

HAMBURG RULES V HAGUE VISBY RULES AN ENGLISH PERSPECTIVE

Doc. Dorian Tozaj, Doc. Ermal Xhelilaj

University of Vlora, Albania

ABSTRACT

It has often been argued for the effect of defences provided to carriers under Art IV (2) of Hague Visby Rules to almost nullify the protection guaranteed to shippers in other provisions of this convention. Therefore an all embracing universal shipper friendly convention, merely the Hamburg Rules, need be incorporated in all countries in order to address this issue and fully satisfy the intentions of the parties for the establishment of international rules in international trade.

1. INTRODUCTION

In this article it is maintained for Hague Visby Rules to provide shippers with much greater protection than what has often been claimed from its critics. It proves the effect of defences contained in this convention have been restricted from vast amount of obligations imposed upon carriers. These defences have been restrained through courts' narrow interpretative application, and the heavy burden of proof placed on carriers in trying to successfully exploit their beneficence.

While there will be a summary of the significant changes likely to have been introduced from incorporation of Hamburg Rules into UK law. It will also be shown these are no profound changes and their imported improvement to 'cargo owners' position is still dubious, taking account of the practical implications likely to be embarked upon with their implementation in England.

2. EFFECT OF LIABILITY EXCLUSIONS IN ART IV

Hague Rules were first established in the Hague Convention 1924, supplemented with Brussels Protocol, The Hague Visby Rules 1968, incorporated in UK through the Carriage of Goods by Sea Act 1971. In order to avoid the hard-line approach imposed under existing common law rules, and ultimately provide shippers with protection from unreasonable exclusion clauses which the powerful contracting party, ship-owners, could impose upon them. This convention purported establishment of uniform sea carriage legislation.

A levelled negotiating ground for these unequal bargaining parties was secured through imposition of obligations upon common carrier in Hague Visby Rules.¹ Nevertheless these obligations were accepted, in exchange for a long list of defences included in it,

¹ Hague Visby Rules [1968], Art III (1) 'The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to (a) make the ship seaworthy, (b) properly man equip and supply the ship and (c) make the ship seaworthy with regard to the specific goods. (2) Carrier shall properly and carefully load, handle, stow, carry, care, keep and discharge the goods'.

therefore giving strength to arguments of its critics that it has not achieved its purpose.

Carriers primary and overriding duty is to "exercise due diligence in providing 'sea and cargo worthy' ship before and at the beginning of the voyage".² With respect to this standard requirement, carrier is responsible not only for itself and its servants,³ but also for reputable independent contractors,⁴ and even Lloyds Surveyors.⁵

In any event of cargo loss or damage, the shipper bears the initial evidentiary burden to prove vessels' lack of seaworthiness.⁶ This is not easy completed task having account of contradictory precedents dealing with this point. In both *Maxine Footwear*⁷ and *The Apostolis*⁸ servants negligence caused fire to goods, nevertheless, the court held vessel unseaworthy in the first but seaworthy on the second case.

Once the shipper establishes lack of seaworthiness, the carrier must primarily prove it exercised 'due diligence'. This necessary prerequisite shall be accomplished before a defence in Art IV could even be claimed by the carrier.⁹ Considering carriers multiple duties calling fulfilling before due diligence requirement can even be pretended to have been satisfied,¹⁰ adding here the widely interpreted statement, 'before and at the

² *ibid*

³ *Maxine Footwear Co Ltd v Canadian Government Merchant Marine* [1959] AC 589

⁴ *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co. Ltd (The Muncaster Castle)* [1961] 1 Lloyd's Rep 57

⁵ *Union of India v NV Reederij Amsterdam (The Amstelslot)* [1963] 2 Lloyd's Rep. HL 223.

⁶ *The Hellenic Dolphin* [1978] 2 Lloyds Rep 336

⁷ *Maxine Footwear Co Ltd v Canadian Government Merchant Marine* [1959] AC 589

⁸ *Meredith Jones & co Ltd v Vangemar Shipping Co. Ltd* [1997] 2 Lloyds Rep 241 welding carried on the ship exposed the cargo of cotton to the risk of ignition.

⁹ *Eridania SpA (formerly Cereol Italia Srl) v Oetker (The Fiord Wind)* [2000] AC 2 Lloyds Rep 191

¹⁰ Hague Visby Rules [1968] Art III(1) Make the ship Seaworthy, properly man equip and supply the ship, make the holds, refrigerating and cool chambers and all other parts of the ship fit and safe for the particular cargo.

beginning of the voyage¹¹ sometimes covering fault occurring on sail.¹² It can be confidently stated that, notwithstanding shippers' apparent difficulty in claiming carriers' obligations, carriers have it far more difficult to exclude liability preconditioned from proof of due diligence.

Where claimants loss or damage is independent of 'due diligence' requirement, shipper can still argue carriers failure to fulfil its continuing obligation to "properly and carefully care for goods".¹³ Because, carriers are *prima facie* liable for all loss or damage to goods received in good order, as evidenced with clean bill of lading.¹⁴ The claimant only needs establishing orderly quantity and quality of goods before loading and their changed condition on discharge. Carriers may then only exclude liability through proving the particular cause to be one included in Art IV (2) (a) to (p). But even satisfying this condition will not conclusively relieve carrier from liability. Because, shipper may at this stage still claim carriers' negligence with respect to the goods.¹⁵

It was once suggested that in addition to satisfying one of the defences, the carrier also had to disprove negligence on its part.¹⁶ This is no longer the case after *Albacora* decision.¹⁷ It has however been argued that House of Lords decision in *Albacora* "is consistent with the fact that they were dealing with an inherent vice which naturally is not brought about by anything done by the carrier".¹⁸ Therefore, it remains to be seen whether shippers shoulder the burden of proving negligence, where loss or damage is caused from something other than inherent vice of goods themselves.

Proving negligence can be difficult burden for shippers because practically all evidence is on carriers hands.¹⁹ Nevertheless, shippers find great assistance from courts wide interpretative approach to negligence and restricted construction of carriers defences. As

indicated in *The Hill Harmony*²⁰ and *Gosse Millard*²¹ judgments where what appears to be negligence in navigation or management which would have secured exclusion of liability for the carrier as provided under Art IV (2) (a), was held to be cargo neglect thereby prohibiting it from pleading exception. Both these judgements have received academic support stating that, "unless the rules are strictly construed the careful compromise worked out between carrier and shipping interests will be defeated, and this should be the uppermost consideration of courts when construing the rules".²² Establishing carriers' cargo negligence automatically deprives it from claiming any of the defences in Art IV (2).²³

Whereas inability to plead specific defences in paragraphs (a) to (p), will not exhaust all of the carriers options, due to paragraph (q) 'catch all exception'. It must first disprove negligence in order to enable itself to claim defence under paragraph (q). Negligence cannot be easily discharged, considering carrier needs doing so for its servants, independent contractors and surveyors.²⁴ Adding to carriers difficulties in striving to avoid obligations imposed under Art III(2) of the Hague Visby Rules, is the situation where part of damage or loss caused to the goods is attributable to the excepted perils under Art IV(2) of the Rules and the rest resultant of carriers negligence to prevent its furtherance. Unless carrier apportions the damage caused from the excepted peril, he will be held accountable for the whole loss or damage.²⁵ Discharging liability under paragraph (q) is hardened from the fact that absence of negligence will not release carrier from responsibility, where the cause of loss remains inexplicable.²⁶

Notwithstanding the list of defences in Art IV of the Rules is long and therefore creating good chances for carriers to escape liability. Unlike common law defences, it is an exhaustive list, and any attempts to add on exclusion or limitation clauses in the bill of lading will be rendered null and void.²⁷ Furthermore, where the carrier is either unable to prove that it exercised "due

¹¹ *Maxine Footwear Co Ltd v Canadian Government Marine Ltd* [1959] AC 589 'covered from at least the beginning of loading until ship started sailing'

¹² (*The Subro Valour*) [1995] Lloyds Rep 509.

¹³ Art III (2) Hague Visby Rules [1968]

¹⁴ *Gosse Millard v Canadian Government Merchant Marine* [1927 29 Lloyds Rep 190, Article III (2) Hague Visby Rules

¹⁵ *Constantine SS v Imperial Smelting Corp* [1942] AC 154 'if the carrier pleads an exception the cargo-owner may counter by pleading fault on the carrier, but the onus of proving that is on the party who makes the claim'.

¹⁶ *F.C. Bradley & Sons Ltd v Federal Steam Navigation Company Ltd* [1927] 27 L.J.L. Rep 395.

¹⁷ *Albacora SRL v Westcott & Laurence Line* [1966] 2 Lloyd's Rep 53

¹⁸ C. Ezoeké "Allocating the onus of proof in sea cargo claims: the contest of conflicting principles" [2001] Lloyd's Maritime and Commercial Law Quarterly, pp. 177-320

¹⁹ *Encyclopedia Britanica Inc v SS Hong Kong Producer* [1969] 2 Lloyd's Rep 536

²⁰ *Whistler International Ltd v Kawasaki Kisen Kaisha* [2001] 1 AC 638

²¹ *Gosse Millard v Canadian Government Merchant Marine* [1927 29 Lloyds Rep 190, 'A reasonable construction of the rules requires that a narrow interpretation shall be put on the excepting provisions of Art IV(2)(a) of Hague Visby Rules'.

²² W. Tetley, 'Interpretation and Construction of the Hague/Visby and Hamburg Rules [2004] 10 JIML' 30-70.

²³ *The Satya Kailash* [1984] 1 Lloyd's Rep 588

²⁴ *International Packers v Ocean SS Co* [1955] 2 Lloyds Rep 218 *McNair J* in *International Packers v Ocean SS* held, "I see no difference between Art III (2) and (1), as a matter of law, therefore, I would hold the defendant liable for the negligent advice of the surveyor"

²⁵ *The Evegrafov* [1987] 2 Lloyd's Rep 634

²⁶ *Pendle & Rivet v Ellerman Lines Ltd*

²⁷ *The Hague Visby Rules* (1968), Art III (8)

diligence”, disprove “professional negligence”,²⁸ or fails to bring itself within one of the exculpatory provisions provided under Art IV(2) of Hague Visby Rules, it will be held accountable for loss or damage caused to the goods.²⁹ Therefore, to argue that Art IV defences potentially diminish carrier’s obligations in an unacceptable manner, would ignore huge amount of liabilities placed on the ship-owners and the barriers it needs to overcome in order to succeed on these defences made a lot harder with narrow construction of the court.

3. HAMBURG V HAGUE VISBY RULES

Many provisions in the Hague Visby, especially the limitation period of one year under its Art III(6)³⁰ which is disproportionate to the amount of time necessary for allocating the contractual carrier,³¹ low amount of compensation calculated in terms of package or unit, insufficient period of coverage under the ‘tackle to tackle’ principle, exclusion of deck cargo ignoring the increasing use of containers, the long list of defences especially the catch all provision in Art IV (2) (q), lack of uniform standard of proof, and apparent permission of deviation for the sole purpose of saving property remain favourable to the carrier at the shippers expense.

Following demand for change from developing states, all the above-stated criticisms were addressed in Hamburg Rules (1978).

First, Art.10³² and Art 20(1)³³ of Hamburg Rules have dramatically lessened the possibility for shippers to lose their right of suit due to time lapse, as they risked doing under Hague Visby. As it has been shown above, Hamburg Rules appear to be more ‘cargo friendly’ than Hague Visby, as they really are to some extent. However, a closer look reveals that many of its provisions are simply a codification of what has already been established by the cases decided under the Hague Visby and in some respects even less favourable to the shipper.

Second, limited amount of compensation for loss or damage to goods under Art 6(1) of Hamburg Rules is more favourable to shippers than under Hague Visby. Nevertheless, package or unit limitations are defined almost in a similar way as they were in the Hague Visby, and despite the limitation amount being greater under Hamburg Rules it is not reflective to inflation change.

²⁸ Union of India v NV Reederij Amsterdam (The Amstelslot) [1963] 1 Lloyds Rep 255 ‘Lack of due diligence is equal to professional negligence’.

²⁹ Hague Visby Rules [1968] Art III (1) and (2)

³⁰ Carrier and the ship shall in any event be discharged from all liability whatsoever unless suit is brought within one year of their delivery or the date when they should have been delivered.

³¹ The Stolt Loyalty [1993] 2 Lloyds Rep 281

³² Hamburg Rules [1978] Art 10(1)-(4) states: both the carrier and actual carrier are liable, jointly and in several.

³³ Hamburg Rules [1978], Art 20(1) states: there is a two year limitation period for any action relating to the carriage of goods by sea.

Leading some commentators to argue that in this respect it was even lower.³⁴

Third, the time of coverage commencing at the loading port and ending with handing goods to the shipper or his agent, ‘port to port’, under Hamburg Rules whereby transshipment is also included, is broader than ‘tackle to tackle’ as it is under Hague Visby Rules. However, almost as much had already been provided for the shipper, under Hague Visby Rules in *Pyrene Co Ltd*.³⁵

Forth, considering popularity of containerised shipment in international trade, the fact that in Hamburg Rules deck cargo is treated same as all other cargo signifies a move in step with the changes in trade practice. Nevertheless, there is no major innovation being introduced from Hamburg Rules on this point. Similarities between its Art 9 and *Svenska Tractor*³⁶ ruling decided under Hague Visby are indistinguishable with respect to deck cargo. Whereas cargo carried on deck short of agreement between parties would deprive the carrier of his limitation were Art 9 of Hamburg Rules to be applied, under Hague Visby unauthorised carriage on deck will also deprives it from limiting liability.³⁷

Fifth, probably the most important change brought by the new rules, at least for the purposes of this document, is the abolition, of the long list of defences granted to carriers under Art IV and the confusion created by the burden of proof associated with it. In contrast to its respective counterpart provisions in Hague Visby, Art 5(1) in Hamburg Rules codifies all carriers’ obligations and defences in one single concise provision. Clarifies aspects of burden of proof, placing it on carrier all the time and makes specific reference to loss or damage caused by delay or miss-delivery. Furthermore, under this convention the duty to exercise ‘due diligence to provide a seaworthy ship’ runs throughout the voyage rather than before and at the beginning of it.

Continuation of carriers obligation to exercise ‘due care’ throughout the voyage was covered by *The Subro Valour*³⁸ ruling decided under Hague Visby. With respect to damage caused by fire, under Hague Visby it was carriers’ obligation to disprove negligence, whereas under Art 5 (4) (a) of Hamburg Rules, such burden has shifted on the shipper despite carriers handling of evidence. Art 5 replaces deviation with measure to save life or reasonable measure to save property, which is simply a codification of the decision in *Stag Line*³⁹ complemented by *Photo Production v Securicor*.⁴⁰ both decided under Hague Visby. Art 5 also leaves open the argument whether carrier will be responsible for defaults

³⁴ William Tetley, “The Hamburg Rules - A Commentary”, Lloyd's Maritime and Commercial Law Quarterly, [1979] pp. 1-20, States: ‘Hamburg Rules failed to adopt a value even as high as Visby adjusted for 10 years of inflation’

³⁵ Pyrene Co Ltd v Scindia Navigation [1954] 2 QB 402

³⁶ Svenska Traktor v Maritime Agencies [1953] 2 QB 295.

³⁷ Encyclopedia Britanica v Hong Kong Producer [1969] 2 Lloyd's Rep536

³⁸The Subro Valour [1995] Lloyds Rep 509.

³⁹ Stag Line v Foscola Mango and Co [1932] AC 328

⁴⁰ Photo Production v Securicor [1980] AC 827

of independent contractors whereas under Hague Visby it is the carriers who shoulder this responsibility.

Incorporation of Hamburg Rules into major maritime countries may lead to some practical difficulties. One major drawback of these Rules is its ambiguous drafting, “occasionally done so with intention so the differing parties left the table convinced that their interpretation was the correct one”.⁴¹ This renders practically impossible the very core purpose of this convention, merely promotion of uniform interpretation.⁴² Being a mixture of civil and common law drafting style, Hamburg Rules may pose interpretation difficulties in United Kingdom courts, where “international conventions are treated very much as English legislation”.⁴³ Major shipping nations like England and USA have invested vast amount of judicial time and expense in striving to shape Hague Visby Rules, it would be overoptimistic to pretend incorporation of an ambiguous convention within their territories, since it would lead to a whole new generation of litigations generating a fresh load of expense.

4. CONCLUSION

From the foregoing analysis we conclude that despite the fact that the long list of defences under Hague Visby Rules may serve as useful channel through which the carrier can avoid the flow of responsibilities running against it. This escape provisions have been narrowed down from courts’ precedents to such degree that carrier may find it extremely difficult to succeed in avoiding liability. Many remaining deficiencies in Hague Visby were not fully remedied from Hamburg Rules, which while inheriting some of the problems created from its predecessor, carries unique problems of its own. Therefore if a whole embracing uniform set of international rules is to be accepted from all the countries all the above stated issues need to be addressed with a conscious thought on the practicality matter.

5. REFERENCES

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- [2] *ibid*
- [3] Maxine Footwear Co Ltd v Canadian Government Merchant Marine [1959] AC 589

⁴¹ William Tetley, “The Hamburg Rules - A Commentary”, *Lloyd's Maritime and Commercial Law Quarterly*, [1979] pp. 1-20.

⁴² Hamburg Rules 1978, Art 3.

⁴³ Charles Debatista “Carriage convention and their interpretation in English courts” [1997] *Journal of Business Law* 130

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- [6] *The Hellenic Dolphin* [1978] 2 Lloyds Rep 336
- [7] *Maxine Footwear Co Ltd v Canadian Government Merchant Marine* [1959] AC 589
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- [31] *The Stolt Loyalty* [1993] 2 Lloyds Rep 281
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