bulk cargoes), the term shipping unit will be used.

Article 6 of the Hamburg Rules (Rule b) introduces also a new element in the application of the liability limitation to containers, pallets or similar article of transport. That rule says: "In case where the article of transportation itself has been lost or damaged (it) if not owned or otherwise supplied by the carrier is considered as one separate unit."

So, when the shipping units within a container are not enumerated the maximum cargo claim is for one package unless the container be owned or supplied by the shipper himself.

It is a clear figure of when and how does the package
have to be defined as being the container or the pallet in a specific given case.

Three criteria are set:

* The listing of goods into the transport document.
* The identity of the Owner or supplier of the article of transport.
* or alternatively the unit by which the goods were shipped.

These criteria cover the current method by which all types of cargo are shipped in the sea transport, which therefore infers that the intention of the makers of the International Law of Carriage of Goods by Sea are satisfied in that respect.

NOTES AND REFERENCES

(1) UNCTAD Document on Bills of Lading, TD/B/c.4/ISL/6/rev.1, p 266.


(4) See in "Cases and Materials" on the Carriage of Goods by Sea, op. cit, p 509, the Case Golman Vs Thai
Airways, 1983.

(5) See Thomas Schoenbaum, op. cit, pp 490 to 491 (Defining priority of knowledge).


(8) CMI, Doc. UNIF 16, p 108.


(13) Jerome Scowcroft, op cit., p 410.


CONCLUSIONS

The Hague Rules 1924 have had the merit to set the first international step for the development of a liability regime in the Carriage of Goods by Sea. However, these rules have been drafted on the basis of clauses taken from the traditional English liner bill of lading and were simply intended for inclusion in Bills of Lading. Therefore, for a long time they have been considered as "implied terms" in bills of lading, e.g. in England until 1971 these rules did not have force of law.

The Stockholm Conference 1963 of the Comite Maritime International (CMI) that ended in the adoption in 1968 of the Visby Protocol has mainly been working on the preservation of the Hague Rules as "a code of statutory immunities" for carriers than it has considered the real developments in shipping and the appearance of other interests based on the birth of new countries and big shippers claiming the status of Shipping Nations that should have a word to say.

The principle of fair balance in the risks allocation between cargo owners and carriers did not stop looking for a re-definition of the rights and duties of persons dealing with the sea carriage.

In 1978, the United Nations Convention on the Carriage of Goods by Sea has been adopted. An allocation of shipments risks in a manner different from any other maritime risk allocation scheme has been introduced. Although not yet in force (1), the so called Hamburg Rules looks to be a response to many technical problems that shipping opera-
tors are faced with since decades ago. The Hamburg Convention is deemed to be made for shippers with a wide influenced from developing countries interests. However, looking at the specific legal points it has challenged, one may find a great deal of solved worries that are also shared by developed countries. Indeed through the Comite Maritime International meeting of 1990, members have been wondering whether "there is any need of change" as to: "Identity of the carrier, Contracts and Documents Subject to the Mandatory Regime, Deck Cargo, Period of Responsibility, Exemptions from Liability, Limit of Liability, Deviation, Delay and Damages".

All these points that have been raised with respect to probable amendments of the Hague/Visby Rules have already received within the Hamburg Rules satisfactory solutions. Furthermore, the new convention does offer more clear views as to the burden of proof; the fault based liability principle, the obligations of the carrier; other points that even for carriers have never been clear enough under the Hague/Visby regime. Still the abrogation of the exemptions have not yet been approved by carriers who see in the so called "error in management, or navigation of the vessel" an excepted peril which should be maintained. Though the various confusions to which that exemption and its effects have on the merits of the Hague/Visby Regime itself, it would not be of use to insert it again in a convention dealing with the same liability questions and having the same fault based liability principle with which the so called excepted perils have been found to be inconsistent.

One should see within the legal standard of reasonableness offered by the new convention (Article 5) a
translation of the human common sense, abilities and capacities which actually are the main basis to weigh an error. Since error itself is an element of the human behaviour, it would have been pretentious for a convention to deny to it any value and the Hamburg Rules did not. On the other hand, it would have also been just too easy to rely on such concept and ignore all the patrimone acquired by the shipping world to lessen its occurrence. Let us think in terms of safety with respect to the sizeable amount of technics, equipments, navigational aids, training education that carriers and their servants and agents enjoy for preventing, avoiding or fighting casualties. The error as it has been seen in 1924 is not anymore the same in 1978. Thus, its approach had to be reviewed legally. That is, what has been done through the Hamburg Rules.

The new convention has had the privilege to be constructed on the basis of the general principles of law.

With respect to the other International Conventions relating to air, rail and road Transport, its provisions as to liability basis are comparable with those of:

- Articles 18(1) and 20(1) of the Convention for the Unification of Certain Rules relating to International Carriage by Air (The Warsaw Convention, 12 October 1929).

- Articles 27(1) and 27(2) of the International Convention concerning the Carriage of Goods by Rail (CMI), 25 October 1952 and

- Articles 17(1) and 17(2) of the Convention on the Contract for the International Carriage of Goods by Road (CMR), 19 May, 1956.
The Hamburg Convention in its Article 25(5) "Nothing contained in this convention prevents a contracting State from applying any other International Convention ... to contracts of carriage of goods primarily by a mode of transport other than transport by sea ..." leaves room for the application of these conventions.

Thus, possible conflicts of liability regimes in an international combined transport operations or a door to door movement of goods are theoretically solved and regimes of liability are harmonized.

The objective of a worldwide uniformity of sea carriers liability is clearly designed and supported in the new convention.

Note:

(1) In the review "Sea Venture, Volume 12 March 1989, p14 it is reported that fourteen countries have already ratified the Hamburg Rules.
REFERENCES

I. LEGAL MATERIALS

a. INTERNATIONAL CONVENTIONS:


- Protocol of December, 18, 1979 Amending the International Rules of Visby. (in force)

- United Nations Conventions on the Carriage of Goods by Sea, 1978. (it requires one year after the twentieth signature for its entry into force)

b. UNITED NATIONS DOCUMENTS:

- UNCTAD document TD/B/c.4/ISL/Rev 1 On Bills of Lading

- UNCTAD document TD/B/c.4/315

- UN document TD/B/289 (1969)

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