

Carriage regimes essay sample



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To what extent do the international carriage regimes facilitate modern international carriage relationships?

MyAnswer:

A) Regulation of contracts by the three frameworks of liabilities and defenses; B) Historical justification for internationally recognized regulation – starting with the Harter Act 1893 and concerns about freedom of contract impact on cargo interests;

At the end of the 19th century shipping started to develop more and more and during the first years of the 20th century international trade was increasing. (Stopford, 2009) In short there was more demand than ship's tonnage and ship-owners had a very strong negotiation position when it came down to signing the contract of carriage. International carriage regimes have attempted to bring back equality between parties of a contract of carriage at the negotiation table. There was a perceived need by lawmakers, pushed by cargo interests, to level the playing field even if common law did not see this need. Case law had the chance to do this in *Norman v. Binnington* (1890) 25 QBD but the ship-owner was held not liable for damage to a cargo caused by negligence of the crew.

Case law had the opportunity but upheld the laissez-faire principle under which commercial law is viewed by common law. There was an attempt in 1880 to introduce model bills of lading with fixed rules by the International Law Association but this idea did not catch on at the time. American cargo owners being constantly confronted by British carriers abusing their position by negating extreme clauses freeing themselves of any risk at all pushed

politicians to make an end to this by introducing legislation. Starting in the USA by the Harter Act in 1890 but followed by other countries all around the world.

Eventually the three frameworks one by one, Hague/Hague-Visby and the Hamburg rules came out of the turmoil after many years of discussions and amendments. Under the Hague rules, 1924, the carriers ability to reduce their liability endlessly by clever clauses was severely reduced and minimum rules were put in place that mandated the carrier to take care of the cargo. On the other hand the carrier was given 17 different ways to defend itself against claims. For example the carrier was only liable for damage caused by fire if it was actually caused by them.

Even if the carrier/shipowner was held liable there was set a limit to which height the cargo interests could claim. The maximum was 100 Pounds per package except if the value of the cargo was declared in the Bill of Lading, which almost never happened. No wonder that this framework found little support as it was considered far too little to please the cargo interests. Many countries continued to use their own systems. Only in 1968 after discussions at an international level did the world decide on an amendment to the Hague rules known as The Hague Visby rules. In 1977 these rules came into force after the agreed number of countries had ratified the new framework.

The Visby amendments increased the amounts that could be claimed and introduced special rules for container transport. The Hague Visby rules were further modernized by the SDR amendments in 1979 and have been in use by the major trading powers since that time. Although later the Hamburg

rules also became into existence they have not made great impact as not any of the major trading countries have adopted them. However they do make it more complicated if one does come across them.

The very existence of the infamous shipping cycles in the shipping business gives rise to situations that either of the two parties in a contract of carriage has the upper hand. In a downward cycle ship-owners are pressurized by cargo interests and in an upward cycle it is the other way round and ship-owners are able to pressurize cargo owners. So I think that in view of the above the introduction of rules regulating liability and defenses for a contract of carriage was necessary to stabilize the system and give seaborne trade the opportunity to grow without being hindered by potentially many losses or damages of cargoes.

The whole contract of carriage by sea material shows that Case Law has somehow lost out on legislated law. Case Law I believe has underestimated the effect of the shipping cycles and has not reacted effectively to changing needs because the laissez-faire principle was deemed more important than the needs of the people the law eventually serves.

C) Lack of uniformity presented by having three regimes: Hague/Hague-Visby and D) Framework of overriding obligations and limitation; In modern times the following regimes are in use: 1) The Hague-Visby rules – The Hague rules as amended by the Brussels Protocol 1968. (Various countries have ratified/denounced various stages of the three developments of these rules). 2) United Nations Convention on the Carriage of Goods by Sea (The Hamburg Rules) Hamburg, 30 March 1978. (At the moment a major

amendment known as the Rotterdam rules is in the process of being ratified) Although the Hamburg rules originate from the United Nations very few important countries have adopted them at this time so their impact is not very great.

However they are in force in 34 countries and cannot be just ignored. There are some main differences between these two regimes; The Hague-Visby rules are still broadly based on the laissez-faire principle while the Hamburg rules have a totally new approach and regulate much more with wider implications. In the Hamburg rules the country of the port of discharge decides if the rules apply. This means it can be that on one voyage two regimes are applicable. For example if one loads a cargo in a Hague-Visby country where those rules are applied because of the law and therefore mandatory.

The carrier nor the shipper has any choice in the matter. Then if the cargo is discharge in a Hamburg Rules country then those rules are applicable. In case of a dispute the choice by which regime to judge depends on which court is chosen to handle the case. If one chooses the Hague-Visby rules country to handle the case then that court will view that the carriage of contract falls under the Hague-Visby Rules.

And vice versa for a Hamburg Rules Country. However the Hamburg rules go further. They give the cargo claimant the chance to claim for damages in a contracting state for the difference of losses after having been previously handled by a non-contracting state. This only if the Bill of lading does not contain a clause that the Hamburg rules are applicable at all times.

Hamburg Rules;

Some very complicated situations can arise from dealing with these two regimes on one and the same contract. Another major difference is the fact that with the Hamburg Rules the carrier is liable for cargo carried on deck.

E) Defenses and question in today's modern world of negligent management and navigation of the vessel defense in H/HV regimes. As the Hague-Visby rules are the most dominant of the regimes it makes sense to discuss them in more depth. As mentioned before the rules mandate the carrier to take due diligence in taking care of the cargo but it has also been given several ways to defend itself. For some maybe surprisingly the carrier is not liable for damages to the cargo caused by any act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship. (The Hague-Visby Rules – The Hague Rules as amended by the Brussels Protocol 1968, Article IV-2(a).)

This may seem as an opposite statement to the one in Article III where the carrier is held liable for not following due diligence in all kinds of instances but the Hague Visby apparently makes a difference between the carrier and the people it has employed on the vessel and elsewhere. This seems logical as the carrier being usually the shipowner can surely not be held liable if one of his employees makes a mistake while he is not there to correct it. It is after all beyond his reach of influence. However if one looks at this critically the carrier could still be held liable if for example that master or crewmember is proven to be incompetent and the carrier still employed him/her while he knew about this or should have known.

Because then Article III, 1(b), of the rules, the obligation of the carrier to properly man the ship, will be applicable and one can consequently argue that the vessel did not depart in a seaworthy condition. Article IV, 1. In this respect the companies ISM system can be used as evidence against the company if it becomes clear from the records in that ISM that the ship-owner was privy to that information. The whole purpose of the ISM was to establish responsibility to the highest levels in the organization. So the ISM in that case could “ sink” the Ship-owner.

The question of negligence or incompetency is not an easy one although essential in establishing liability. (Bachxevanis, 2011) Summarizing it is clear to me that the introduction of international carriage regimes like the Hague-Visby rules have indeed like they intended to do, leveled the playing field somewhat, improving the relationship between the carriers and the shippers.

This in turn has had a positive effect on seaborne trade and on shipping itself. I realize now at the end of this essay that even with the present rules the outcome of the case I described earlier, *Norman v. Binnington* (1890) 25 QBD, would have been the same as Negligence by a crew member is one of the 17 defenses described in the Hague-Visby rules that a carrier can rely on to not be held liable in case of damage to cargo. Perhaps the case law was not so wrong after all.