

Application of the hague visby rule



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INTRODUCTION

Disputes over loss of cargo, delay, damage or short delivery were resolved by referring to the contract of carriage as contained in the bills of lading based on the validity or non-observance of clause exonerating carrier from liability. The resultant public policy weight against allowing the carrier to exonerate himself from damage caused by his negligence which was not in line with the doctrine of freedom of contract, culminated in a “Compromise” in which carriers and shippers from developed nations, crystallized in the “Hague Rules” in 1924.^[1] The rules could not comprehensively regulate carriage of goods by sea, but stipulates the basic duties of Carriers and Shippers by creating limitation, exonerating carriers from liabilities.

The need to modify the Hague rule by increasing the liability of Carrier that became commercially unrealistic, resulted in the “Visby Amendment” in 1968, in concomitance with Hague Rules, that are applicable in many nations as the Hague/Visby Rules.^[2] It is important to specify the political influence on rules when they are promulgated, as most developing nations being unsatisfied with the reform of Hague/Visby Rules, thought that new comprehensive approach to carriage of goods by sea was needed. As a result carriage of goods by sea was revisited through UNCTAD and UNCITRAL by the United Nations in the re-examining the carriage of goods by sea, the result was the Hamburg Rules 1978,^[3] that came into force 1992, November 1, but had not being ratified by major commercial and maritime powers (as seven of the contraries that have adopted Hamburg rules are landlocked, with no significant to world trade).^[4] Hague/Visby Rules apply where shipment commenced from a port in the United Kingdom, inland or

internationally,[5]as evidenced by the contract or bill of lading expressly stated that Hague/Visby Rule applies. Where a non- negotiable document is issued based on Hague/Visby Rule as governing law in the receipt. Where bill of lading is issued in contraction state that adopt Hague/Visby Rule, in different contracting states where HVR is adopted in the bill of lading and any bill of Lading contract that expressly adopt Hague/Visby Rules. With the forgoing Hague/Visby Rule apply only to contract of carriage which is covered by bill of lading or document of title, excluding charter party contract, in view of this there is conflict between article 3(3) and article 6, the latter mandates the carrier to issue bill of lading on demand to the shipper, while the latter grant freedom of contract to where no bill of laden is issued. The Hamburg Rule apply in cases where port of loading or discharge is within a contracting state, extending the liability of the carrier to period in passion of goods at port of load, carriage and at the discharge port,[6]

This essay will be saddled with the provision under the Hague/Visby regime defence on short delivery and delivery of damaged goods by the carrier, rights of the shipper, statutory immunity of the Carrier (Article IV) in relation to Hague, Hague/Visby and Hamburg regime. Based on the following; Scope of application, Contract, Seaworthiness, Duty to care for Cargo, Period of responsibility, Short Delivery, Delivery of damaged Goods, Lost Goods, Burden of Proof, Immunity of Carrier, Basis of liability and Limit of Liability. Reference will be made to the Carriage Of Goods Act 1971(COGSA) on the basis that it incorporates the Hague/Visby rules as it gives them the ‘ Force of Law’,[7]in Hollandia,[8]Lord Diplock, ‘ The provision in Section 1 appear to me to be free from any ambiguity perceptible to even the most ingenious of

legal minds. The Hague Visby Rules or rather all of those which are included in the Schedule, are to be treated as if they were part of directly enacted law...'. By this the Hague/Visby Rules functions as if they were directly part of enacted statute Law, which will establishing that Hague/Visby rule has not provided perfect solution to cargo dispute, rather it created divisions within the carriage of goods by sea.

Hague/Visby Rules applies to all ' Contract of Carriage as defined in Article 1b, that is all ' contract of carriage of goods by sea, evidenced by a bill of lading or any similar document of title.' Article 1(e) of Hague/Visby rule state, ' Carriage of goods' covers the period from time when goods are loaded on to the time they are discharged from the ship, it can be deduced that the period of the application is for dry cargo, from loading of cargo on the ship to completion and discharge from ship.

There is no defined scope of contract under the Hague/Visby regime, but refers the ' contract of carriage' to the document issued evidencing the cargo which is the bill of lading or any similar document issued or in relation to charter party or any document regulating the relation between the carrier and the holder of the said document, parties are free to determine what particular functions they are to take in relation to loading and discharge, when loading and discharge as agreed by parties is the responsibility of carrier, then carrier obligation is as set out in Hague/Visby Rule, but where this obligation is vested on the shipper, then article 2 does not transfer this burden, it is solely the shipper responsibility, hence the Hague/Visby Rule does not apply,[9](Pyrene Co. Ltd v Scindia Navigation Ltd[1954] 2 QB 402.),

Volcafe v CSAV (2016) ECWA CIV 1103, that also deals with not only loading but includes stuffing of the container.

The Hamburg rule defines contract in relation of obligation of carrier in a contracting state, which is to carry the goods by sea from port of loading to port where goods are discharge to, expressly excludes other mode other than sea.[10]Both inbound and outbound shipment, are subject to Hague Rules in the United States as modified by COGSA, parties may agree that the contract of carriage include the Hamburg Rules. Where they are not applicable by force of law in addition to Hague Rules, however Hamburg rules apply to bill of lading issued in relation to charter party, it only binds the relationship between the holder of bill of lading who is not the charterer, regardless of ‘ the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or other interested party’ Hamburg Rules apply.[11]

The duty of Seaworthiness is a requirement imposed by common law, where Hague /Visby Rules do not apply, it is implied that the absolute duty of carrier is to provide a sea worthy ship. “ A ship owner who accepts goods, which he is to deliver in good condition, impliedly contracts to perform the voyage in a ship which is seaworthy.” [Lord O’Hagen].[12]The Hague/Visby Rules mandate, ‘ the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

1. Make the ship seaworthy;

Properly man, equip and supply the ship;

2. Make the holds, refrigerating and cool chambers, and all other parts of the ship in which the goods are carried, fit and safe for their reception, carriage and preservation.

All the above refer to the duty of Seaworthiness as required of the carrier for due diligent obligation and the doctrine of stages does not apply.^[13] COGSA, confirms no absolute duty, but imposes due diligence, if a ship becomes unseaworthy at immediate port, then it is not a breach, but where a liner cargo is loaded at different port, the duty reattaches at each port in respect of cargo loaded and the term due diligent is broadly related to common law duty of care.

The burden of proofing un-seaworthiness lies on cargo owner to show before and at the beginning of the voyage, cargo owner must prove that the loss or damage was caused by the un-seaworthiness of the ship and the causative of the cargo damage must be proved establishing a link between the un-seaworthiness and the damage caused. Ability of cargo owner in proving both points shift the burden to the carrier to show that due diligence and cargo owner stand point is that cargo was loaded in good condition and discharged in poor condition, inability by the carrier to disprove this, the carrier cannot rely on the exception of article IV.^[14] The Hague/Visby Rule advocates total seaworthiness for the voyage at all stages, “ She must, in my view, be fit as a ship, as distinguished from a carrying warehouse, at each stage of her contract adventure” [Scrutton L. J].^[15] In the case of, “ Volcafe”, container was lined with some packing’s, loaded with sugar and nuts of coffee, the question in this case was who to be held responsible for the damage goods. The judge of the first instance could not make a finding as to

who was responsible, came down to burden of proof. Court of Appeal held, where goods are loaded in apparent good order and condition and a clean bill of lading is issued, but cargo owner established that they are delivered in damaged condition, leaves inference that the carrier was in breach of the condition to properly and carefully care and carry the goods.[16] When a cargo owner claims to set off the inference of breach on Article III (2), the evidential burden passes to carrier to establish prima facie defence based on expected peril, (Inherent Vice) coffee when transported from southern hemisphere to northern hemisphere, rust occurs as a result of condensation. When carrier shows this prima facie, the burden shifts to cargo claimant to establish negligence on the part of the carrier, such nullify the operation of the exception, carrier had to disprove negligence in order to rely on article IV (2) exception.[17] Thus in Hague/Visby Rules Article 4 is a total defence for loss or damage to goods as a result of unseaworthiness of the ship, whereby want of due diligence on carrier part in relation to Article III HVR, burden of proving due diligence as stated above falls on the carrier or those claiming exception under this clause. Article IV (2) exonerates the carrier from;

1. Act, neglect, or default of the master, marine, pilot, or the servant of the carrier in the navigation or in the management of the ship.
2. Fire, unless caused by the fault or privity of the carrier.
3. Peril, danger and accident of the sea or other navigable waters.
4. Act of God.
5. Act of War.
6. Act of public enemies.

7. Arrest or restraint of princes, ruler or people, or seizure under legal process.
8. Quarantine restrictions.
9. Act or omission of the shipper or owner of the goods, his agent or representative.
10. Strikes or lockout or stoppage or restraint of labour from whatever cause, whether partial or general.
11. Riots and civil commotions.
12. Saving or attempting to save life or property at sea.
13. Wastage in bulk of weight or any other loss or damage arising from inherent defect, quality or vice of the goods.
14. Insufficiency of packing.
15. Insufficiency or inadequacy of marks.
16. Latent defects not discoverable by due diligence.
17. Any Other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault of the agent or servants of the carrier contributed to the loss or damage.

This part has being classified as the carrier's defences to the detriment of the shipper position, which has created imbalance in the shipper -carrier relationship in the carriage of goods by sea, resulting in the Hamburg Rules as a result with the dissatisfaction in Hague/Visby Rules that has become unrealistic commercially.[18]

The Eurasian Dream,^[19] places the onus of proof of unseaworthiness with cargo owner before and at the beginning of the voyage. Cargo owner must prove the causative link of loss or damage was caused by the unseaworthiness, (Europa).^[20] Where cargo owner is able to prove the above two points, the burden shifts to the carrier to show that 'due diligence'.^[21] Carrier's ability to debunk the shipper's claims would enable the latter to rely on Article IV rule 2 of HVR, including the fire exception and anything contrary to the carrier would not be able to rely on the defence provision 'fire exception' as a defence to breach of Article III Rule 2, subject to the claimant proving that loss or damage was 'caused by the actual fault of the carrier'.

The Hague Rule on the other hand had no reference made to the provision of unseaworthiness, but article 5(1) of this rule infers that carrier is liable where delay or damage to goods occurs; unless the contrary is proven that due diligence was taken by carrier, crew or agents in avoiding the occurrence and the carrier can rely on a clean bill of lading in establishing a prima facie case against the carrier, who is faced with the burden to show damage was caused with all due care taken or caused under the situation where carrier is immune to liability, result in "presumed fault".^[22] The contrast between Hamburg and Hague rules as carrier faces 'presumption of fault', can be illustrated in the rule as established in 'THE MUNCASTER CASTEL', that due diligence is non-delegable, so the negligence of independent contractor such as repair yard, based on the situation of the case would not afford the carrier a defence, but proves the carrier liability.^[23]

This may be likened to the Hamburg rule which lacks the provision in dealing with damage caused by unseaworthiness condition of the ship, but in line with the <https://assignbuster.com/application-of-the-haguevisby-rule/>

Hague rule where the burden of proving due diligence falls on the carrier and mere proof of damage to cargo while cargo still with the carrier's custody imposes the duty to rebut carrier's claim.[24] In the above case the act of negligence on the shipyard, under Hamburg rule might result in shipowner escaping liability, it imposes no express responsibility other than not to negligently damage goods.[25] "The law implies a warranty of seaworthiness, but it is not an absolute warranty of perfection, but only that the ship be as seaworthy as she reasonably can be made by known methods." [26]

COGSA [27] art III placed obligation on the carrier before and at the beginning of the voyage to exercise due diligence in making the ship seaworthy, properly man, equip and supply the ship, make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation. No absolute duty but due diligence as in common law of care is needed on the part of the carrier, when this is in place the carrier can then rely on the provisions of Article IV as defence.

Rotterdam rule upholds the same liability as Hague, Hague/Visby rule, that the carrier shall be liable for loss or damage to the goods, also delay in the delivery of goods, if the claimant proves that the loss, damage, or delay and event that led to the circumstance happened when the goods were in custody of the carrier.[28] If the carrier can prove that the cause of loss, damage, or delay is not attributed to carrier fault as provided for in paragraph 1 in the article, then the carrier is relieved of all or part of the liability.[29]

Carrier liability for damaged goods as contained in the Hague/Visby Rule extend to fault of his servant, agent which does not includes contractor due to the fact that the application of this rule is limited to the commencement of loading and the complete discharge of goods from the ship, in this regard action executed ashore at the port of loading and discharge not subject to the above rule.[30]The carrier is under obligation to adopt a system of carriage which is suitable in light of the nature of cargo to be carried or the stowage of the goods.[31]Cargo such as cereal grain, mineral ores, liquid tanker where the bill of lading indicates the weight, or quantity measured at port of loading and measured at the port of discharge, resulting in cargo shortage which is beyond the Trade Allowance (generally 0. 5%is the allowed discrepancy on bill lading) in such cases becomes cargo claim, most especially grain cargo or oil cargo. Normally the quantity recorded on bill lading will be determined by the figures at the port of discharge.[32]The carrier may refuse to insert in the bill of lading any of the information if he has no means of checking them, (The Atlas [1996] 1 Lloyd's Rep 642. In Hamburg rules, the carrier is liable to loss, damage or delay for which he sub-contracted out, as they are regarded as his agent, but the rule did only specifically classify servants and agents of the carrier.[33]

Obligation and liability of shipper in Hague/Visby Rule are three, contained in articles 3(5), 4(3) mandating the shipper to guarantee the carrier accurate time of shipment of the marks, quantity, numbers, including the weight as furnished by him and any loss or damage incurred by the carrier or ship from a cause linked to act, fault or neglect of the shipper he shall be liable. Article 4(2). Article 4(6) made shipper liable for any damages, expenses, indirectly

or directly as a result of shipment of dangerous goods whereof the carrier has not consented or prior knowledge of the goods shall be strict liability on the part of the shipper. Shipper obligation is regulated in Hamburg Rules in two Articles 12 and 13, Article 12 is in line with the HVR Article 4(3) while Article 13 is in tandem with Article 4(6) of HVR but pinpoint the obligation on the shipper to declare the nature of the shipment of the dangerous goods.

HAGUE/VISBY RULE A PERFECT SOLUTION

Major challenges in the carriage of goods by sea is the inability of the Rules to cure the defects in the rules as Hague, Hague/Visby that gave the carrier the superior bargaining position by allowing indiscriminately grate exclusion clause against that of the shipper. Hence Hague/Visby rule has not created perfect solution in regards to dispute concerning short delivery,[34]neither as it solved the issue of damaged cargos, the lacuna which the Hamburg Rule and Rotterdam rules were meant to cure.[35]Hague/Visby Rules – pinpoints the importance of liability in the application of the rules to every contract of carriage of goods by sea. Basis of liability under all the rules is fault, but under Hague/Visby rules carrier is exonerated carrier from the loss or damage to cargo that occurs or resulting from unseaworthiness only when occurs from the breach of his obligation of due diligence, loss or damage to goods by master, mariner, pilot, or the servant of the carrier in the navigation and management of the ship and for any loss through fire caused by the fault of the crew.[36]

(Article 1. b) In relation to or any similar document of title and article VI with regard to the ‘ loading, handling, stowage, carriage, custody, care and

discharge of such goods', culminating in the responsibility and liability that starts with loading and ends with the discharge of cargo from the ship, entitled carrier to the rights and immunities hereinafter set forth, (Article II). From the above points, the universal problem in the shipping industry can be classified into three, delivery of cargo short of destination, loss or damage to cargo while on transit or at the port of final destination and late delivery, which had been a war between the shipper, carriers and the P & I clubs, in relation to article 17(5)(a) of the Rotterdam Rules, which made the required burden of proof of shipper lighter, all he need to prove is that the loss, damage or delay was probably caused by unseaworthiness: just probability required. Specifying the mandatory duty of providing a sea worthy ship at the beginning of the voyage with due diligence and with the requirement under in Article III, which shall enable the carrier rely on the exceptions stated under Article IV (2). Hague/Visby Rules as well as Rotterdam Rules provides that, delay, loss, damage is not attributed to carrier fault or other that he is liable and only the presumption of fault where carrier proves that the above was caused by expected peril, principles adopted by Rotterdam rules 4(2) C-P.[37]

Where the fault lies as contained in HVR Article 4(1), that the burden lies on the shipper to prove causation where damage occurs, either by unseaworthiness or damage to goods while in custody of the carrier. With the above points in mind it is right to infer that the Hague/Visby rules has made the shipper position more difficult with regard to the immunity without reference to delay by only defining the value of goods omitting any loss incurred from the delay which are recoverable.[38] This ambiguity, was

removed in the Hamburg Rules which expressly allowed the shipper to claim for delay by limiting the compensation to two and half freight paid on the delayed goods, thus strengthen the shipper position to claim for delay to goods delivery, a notice of the delay must be given to the carrier in writing within 60 days after delivery.[39] Under the Rotterdam Rule, the shipper requires burden of proof based on balance of probability.[40]

Another point of importance is the notice of damage or delay, under Hague/Visby rule, that must be given before or at the time of delivery and where loss or damage is not visible must be given within three days of the delivery.[41] In Hamburg rules notice must be given, ' to the carrier not later than the working day after the day when the goods were handed over to the consignee,' the action is a prima

facie evidence of delivery where a clean bill was issued.[42] Same position is adopted under the Hague/Visby rule Article III (6). Under Rotterdam rules notice must be given before or at the time of delivery, if loss or damage is not visible within seven days of delivery, but on the contrary to Hague, Hague/Visby Rules, failure to give such notice at the stipulated period does not affect the right to compensation and the allocation of burden of proof under article 17 of Rotterdam Rule, it does not relieve shipper the burden to prove that damage occurred while cargo was in custody of carrier.[43]

Limitation of liability under Hague/Visby rules is to cover loss or damage to cargo are calculated at ' 666. 67 unit of per package or 2 units of account per kilogram of gross weight of goods lost or damage, whichever is higher'. [44] Recoverable amount to be calculated reference to value of cargo at

place and time which the cargo was discharged from ship as contained in the terms contract and fixed in relation to the current market price, or with reference to normal value of cargo.[45] This was increased from 666.67 to 835 units of account per package or 2.5 units of account per kilogram of gross weight by Hamburg Rules.[46] Further increase liability from 835 to 875 units of account per kilogram, or 3 units of accounts per kilogram of gross weight of the goods which are subject to the claim in Rotterdam Rules.[47] In line with article 5 of Hamburg Rule, Rotterdam Rule provide under article 60, subject to article 61(2) compensation for loss or damage caused by delay based on article 22, limited and calculated on amount equivalent to two and one half times freight payable on the cargo delayed. However all the rules as stated previously above recognised higher limitation but not to reduce liability of the carrier and recklessness conduct will not attract any limitations under the regimes.[48] Being widely rectified by major shipping nations, Hague/Visby rules has being the only regime that

[1] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading and Protocol of Signature, Aug, 25, 1924, 51 Stat. 233 L. N. T. S. 155

[2] Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bill of Lading, Brussels, Feb. 23, 1968, 2 U. N Register of text ch. 2, at 180

[3] United Nations Convention on the carriage of goods by sea, Hamburg, Mar. 31. 1978, UN Doc. A/Conf. 89/5 17 I. L. M. 806 (1978)

[4]George F. Chandler, After Reaching a century of the Harter ACT: Where Should We Go From Here? 27J. Mar. L. & COM. 43, 44 n. 8 (1993).

[5]COGSA 1971. S 1(3)

[6]Hamburg Rule article 4(1)

[7]COGSA 1971 Section 1 (2)

[8]Hollandia House of Lords [1983] 1 AC 565

[9]Article 1 (b) Hague/Visby Rules

[10]Article 1. 6 Hamburg Rules

[11]IBID Article 2(2)

[12]Steel v State Lines SS CO(1877) 3 APP CAS 72.

[13]Hague/Visby Rules Article III (1) a. b. c.

[14]IBID Article 4 rule 2.

[15]Reed v Page (1927) I. K. B. 743.

[16]Hague/Visby Rule article III (2)

[17]Volcafe v CSAV [2016] ECWA Civ 1103.

[18]United Nations Convention on the carriage of Goods by sea, Hamburg, Mar. 3, 1978, U. N. Doc. A/Conf. 89/5,

17 I. L. M. 806 1978), reprinted in 6 BENEDICT ON ADMIRALTY, supra note 1, Doc. 1-3, at 1-32. 6 {hereinafter

Hamburg Rules}.

[19]The Eurasian Dream [2002] 1 Lloyd's Law Rep 719, 735.

[20]The Europa [1908] P 84, 97.

[21]The Toledo [1995] 1 Lloyd's Rep 40, 50.

[22]Hague Rules Article 3. (1).(2)

[23]Riverstone Meat Co. v Lancashire Shipping Co. (THE MUNCASTER CASTEL) [1961] 1 Lloyd's List L. Rep. 57, 1961 AMC 1357 (HL).

[24]Hamburg Rule Article 5

[25]IBID Article 5

[26]The Glenfruin (1855) 10 P. D. 103

[27]Carriage of goods by sea Act 1971, Article III, IV.

[28]Rotterdam Rules Article 17.

[29]IBID Article 17(3)