NASARAWA STATE UNIVERSITY, KEFFI

SCHOOL OF POST GRADUATE STUDIES

ANALYSIS OF INTERNATIONAL PERSPECTIVE OF LEGAL REGIME OF PACKAGE LIMITATION IN CARRIAGE OF GOODS BY SEA.

A DISSERTATION SUBMITTED TO THE SCHOOL OF POST GRADUATE STUDIES

NASARAWA STATE UNIVERSITY, KEFFI

IN PART FULFILMENT OF THE REQUIRMENTS FOR THE AWARD OF A MASTER DEGREE IN LAWS (LL.M) IN INTERNATIONAL MARITIME LAW

BY

MAFANY VICTOR NGANDO

NSU/LLM/LAW/0130/16/17

FACULTY OF LAW

NASARAWA STATE UNIVERSITY, KEFFI

October 7th 2020

DECLERATION

Permit me to declare that this research is a product of my sole academic effort. To the best of my knowledge and ability, this research has not in any way be presented, published or pirated by any one, group of persons, institution or organization.

This Research has not been used or published for use in any previous presentation for Degree or other qualifications by an institution of higher learning. All information is duly acknowledged.

MAFANY VICTOR NGANDO ----------

NSU/LLM/LAW/0130/16/17 DATE

CERTIFICATION

The Dissertation "Analysis of International Perspective of Legal Regime of Package Limitation in Carriage of Goods by Sea" meets the regulations governing the award of Master of Laws (LLM) of the School of Postgraduate Studies, Nasarawa States University, Keffi and is approved for its contribution to Knowledge.

Chairman Supervisory Committee — Date ---

Member Supervisory Committee — Date ---

Yakubu
Ass. Prof Y. Isa — Date 08-10-2020

Internal Examiner — Date

Dean, Faculty of Law
(Prof J.O. Adedoyin –Raji — Date ---

External Examiner — Date ---

Dean, School of Post Graduate Studies
(Prof. J. Ayub — Date

DEDICATION

This work is dedicated to the glory of God for his mercy.

ACKNOWLEDGEMENT

I owe my gratitude to God for his infinite mercy made it possible for me to conclude this LLM program in International Maritime Law in Nasarawa State University, Keffi, Nasarawa State.

May I use the opportunity to express my deep appreciation to Ass. Prof Y. Isa whose support and motivation influenced the successful completion of this research.

I also appreciate the Family of Late Dr. Kenneth Nsor for giving me the platform to complete this program.

I also acknowledge the support of my colleagues and all those who contributed to my success as a Post Graduate student at the Faculty of Law Nasarawa State University, Keffi. May God Bless You All.

Thanks.

ABSTRACT

The move by the international maritime community in enacting legal regimes regulating package limitation liability in carriage of goods by sea in international law was greatly influenced by Carrier's continuous exploitation against cargo owners especially in the 19th century, which was characterised by the concept of freedom of contract. The Carriers enjoyed a strong bargaining power in negotiating carriage contract terms, which resulted to them introducing terms excluding themselves from strict common law liabilities. The concept of freedom of contract developed to an extend that carriers attempted excluding themselves from damages resulting from their own negligence. Cargo owners were subjected to insure their own goods against maritime perils a situation they could not condole for long and consequently led to them putting up stiff resistance against carrier's unapologetic exploitation activities. Cargo owner's exploitation soon attracted international eyes as their weak bargaining strength pushed the international maritime community to enact legislations aimed at curtailing carrier's excesses in a bit to strike a balance between carriers and cargo owners viz-a-viz package liability limit in international carriage of goods by sea contract. The Maritime community efforts led to the enactment of The Hague's Rule 1924, The Hague's –Visby Rule 1968, The Hamburg Rule 1978 and Rotterdam Rule 2008. These regulations were aimed at protecting cargo owners against carrier's exploitation by expressly spelling out carrier's responsibility, liability and immunity in international carriage contracts. The research is aimed at analysing the different legal regimes of package limitation vis – a -vis the protection accorded to cargo owners and also geared towards achieving the following objectives to wit: analyze the limit of package liability, mode of calculating the package liability limitation, responsibility of parties in a carriage contract, liabilities and immunity of carriers and cargo owners in carriage contracts. The research methodology is largely doctrinal derived basically from primary and secondary data sources. The research didn't just find a problem in interpreting the term "package or unit "used in determining the liability limitation formula and monetary unit but realized that the draftsmen did not envisage carriage using containers vis-à-vis liability limitation thus introducing interpretation problems which required judicial interpretations. This research work recommends the need for International uniformity in interpreting the main package limitation regimes in carriage of goods by sea in order to avoid future dispute and confusion patterning package limitations in carriage of goods by sea that has rocked the international maritime community over time.

Table of Contents

CHAPTER 1

INTRODCUTION

1.1 BACKGROUND TO THE STUDY

According to John F. Wilson [1] a carriage contract or contract of affreightment is when a shipowner either directly or through an agent undertakes to carry merchandise by sea or to provide a vessel with the aim of transporting goods. The expressed terms of a contract of carriage between the carrier and shipper is typically contained in a document referred to as a bill of lading. A bill of lading is a document issued by a carrier or its agent to the shipper as a contract of carriage of the products[2]. Interestingly a bill of lading once issued act as a receipt of the goods shipped, evidenced the terms of the carriage contract and acts a negotiable tittle document in situation where ownership of the good want to be transferred to a third party while the goods are in transit on the sea.

In the hands of the shipper, the bill of lading is prima facie evidence at common law of the weight or quantity of goods shipped. To avoid liability, the carrier has the burden of proving that the products were not shipped as declared in the bill. His burden isn't any lightweight one since the carrier must clearly proof that the products were not in fact shipped, not merely that it is unlikely on a balance of possibilities. Thus in ***Smith*** **v** ***Bedouin Steam Navigation Co***[3] "988 bales of jute was delivered under a bill which stated that 1,000 bales had been shipped, Lord Shand indicated that for the carrier to succeed the evidence must be sufficient to lead to the inference not merely that the goods may possibly not have been shipped but that in point of fact they were not shipped[4].

---

[1] Carriage of gods by sea 7th edn, Pitman Publishing 2010 P .512

[2] *Pacer Multi-Dynamic Ltd V The M.V Dancing Sisters (2012) LPELR-SC.238/2000*

[3] (1896)AC.70

[4] *Att Gen of Cylon v Scindia Steam Navigation Co (1962) AC .68*

Truly such a burden is difficult to discharge because the carrier may not be aware whether such products were shipped enough reason why carriers to insert contracting out clauses in the bill of lading a practice which has become common.

In the case of ***New Chinese Antimony Co Ltd*** **v** ***Ocean Steamship Co*** [5]a bill of lading covering a cargo of antimony oxide stated that 937 tons had been shipped. In the body of the bill was a printed clause in ordinary type to the effect that 'weight, measurement, contents and value (except for the purpose of estimating freight) unknown. In these circumstances the Court of Appeal held that the written statement in the bill did not provide even prima facie evidence of the quantity shipped. In the opinion of Viscount Reading LJ, the true effect of this bill of lading is that the words "weight unknown" have the effect of a statement by the shipowners' agent that he has received a quantity of ore which the shippers representative says weighs 937 tons but which he does not accept as being of that weight, the weight being unknown to him, and that he does not accept the weight of 937 tons except for the purpose of calculating freight and for that purpose only.

On the reverse side of every standard liner bill of lading form contains a detailed set of printed contractual agreement terms that doesn't represent the contract of carriage itself but simply act as proof of the carriage contract. The contract is normally concluded orally long before the bill of lading is issued and should the goods be lost or damaged before a bill of lading is issued the shipper will not be deprived of a remedy for breach of carriage contract.[6]

According to the wordings of **Lush J** "A bill of lading is not the contract but only the evidence of the contract and it does not follow that a person who accepts the bill of lading which the shipowner hands him necessarily and without regard to circumstances, binds himself to abide by all its

---

[5](1917)2KB 664

[6] Pyrene v Scindia Navigation Co (1954)2 QB .402

stipulations. If a shipper isn't aware when he ships them or is not informed in the course of the shipment, that the bill of lading which will be tendered to him will contain such a clause, he has a right to oppose that his goods are received on the usual terms and to require a bill of lading which shall express those term.[7] Invariably mean that a shipper can use oral evidence to proof omitted terms in bill of lading.

Lastly, a bill of lading served as a document of tittle basically because of the lengthy and invariably slow voyage. The owners of cargo therefore required a document of title in order to boost credit for an international sale or to take advantage of an opportunity to sell the goods in transit. A bill will only operate as a document of title, however, if it is drafted as an 'order' bill, i.e. a bill under which the carrier agrees to deliver the goods at their destination to a named recipient /consignee or to his 'order or assigns'. If the document solely makes provision for delivery to a named consignee, it is called a 'straight' bill of lading or waybill, and lacks the negotiable quality needed to qualify it as a document of title.[8]

The primary push factor for an international package limitation and liability regime of parties in carriage of goods by sea, was to address the need of maritime stakeholders to strike a fair liability balance out of the exploitative might enjoyed by carriers for loss/damage of products arising out of a contract of carriage of goods by sea.

Although the international shipping organization have drafted standard bill of lading forms to be adopted by players within the maritime industry in carriage contracts ,maritime stakeholders are at liberty to make consequential modification.[9] Over the years, international trade have proven to be terribly dangerous[10] particularly with the sinking of the Titanic ship in April 14, 1912 and the

---

[7] *Crooks v Allain (1879) 5QBD .38 at 40*

[8] *The Chitral (2000) 1Lyoyds Rep 529*

[9] The Baltic & International Maritime Conference and The UK Chamber of Shipping.

[10] Yerokun, O, *Insurance Law in Nigeria* 2nd edn , Folarin Nigeria Company ,1992 p.443

exploitation that cargo owners were subjected to by carriers who usually exempted themselves from damages ensuing from their negligence because of the strong bargaining power they enjoy. This undoubtedly led to the enactment of international legislations to regulate the package liability limit, responsibilities, immunities of parties in Carriage contract in relation of loss or damage of goods at transit.

Historically, the liability of carriers in a contract of carriage was strict therein carriers were held liable for any loss /damage ensuing out of their fault and negligence. The only exception open to carriers to exclude them from the strict liability regime was for them to establish that the loss or damage was caused out of an act of god, the queens army or an inherited vice[11].The strict liability regime became non-effective economically because the risk associated in international trade accrued daily considering the prolonged distances and also the corresponding increment in insurance and fright amount. There was therefore a necessity to shift away from the strict carrier's liability regime to a more liberal maritime business surrounding. The concept of freedom of contract soon developed in the 19th century to the advantage of the carrier with a bill of lading. The carrier enjoyed a stronger bargaining power in the 19th century and could introduce terms in the contract of carriage excluding them from the strict common law liability regime.

The freedom of contract that characterized the 19th century before long attained a worrisome point were some carriers tried to exclude themselves from loss/damage emanating from their own negligence thereby relegating shippers to the position of an insurer of their own cargo a situation that received stiff resistance from shippers. There was therefore a need for the international maritime community to strike a balance between the package liability limit between the carrier, shipper and the consignee so as to achieve universal uniformity in carriage contract.

[11] United Nations Organization Brussels Supplementary Convention,2004

Some countries introducing legislations to curtail the carrier excessive strong bargaining power so as to strike a balance between the package liability among the carrier, shipper and consignees. The United States, took the lead by enacting the Harter Act 1893 which made it possible for courts to dismissed applications that contained carriage contract clauses that exclude carriers from liability ensuing from their negligence. Commonwealth countries like Australia, New Zealand and Canada followed suit by enacting similar US legislation while United Kingdom applied the freedom of contract rule[12].

The above legislations were considered cosmetic as maritime nations saw the need of an international uniform acceptable rule regulating package liability in international carriage of goods by sea. This led to the enactment of four main international legal instrument aimed at regulating carriage of goods by sea. They are, The Hague Rules of 1924, The Hague-Visby Rules1968, The Hamburg rules1978 and The Rotterdam rules of 2008. These set of rules clearly set out the obligations, liabilities, rights and immunities of carrier entitlement in case of any loss /damage in the course of transit and was aimed at attaining international uniformity. We shall evaluate their contributions and shortcoming in this thesis proper.

1.2. STATEMENT OF THE RESEARCH PROBLEM

This dissertation has as a goal to draw an analysis of the legal regimes of package limitation in carriage of goods by sea from an international perspective. The overall problem in actualizing this goal is the absence of a universal acceptable formula in carriage contracts to ascertain the liability limit. Enough reason why this dissertation advocates for a uniform formula so as addressed the ambiguities in package limitation in a bit to achieving international uniformity.

[12] Australia carriage of goods by sea Act 1904, New Zealand shipping & Seaman Act 1908 and Canadian Act 1910

1.3. RESEARCH QUESTIONS

As a result of the ambiguity surrounding the legal regimes of package limitation in international carriage, my research question would be what is the limit of package liability in carriage contracts? for the purpose of determining the legal regime of package limitation in carriage of goods by sea

1.4. AIM AND OBJECTIVES OF THE STUDY

The Aim of this dissertation is to analyse the legal regimes of package limitation in carriage of goods by sea so as to better allocate liability for damage or loss cargo between contracting parties to the carriage contracts. In view of the above stated aim, the objectives of this study are as enumerated:

I. Analyze the limit of package limitation under the main regimes.

II. Examine the rights and liabilities of cargo owners under the main regimes

III. Examine the rights and liabilities of ship-owners under the main regimes

IV. To advocate for uniformity in deciphering these rules among contracting states.

1.5. SIGNIFICANT OF STUDY

This research endeavor provides an in depth explanation of the meaning of carriage of goods by sea, the parties to a carriage contract, their respective liabilities and limitation all in an effort to analyse the legal regime of package limitations in carriage of goods at sea from an international perspective. Additionally, this research reflects on the developments that have taken place in terms of transport patterns with the advent of containers and see the need for international uniformity in deciphering the applicable rules governing carriage of goods by sea.

1.6. SCOPE AND LIMITATION

The scope of this research work essentially centers on analyzing the legal regime of package limitations in carriage of goods by sea from an international perspective. However, to effectively discuss the legal regime of package limitation, we shall attempt to analyse the liability limit of

parties to a carriage contract, responsibility and immunity of parties to a carriage contract and the liability for damages or loss of cargo under a contract of carriage. In my quest of carrying this research, my major limitation was the window allotted to complete this work and defend remains my most doubting constraint as effort to meet up with the date line especially with union strikes and the outbreak of the corona virus. This created some anxiety which of course did not affect the quality of this dissertation. Also the financial cost to get renounce maritime law text books was indeed a daring limitation to this research.

1.7. RESEARCH METHODOLOGY

To ensure that this research is carried to its logical conclusion, the use of doctrinal approach was adopted. Hence date for the work was derived from primary and secondary mode of data collection such as Text books, articles, journals, online sources, statutes, legislature, Cases, Newspapers and Magazines.

CHAPTER TWO

LITERITURE REVIEW

2.1. THEORITICAL FRAMEWORK

The underlying issue related to this research is to identify how the different package limitation regimes have protected cargo owners against ship owners who exclude themselves from liability ensuing from cargo loss/damage within the course of carriage of goods by sea. This exemption observe by carriers was very common in the nineteenth century where carriers enjoy wider bargaining power creating immunities to themselves from cargo damage or loss claims resulting from their negligence within the course of carriage of goods by sea. This necessitated the international maritime community to enact legislations to protect cargo owners and also strike a liability balance contracting parties in carriage contracts. The enacted legislations or legal regimes of package limitation in Carriage of goods by sea includes: -The Hague Rule 1924, The Hague Visby Rule 1968, The Hamburg Rule 1979 and The Rotterdam Rule 2008. These legislations had as primary objective to safeguard cargo owner against shipowners who often exclude themselves from liability ensuing from cargo loss/ damage. Additionally, these rules specify the limit of shipowners liability limit in the case of a loss/damage of good emanating from the carriage contract of goods by sea. The main issues surrounding The Hague Rule 1924 was that the package limit of 100-pound sterling per package was considered too be preposterously low by cargo owners considering the growing rate of inflation. The Hague Rules 1924 did not interpret elementary terms like 'package or unit" used as formulas in analyzing the regime of package limitation in carriage of goods by sea. It was therefore logical for The Hague Rules 1924 to be amended by the Visby protocol of 1968. The Hague -Visby Rule was enacted with a major amendment of the package limitation amount which witnessed an increase to 666.67 units of account per package with an alternative of 2 unit of account per kilogram of gross weight of goods damages or loss.

The continuous clamor by cargo owners who requested for a more comprehensive code to ensure adequate protection to cargo owners and carriers resulted to the promulgation of the Hamburg Rule 1979 which increased carrier liability for loss or damages to 835-unit account package limit with an alternative of twenty-five unit of account per kilo and lastly The Rotterdam Rule with higher figures of 875 SDR's per package or unit or 3 SDR's per kilogram of gross weight. Although The Rotterdam rule 2008 maintained the SDRs limitation liability formula, the unit of account with liability for loss or damage being now limited to 875 units of account per package or other *shipping* unit, or 3 units of account per kilo of the gross weight of the goods whichever produces is the higher amount. Interestingly all the conventions failed / neglect to give in clear precision as to what constitute package or unit in carriage of goods by sea.

2.2. CONCEPTUAL FRAMEWORK

2.2.1. CONTRACT OF CARRIAGE

Unlike the Hague's –Visby Rule that did not define the term contract of carriage, The Hamburg Rule defines a contract of carriage by sea to mean any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to a different port. However, a contract which involves carriage by sea and additionally carriage by some other means is deemed to be a contract of carriage by sea only in so far as it relates to the carriage by sea[13] whereas The Rotterdam Rule defines a contract of carriage as a contract in which a carrier against the payment of freight , undertakes to carry goods from one place to another . The contract shall expressly provide for carriage and may provide for carriage by different mode of transport in addition to sea carriage.[14]

[13] Article 1(6), Hamburg Rule 1978
[14] Article 2(1) Rotterdam Rule ,2008

2.2.2. HISTORICAL BACKGROUND

At common law, parties to a contract of carriage evidenced by a bill of lading were at liberty to freely discuss their respective contractual terms. This freedom to negotiate contractual terms in carriage contracts was grossly abused by carriers who dominated the seas and exercised great commercial bargaining strength over cargo owners thereby increasing the ship owner's bargaining power and decreasing the scope of their liability. The orthodox practice was illustrated by ship owners who resulted to inserting exemption clauses in bill of ladings and thereby making them immune from all liability and crew negligence.[15]The was therefore the need for special protection to be accorded to cargo owners who were hardly in a position to monitor their goods from thief's and dishonest carriers while on board the vessel in transit. Cargo owners became disgruntled with carrier's use of oppressive exemption clauses and lobbied their government to enact regulations to curtail the abuse of the carrier's strong bargaining position.[16]

In the seventeenth century, common law nations saw the necessity to impose strict liability on maritime carriers so as to make them completely liable for loss or damages caused to goods carried under contracts evidenced by bills of lading whether or not they were responsible. The sole exception open to carriers is if they can show that such a damage or loss was either caused by an act of God, acts of the Queen, public enemies, and inherent vice of the goods or the fault of the shipper.[17] This move accorded special protection to cargo owners against ridiculous exemption clauses typically inserted within the bill of lading by carriers.

---

[15] Inc. v. S.S Hong Kong Producer, 1969, F.2d 7
[16] Jones v The Flying Clipper, 1953, 386 SDNY
[17] S New Jersey Steam Nay. Co. v. Merchant Bank, 1848, 47 U.S, 343.

2.2.3. DEVELOPMENT OF THE LEGAL REGIME IN CARRIAGE OF GOODS BY SEA

The United States, took the lead by enacting the Harter Act 1893 that made it possible for the courts to dismissed applications that contained carriage contract clauses which excluded carriers from liability ensuing from their negligence. Commonwealth countries followed suit with the enactment of Australia sea of goods act 1904, New Zealand & Seamen act 1908 and Canada carriage of goods by water act 1910. These acts influenced the international maritime community to enact The Hague Rules in 1924. The major objective of The Hague Rules 1924 and The Hague Visby Rules 1968 which subsequently followed was to protect cargo owners from carriers who regularly exclude themselves from liability in contract of carriage. This objective to a larger extend was achieved as The Hague and Hague – Visby Rules didn't just ensure that standard clauses were incorporated in the bill of lading but went ahead to define the responsibility, liability and immunity which the carrier are entitled to. Carrier's under these rules can make an undertaking to assume liability above those prescribed in the rules but cannot attempt to reduce the liability as such an attempt will result to an absolute nullity.[18] The package limitation under the Hague Rules was one hundred pound sterling an amount which was considered ridiculously low and necessitated The Hague Visby amendment which introduced the special drawing right (SDR) defined by the International monetary Fund to 666.67 unit of account per package or 2 unit of account per kilogram of gross weight of goods damages or loss whichever is higher.

Despite the modifications of The Hague Rules in 1968 by the Brussels protocol, cargo-owners merely considered the move to be timely and further pressured the international community for a comprehensive code that addresses all problems of carriage of goods by sea. This necessitated the United Nation to organise an international conference and adopted a new legislation known as the Hamburg Rule 1978. One of the most important protections accorded to cargo-owners under the

[18] Article III Rule 8

Hamburg rule is that, The Hamburg rule applied to contract of carriage by sea between ports in two completely different states[19] whether or not a bill of lading is issued. It is crystal clear that this was not the case of The Hague / Hague –Visby protocol which applied solely on contract of carriage covered by a bill of lading or any similar document in so far as such document relates to carriage of goods by sea.[20] Also, The Hamburg rules apply from the port of loading, throughout the carriage and at the dispatch port and thereby improved on the position of The Hague / Hague –Visby rule which exclude liability for cargo not onboard the vessel.[21] The Hamburg Rule has achieve international success as it adopted the SDR and restricted the carrier liability for damages or loss of cargo to 835 unit account package limit with an alternative of 2.5 unit of account per kilogram of the gross. The Rotterdam Rule that was subsequently enacted was more flexible with its applicability to contract of carriage by sea irrespective of the type of document used but to the exclusion of charter parties.[22]Additionally , the rule is applicable once an agreement is reached that electronic equivalent be used to replace traditional documentary paper [23] and finally to both inward and outward voyage from the contracting states thereby extending its scope tremendously when put next to the Hamburg Rule.

2.3. EMPIRICAL FRAMEWORK

There are several literatures that examines the legal regime of package limitation in carriage of goods by sea from an international perspective. This dissertation shall concentrate on renounce literatures in actualizing it objective. According to Paul Todd [24] The Harter Act 1893 of USA , Australian sea carriage of goods act 1904 and Canadian carriage of goods by water act 1910

[19] Article 1.6 Hamburg rule
[20] Article 1(b) Hague –Visby rule
[21] Article 4.1 Hamburg rule
[22] Article 1.1 and 35
[23] Article 8(a)
[24] *The Principles of Carriage of goods by sea* (1st edn, Routledge Publishers) ,2016

remains the earlies codification attempts in carriage of goods by sea and greatly influenced the enactment of The Hague's Rule 1924 which was aimed at setting a uniform rules viz-a-viz carriers responsibilities ,liabilities Rights and immunities. To Todd , the low carrier package liability limit under the Hague's Rule 1924[25] and the high inflation rate threat led to the legislative birth of the Hague Visby Rule 1968 which increased carrier package liability limit to 666.67 unit of account per package or 2 unit of account per kilogram of gross weight of goods damaged. Most interestingly is the leverage bestowed on cargo owners to choose whichever liability limit they deem high in the course of making their claim to loss/damage of cargo. Todd in his book, acknowledge that the need to strike a better balance with respect to package liability limit necessitated cargo-owner nations to propose the Hamburg Rule 1978 and The Rotterdam Rule 2008 which increased carrier liability for Damages or loss of cargo to 835-unit account package limit with an alternative of 2.5 unit of account per kilogram of the gross to 875 SDR's per package or unit or 3 SDR's per kilogram of gross weight respectfully.

To Simon Boughen,[26] package limitation regime in Carriage of goods by sea was aimed at protecting cargo owners from carriers who regularly exclude themselves from liability for damage caused to goods. To Simon, the signing of the Hague's Rule 1924 was a unanimous attempt of respective governments to adopt unify carrier liability limit/ rules in carriage contracts. Simon acknowledged the urgent need for an amendment as not just was the carrier liability limit of 100-pound sterling considered so low, inflation was an increasing threat in the 1960s. He acknowledged that The Hague Visby amended Rules 1968 didn't just adopt the Special drawing right (SDR) of the IMF but increased the carrier package limit to 666.67 unit of account per package or 2 unit of account per kilogram of gross weight of goods damaged significantly giving the cargo owners the

[25] Article IV (5) Hague Rules
[26] Shipping law (6th edn, Routledge Publisher, 2015)

opportunity to choose the highest liability limit. Simon saw, The Hamburg Rule 1978 as another attempt to perfect cargo owner protection because The Hamburg Rule also adopted the SDR increased carrier liability limit for damages or loss of cargo to 835-unit account package limit with an alternative of 2.5 unit of account per kilogram of the gross which experienced a subsequent increase to 875 SDR's per package or unit or 3 SDR's per kilogram of gross weight under the Rotterdam Rule 2008 a move he gave a plausible remark in his book.

John F Wilson in his book [27] acknowledged the dominance of carriers in the 19th century to the detriment of cargo owners and saw the need of a legal framework to check carrier's excesses. To John F Wilson who remains one of the most celebrated writers on this thesis subject, explained how the enactment of The Hague Rule 1924 was a timely effort by the international maritime community to limit carrier liability to cargo loss or damages caused to 100 pound sterling gold values per package [28] although he acknowledged the amount to be mega applauded to move to amend the Hague's Rules so as to improve protection to cargo package as the packaged limitation provision registered an increased to 666.67 units of account per package or 2 unit of account per kilogram of gross weight of goods damages whatever amount under the SDR of International Monetary Fund. John F. Wilson applauded the emergence of The Hamburg Rule 1978 and Rotterdam Rule 2008 as a better protection to cargo owners this explains why the Special Drawing Right (SDR) was adopted carrier liability increases to 832 unit of account per package or 2.5 unit of account per kilogram of the gross weight of the good, and 875 SDR's per package or unit or 3 SDR's per kilogram of gross weight respectfully.

[27] Carriage of Goods by Sea (7th edn, Pitman Publishing 2010)
[28] Article ix Hague Rule

To Alane E [29] codification of package limitation legislation in carriage of goods by sea was a step to protect cargo owners from carriers who exclude themselves from liability or insert ridiculous low amount. The 100-pound sterling per package limitation amount under The Hague Rule 1924 aimed at protecting cargo owners was in his view too low a security to cargo owners and the need for an amendment was inevitable. To Alane the Hague's Visby amended protocol was timely in 1968 as it adopted the IMF Special Drawing Right (SDR) and increased the package limitation of 666.67 per package or unit or unit or SDR 2 per kilo with an option of cargo owners to choose whichever is greater and thereby improving cargo owner protection in carriage contract. Alane only saw The Hamburg Rule 1978 as an improvement of cargo owners interest in carriage contracts and a step towards achieving International uniformity. The package limitation amount increased carrier liability to SDR 835 per package and SDR 2.5 per kilo and subsequent increased under the Rotterdam Rule 2008 to 875 SDR's per package or unit or 3 SDR's per kilogram of gross weight. To Charles Debattista [30] package limitation regimes were aimed at according special protection to cargo owners against ridiculous exemption clauses usually inserted in the bill of lading by carriers in the course of carriage of goods by sea. To Debattista the adoption of The Hague Rule in 1924 was aimed at limiting carrier's liability and gives cargo owner a liberal limit so as to prevent carriers from limiting liability to very low amount. He acknowledged that the 100-pound steeling package limitation under The Hague Rule too low especially with the growing inflation threat and submitted that amendment calls on that provision was not surprising by respective signatory governments.

[29] Element of Shipping (9th edn , Routledge Publishers)2014
[30] Maritime law (3rd edn , Routledge Publishers)2014

The Hague Visby Rule 1968 amendment increased the provision of package liability limit, the method of calculation of the limit and the right to break and extend the limit by introducing The SDR. He opines that the introduction of the Hamburg Rule 1978 was a step towards attaining better protection as envisage with an increase in the liability limit for Damages or loss of cargo to 835-unit account package limit with an alternative of 2.5 unit of account per kilogram of the gross and Rotterdam Rule 2008 which subsequently increased the liability limit to 875 SDR's per package or unit or 3 SDR's per kilogram of gross weight.

According to Dr Sarah C. Derrington [31] package limitation regimes were aimed at redressing the imbalance which existed between carrier interests and cargo interests in relation to the loss or damage occurring to goods in the course of carriage by sea. To Dr Sarah, the promulgation of The Hague Rules 1924 was aimed at to limit carriers liability and at the same time give cargo interests a liberal limit so as to preclude carriers from inserting clauses in their bills of lading purporting to limit liability to ridiculously low[32]. Dr Serah observes that Article IV rule 5 of The Hague Rules did not clearly define the words package or unit' and also the limitation amount as carrier liability for loss or damage of cargo at sea was too low and thereby necessitated the promulgation of The Visby Protocol in 1968 so as to amend the Package Limitation provision and increase liability limit[33]. Dr. Serah further commented that the subsequent promulgation of the Hamburg Rule 1978 and Rotterdam Rule 2008 was not just to archive international uniformity but to increase Carrier liability for damages or loss of cargo to 832-unit account per package with an alternative of 25unit

[31] Serah C, Derrington , "A Piece Neither a package nor a Unit *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA*, 68 Mod. L. Rev. 111, 120 (2005) http://heinonline.org/article/view/accessed 14th November 2017

[32] Article IX Hague Rules, 100-pound steeling per package.

[33] Article IV Rule 5(c) Hague Visby Rule.

of account per kilogram to 875 SDR's per package or unit or 3 SDR's per kilogram of gross weight respectfully.

Conclusively, All the International conventions regulating carriage of goods by sea (Hague's Rule 1924, Hague's Visby- Rule 1968, Hamburg Rule 1978, Rotterdam Rule 2008) had as an objective to protect cargo owners from wide spread exploitation and exclusion of liability by carriers. This objective to a larger extend was achieved through incorporating liability limitation clauses in the contract of carriage. An eagle eye perusal of all literatures reviewed shows an increasing amendment of the package liability limit from the Hague's Rule 1924, Hague's –Visby Rule 1968, Hamburg Rule 1978 and Rotterdam Rule 1996. However, there exist gaps in research in the course of review. The Hague's Rule 1924, Hague's –Visby Rule 1968, Hamburg Rule 1978 and Rotterdam Rule 1996 made use of the term "package and unit" as the limitation liability formula which lacked clearness and accuracy. This posed a lot of interpretation especially with the development of other mode of carriage like containers.[34] Also, there exist a gap in uniformity as not all nations are signatories to the conventions thereby limiting the scope of applicability. Further discoveries show that even among signatory nations of the convention, the judicial system still give conflicting thus the need for harmonization.

In The "**RIVER GURARA**[35]" was on a laden voyage from Africa to Europe when she suffered an engine breakdown. She stranded off the coast of Portugal and subsequently broke up with loss of life and total loss of cargo. The cargo was carried under bills of lading which, by a Clause Paramount, were subject to The Hague Rules if the rules formed part of the law of the place of shipment. In this case the law of the place of shipment incorporated The Hague Rules in their unamended form. Cargo claimants sued the shipowners for the loss of the containerised cargo.

[34] The River Gurara [1998] 1 Lloyd's Rep. 225
[35] supra

Owners pleaded that they were entitled to limit their liability under Article IV Rule 5 of The Hague Rules to "GBP 100 per package or unit", and that each container was a package for the purposes of the Rules. The bills of lading described the cargo as "said to contain" a given number of "bales", "parcels", "bags", "bundles", "crates", "cartons", or "pallets". Colman J in the English High Court found in favour of the cargo claimants and the owners appealed.

The court of appeal upheld the decision of Colman J:

1. Where the package limit falls to be calculated in relation to parcels of cargo loaded into containers, it is the parcels and not the containers which constitute the relevant packages. The Court of Appeal took into account the following points:

a) The Hague Rules were the product of an international convention and it is therefore legitimate when construing the rules to have regard to their objects as disclosed by the travaux préparatoires of the Convention. These had been discussed in a number of US authorities and in a number of articles to which the Court referred. The Court concluded that one of the main purposes of the limitation was to benefit cargo owners and prevent shipowners inserting clauses in bills of lading purporting to limit liability to ridiculously low figures. It was argued by the shipowners that one of the objects underlying the Rules was to ensure that the shipowner was able to verify the extent of his liability and that where the nature and value of the goods inside a package were not specifically declared, the limit of the liability would attach to the package itself. They further contended that if a number of smaller packages were put inside a larger package the appropriate package for limitation purposes was the larger one as that would be the only one that the shipowner could verify. The Court of Appeal, however, decided that the travaux préparatoires do not support this

argument and that in any event Article III, Rules 3-5 envisage circumstances where the shipowner will not be able to verify the number of packages shipped.

b) In 1924 when the Convention came into force, a figure of GBP 100 represented a fair figure for the average value of a package shipped. The Court held that to apply the same figure today to a huge container stuffed with many packages would defeat the object of preventing shipowners from limiting their liability to sums that were absurdly low.

c) To describe a container as a package, said the Court, was to strain the natural meaning of the word. The Court of Appeal referred to **Bekol B.V. v Terracoma Shipping Corp.** (unreported) 13th July 1998 where Leggatt J. referred to the definition of the word in the Oxford English Dictionary, "a bundle of things packed up, whether in a box or other receptacle, or merely compactly tied up."

d) A preference for packages, rather than the containers in which they are stuffed, at least where the bill of lading states the number of packages (as to the manner in which the bill of lading describes the cargo this is also relevant (see below) as has been shown by the Courts of the US, Canada, Australia, France, Holland, Italy and Sweden).

2. In calculating the package limit, this must be done by reference to the cargo which was established to have been loaded and not to the way in which the cargo was described in the bill of lading. Thus, if the cargo owner proves loss by relying on the bill of lading as prima facie evidence of what is shipped, the description of the goods in the bill of lading will form the basis of the calculation of The Hague Rules limit of liability. Where the shipowner displaces the prima facie evidence or the cargo owner establishes his claim to damages by reference to evidence extrinsic to the bill of lading, the extrinsic evidence will form the

basis of the calculation of The Hague Rules limit of liability and if the shipowner finds himself subject to a greater limit than that which would have resulted from the goods as described in the bill of lading, he may have a claim for breach of warranty against the shipper under Art III, Rules.

CHAPTER THREE

RESEARCH METHODOLOGY

3.1. RESEARCH DESIGN

A qualitative research design was used in obtaining information on the legal regime of package limitation in carriage of goods by sea from an international perspective. The qualitative research design was used to integrate the different components of the study in a coherent and logical way consequently ensuring the research problem is effectively addressed. A case study design approach shall review the legal regime of package limitation in carriage of goods by sea so as to classify and examine each regime. This helps in presenting constructive and precise information to rejoin the queries that are founded on when, what and how (*Mitchell and Jolley 2012*).

3.2. METHOD OF DATA COLLECTION

Data collection is a process of collecting information from all the relevant sources to find answers to the research problem, test the hypothesis and evaluate the outcomes. The research shall use secondary data collection. Secondary data are data's which are readily available from other sources and as such there is no specific collection method. Its main advantage is that data is easily available and less expensive as compared to primary data. Qualitative secondary source of data used by the researcher includes; books, journals, papers, articles and internet source. The major disadvantage of this method of data collection is, it is not specific to the researcher and at times it is incomplete to reach a conclusion.

3.3. TECHNIQUE FOR DATA ANALYSIS

The technique for data analysis adopted by the research is purely Thematic. Thematic Analysis allows the researcher to determine precisely the relationships between concepts of the research topic and compare them with the replicated data. Thematic Analysis provides a possibility for the researcher to link the concepts and compare these with the data that has been gathered in during the project.

3.4. JUSTIFICATION OF METHOD

The rationale for the selection of qualitative secondary data collection in this research study is Qualitative research method is largely descriptive and exploratory in nature. The data collected in qualitative research are mostly in the form of words from relevant documents, such as books, policy documents, journals, newspapers and acts of Parliament making it easier to collect, time saving and less expensive. Accordingly, John W. Creswell in his book "Qualitative inquiry and Research design" identified the following useful characteristics of a qualitative research to justification of this research method. Qualitative research uses multiple methods of data collection that are interactive and humanistic. It is fundamentally interpretive whereby the researcher gathers, interprets and analyses data. Finally, the data are interpreted in order to draw conclusions on their meaning and to then be able to state the lessons learned. Qualitative research views social phenomena holistically an indication of the reason why qualitative research is broad and complex. The more complex, interactive, and encompassing the narrative of the qualitative research is, the better the qualitative study becomes. It also uses complex reasoning that is multifaceted interactive and simultaneously uses both inductive and deductive methods in a qualitative research. Finally, a

qualitative researcher adopts and makes use of one or more strategies of inquiry as a guide in the procedures of a qualitative study.

CHAPTER 4

DATA PRESENTATION AND ANALYSIS

4.1.1 INTRODUCTION THE HAGUES RULE 1924 AS AMENDED BY THE BRUSELLS PROTOCOL 1968.

Before 1800 it was uncommon for English bills of lading to incorporate extensive exclusion clauses. Practice changed dramatically in the first half of the nineteenth century and in due course provoked a reaction on the part of cargo interests. Carriers claimed that freedom of contract was the proper approach and robustly exercised that freedom. Shippers responded that the sole freedom of contract they enjoyed was the freedom either to ship on terms settled by the sea carrier or the liberty not to ship at all. Consignees, endorsees and their bankers typically had even less chances than shippers to influence the terms of bills of lading by negotiation. In England, these considerations led to the promotion of model bills of lading and to unsuccessful demands for legislation. In different jurisdictions, cargo interests were powerful enough to obtain legislation to regulate the balance in their favour. This was done in the United States in the Harter Act in 1893 and later in Australia (Sea Carriage of Goods Act 1904), Canada (Water Carriage of Goods Act 1910) and in New Zealand (Shipping and Seaman Act 1903).

A series of moves were made to secure a standardised international approach. After respectable discussion among the representatives of leading shipowners, underwriters, shippers and bankers of large maritime nations, a collection of rules was finally drafted by the Maritime Law Committee of the International Law Association at a gathering held at The Hague in 1921 That came to be known as the Hague Rules, but were not immediately adopted. The Rules

were amended at the London Conference of CMI in 1922. A draft convention settled at that conference was amended at the capital of Belgium in 1923, and in due course an international Convention was ultimately signed by the most important commercialism nations on twenty five of August 1924. Every State was expected to give The Hague Rules statutory force with regard to all outward bills of lading. The Hague Rules radically modified the position of sea carriers who engage in carriage contract under bills of lading. According to the previous law, shipowners were usually common carriers, or were liable to the obligations of common carriers, however they were entitled to the utmost freedom to restrict and limit their liabilities, that they did by elaborate and mostly illegible exceptions and conditions. Under the Act and also the Rules, that cannot be varied in favour of the carrier by any bill of lading, their liabilities are exactly determined, and so also are their rights and immunities.

In 1963 the CMI adopted (at Visby on the Swedish island of Gotland) the text of a draft document was meant to make limited amendments to the 1924 Convention. This draft was thought about at the twelfth session of the Brussels Diplomatic Conference on Maritime Law in 1967 and 1968. The result was the Protocol signed on twenty third of February 1968. In the United Kingdom, the Carriage of Goods by Sea Act 1971 was passed to give effect to that Protocol. The Act was brought into force on twenty third of June 1977. It repealed the 1924 Act and re-enacted the Hague Rules in their amended Hague-Visby form. The Hague Rules (and their successor the Hague-Visby Rules) form an internationally recognised code adjusting the rights and duties existing between shipowners and people shipping goods under bills of lading. As **Sir John Donaldson MR said in *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd*** [36] "The rules create an intricate blend of responsibilities and liabilities, rights and

[36] [1985] QB 350, 368

immunities, limitations on the amount of damages recoverable, time bars, evidential provisions, indemnities and liberties, all in relation to the carriage of goods under bills of lading".

Although the 1968 Protocol created important changes, it didn't radically alter the compromise between the interests of carriers and cargo owners which had been reached in 1924.The Hague's Rule 1924 and its successor Hague's Visby Rules 1968, had as primary aim to safeguard cargo owners against carrier's exploitation, defining carriers risk, extend of protection a carrier may claim and most importantly minimum liability limitation. Any attempt made by the carrier to exclude themselves from liability below the minimum liability limitation are going to be declared an absolute nullity and of no effect.[37]

4.1.2 SCOPE OF APPLICATION

Article 1(b) of The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968 states that the rules applies solely to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, as well as any bill of lading or any similar document as aforementioned issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same. The sole exception to the rules may be a straight bill of lading that as per **Lord Rodger** "*a document which described itself as a bill of lading and contained with the exception of the words 'to order' all the usual clauses to be found in such a document, qualified in his opinion as a bill of lading.*"[38] The rules however excluded the carriage of live animals and cargo which are stored on deck.[39] However parties are free to negotiate independent carriage terms in respect to carriage of animals and cargo on deck.

---

[37] Article III rule 8 The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968
[38] Article 1(b) of The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968
[39] Article 1(c) The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968

In the case of ***Svenska Traktor*** v ***Maritime Agencies***[40] a consignment of tractors had been shipped from Southampton under a bill which conferred a liberty on the carrier to stow the cargo on deck. When one of the tractors was washed overboard during the voyage, the shipowner sought to rely on a clause in the bill excluding his liability for loss or damage to deck cargo. The court held that he was unable to do so since a mere general liberty to carry goods on deck is not in my view a statement in the contract of carriage that the goods are in fact being carried on deck.[41]

The trial judge pointed to the fact that 'Such a statement on the face of the bill of lading would serve as a notification and a warning to consignees and endorsees of the bill of lading, to whom the property in the goods assed under the terms of section 1 of the Bills of Lading Act 1855, that the goods which they were to take were being shipped as deck cargo. They would thus have full knowledge of the facts when accepting the documents and would know that the carriage of goods on deck was not subject to the Act. Without such warning, the transferee of the bill would presume the Rules to be applicable. Accordingly, the carrier was held liable for a breach of Art III rule 2 in failing to look after the cargo properly and carefully during transit".

The Hague/ Hague – Visby rules carriage coverage period runs from once the goods are loaded on the ship to the time that the goods of discharge from the ship.[42]This is expressly evident that carriers liability are not limited throughout the actual carriage but during loading and discharge of goods under a carriage contract. However, The Hague –Visby rules 1968 [43] makes is straightforward for carriers to exclude liability in regards to care of cargo before loading and when discharge as such terms are freely negotiated by carriers and so making it a serious weakness to

[40] [1953] 2 QB 295
[41] At p 300 *per* Pilcher J
[42] Article 1(c) The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968
[43] Article V11 The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968

the rules as identified by cargo owners. Another drawback is the inapplicability of the rules where goods are supplied under a through bill of lading transshipment document especially as Article (1) b of The Hague-Visby Rules Amended Protocol in 1968 defines the term contract of carriage by specifying that the contract of carriage must be covered by bill of lading.

4.1.3 OBLIGATION OF THE CARRIER UNDER THE HAGUES RULE 1924 AS AMENDED BY THE BRUSSELS PROTOCOL 1968.

The Rules alter the position at common law. Art III provides an obligation to the carrier to exercise due diligence before and at start of the voyage. Unlike the common law duty, this obligation can be excluded by agreement. The obligation under the Rules to exercise due diligence has been held to be inescapable and as such a concept that has been exploded in recent cases.

OBLIGATION TO PROVIDE A SEAWORTHY VESSEL: Article III Rule 1[44] expressly provides that the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to ;

a) Make the ship seaworthy.

b) Properly man, equip and supply the ship.

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

By Art IV r 1, the carrier is formed liable just for loss or damage caused by want of care. The burden of proving due diligence is placed on the carrier. The meaning of before and at the beginning of the voyage was settled by the decision in ***Maxine Footwear Co Ltd Vs Canadian***

[44] The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968

Merchant Marine[45], a case which also established that if the obligation in Art III r 1 is not fulfilled and the non-fulfilment causes damage to cargo, the immunities in Art IV r 2 cannot be relied on.

Facts:

The appellants were shippers and consignees of cargo loaded on the Maurienne at Halifax NS for carriage to Kingston, Jamaica. The contract was subject to The Hague 168 Cases & Materials on the Carriage of Goods by Sea Rules as enacted by the Canadian Water Carriage of Goods Act 1936. Shortly before the vessel was due to sail an attempt was made to thaw a frozen drainpipe with an acetylene torch. A fire was started in the cork insulation around the pipe. The fire eventually forced the master to scuttle the ship.

Held

Lord Somervell of Harrow: .... Before proceeding to consider the arguments it is convenient to state certain conclusions which appear plain to their Lordships. From the time when the ship caught on fire she was unseaworthy. This unseaworthiness caused the damage to and loss of the appellants goods. The negligence of the respondent's servants which caused the fire was a failure to exercise due diligence.

Logically, the first submission on behalf of the respondents was that in cases of fire Article III never comes into operation even though the fire makes the ship unseaworthy. All fires and all damage from fire on this argument fall to be dealt with under Article IV, r 2(b). If this were right there being at any rate a very strong case for saying that there was no fault or privity of the carrier within that rule, and the respondents would succeed.

---

[45] *(1959) AC at P.603*

In their Lordships' opinion the point fails. Article III, r 1, is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage the immunities of Article IV cannot be relied on. This is the natural construction apart from the opening words of Article III, r 2. The fact that that rule is made subject to the provisions of Article IV and r 1 is not so conditioned makes the point clear beyond argument.

The further submissions by the respondents were based, as they had to be, on the construction of Article III, r 1. It was submitted that under that article the obligation is only to exercise due diligence to make the ship seaworthy at two moments of time, the beginning of the loading and the beginning of the voyage.

It is difficult to believe that this construction of the word 'before' could have been argued but for the fact that this doctrine of stages had been laid down in relation to the absolute warranty of seaworthiness in English law.

It is worth, therefore, bearing in mind words used by Lord Macmillan with reference to the English Carriage of Goods by Sea Act 1924, which embodied The Hague Rules, as does the present Act:

In their Lordships' opinion 'before and at the beginning of the voyage' means the period from at least the beginning of the loading until the vessel starts on her voyage. The word 'before' cannot in their opinion be read as meaning 'at the commencement of the loading'. If this had been intended, it would have been said. The question when precisely the period begins does not arise in this case, hence the insertion above of the words 'at least'.

On that view the obligation to exercise due diligence to make the ship seaworthy continued over the whole of the period from the beginning of loading until the ship sank. There was a failure to exercise due diligence during that period. As a result the ship became unseaworthy and this

unseaworthiness caused the damage to and loss of the appellants' goods. The appellants are therefore entitled to succeed . . .

It becomes therefore unnecessary to consider whether the Supreme Court were justified in holding that the appellants' goods were not stowed until after the commencement of the fire.

It is also unnecessary to consider the earlier cases as to 'stages' under the common law. The doctrine of stages had its anomalies and some important matters were never elucidated by authority. When the warranty was absolute it seems at any rate intelligible to restrict it to certain points of time. It would be surprising if a duty to exercise due diligence ceased as soon as loading began, only to reappear later shortly before the beginning of the voyage. For these reasons their Lordships will humbly advise Her Majesty that this appeal should be allowed.

The obligation under the Rules to exercise due diligence has been held to be 'inescapable' in the sense that the carrier is liable for lack of due diligence on the part of anyone involved in keeping or making the vessel seaworthy.

Lord Keith of Avonholm stated:

"The obligation is a statutory obligation imposed in defined contracts between the carrier and the shipper. There is nothing novel in a statutory obligation being held to be incapable of delegation so as to free the person bound of liability for breach of the obligation, and the reasons for this become, I think, more compelling where the obligation is made part of a contract between parties. We are not faced with a question in the realm of tort, or negligence. The obligation is a statutory contractual obligation. The novelty, if there is one, is that the statutory obligation is expressed in terms of an obligation to exercise due diligence, etc. There is nothing, in my opinion, extravagant in saying that this is an inescapable personal obligation. The carrier cannot claim to have shed his

obligation to exercise due diligence to make his ship seaworthy by selecting a firm of competent ship repairers to make his ship seaworthy. Their failure to use due diligence to do so is his failure. The question, as I see it, is not one of vicarious responsibility at all. It is a question of statutory obligation. Perform it as you please. The performance is the carrier's performance"

CARE OF CARGO : The Hague/ Visby Rule [46] imposed another duty on the carrier to exercise reasonable care by properly and carefully loading , handling ,stowing , carrying , keeping , care for and discharge the goods delivered. In defining care, the words carefully and properly seem to be that a higher care apart from reasonable care.

The House of Lords in **Albacora *v* Westcott and Laurance Line** [47] in which a consignment of wet salted fish had been shipped at Glasgow for Genoa. The crates were marked 'keep away from engines and boilers 'but otherwise no special instructions for carriage were given by the shippers. It was subsequently established that fish of this type could not be safely carried on such a voyage without refrigeration although this fact was unknown to the carrier. On arrival at Genoa the cargo was found to have deteriorated substantially in quality as a result of bacterial action and the question was whether it had been carried 'properly' within the meaning of Art III.

Lord Reid expressed the view that 'properly' meant in accordance with a sound system. 'In my opinion, the obligation is to adopt a system which is sound in light of all the knowledge which the carrier has or ought to have about the nature of the goods. And if that is right, then the Respondents did adopt a sound system. They had no reason to suppose that the goods required any different treatment from that which the goods received.[48]

[46] Article III Rule 2 The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968
[47] [1966] 2 Lloyd's Rep 53

OBLIGATION TO ISSUE A BILL OF LADING: The carrier have an imposed obligation under the rules to issue a bill of lading to the shipper of the goods.[49]Article III Rule 3 specifically provides that just in case of any leading identifying the goods , the bill of lading should expressly capture and among others , identify the number of package, piece quantity, weight and especially the condition of the goods.

In reality, information on a bill of lading are typically provided by the shipper reason why the rules[50] makes it obligatory on the shipper to indemnify the carrier in case of loss or damages of goods ensuing because of inadequate information provided in the course of the carriage. The carrier is not oblige to accept inaccurate information particularly when the goods are seal. In most circumstances wherever the goods are sealed making it difficult to ascertain the condition, it is a normal occurrence to see carriers contract out by stating that weight and condition unknown.[51] The bill of lading is seen to play a cardinal function as proof of receipt.[52]

OBLIGATION NOT TO DEVIATE FROM THE AGREED ROUTE

The general rule is a carrier while performing his obligation under the contract of carriage shall not deviate from the contract voyage. Under common law, some exceptional circumstances were acknowledged under which deviation by the carrier can be accepted.

Firstly, deviation is justified if it is aimed at avoiding danger to the ship or cargo. The carrier is required to take reasonable care in the course of deviating from the proper route in order to ensure the safety of the vessel and its cargo. In cases of natural happenings like storms, ice or fog, or

[49] Article III Rule 3 The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968
[50] Article III rule 5 The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968. See *The Boukadoura* [1989] 1 Lloyd's Rep 393.
[51] Vita Food Products *v* Unus Shipping Co *[1939] AC 277 at p 294*
[52] Article III rule 4 The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968.

political factors like the outbreak of war or the fear of capture by hostile forces the carrier taking another voyage is justified. Secondly, the carrier will deviate from its natural route thus to safe human life or communicate with a vessel in distress provided it motive is not to profit from salvage claims.

The Hague /Hague –Visby rules acknowledges the obligation of a carrier not to deviate from its natural route in the course of the voyage except when such deviation is aimed at saving or attempting to save property at the sea and any other reasonable deviation.[53] The rules added two additional head of exception to the common law. In a bit to arrive at the meaning of "reasonable" in this context, the House of Lords in ***Stag Line Ltd v Foscolo, Mango & Co [1932] AC 328*** settled this issue.

Held:

Lord Buckmaster: My Lords, the appellants are the owners of the steamship Ixia. The vessel was chartered to carry a cargo of coal and to proceed from Swansea, where the coal was to be loaded with all possible dispatch to Constantinople. The usual and customary route for the voyage was from Swansea, south of Lundy, from thence in a straight line to a point about five miles off Pendeen, on the north coast of Cornwall, and then with a slight alteration to the east to Finisterre and so on. The ship had been fitted with a heating apparatus designed to make use of the heat which might otherwise be wasted as steam and so to diminish the bill for fuel. This apparatus had not been 188 Cases & Materials on the Carriage of Goods by Sea working satisfactorily, and the owners therefore arranged to send representatives of the engineers to make a test when the

[53] Article IV Rule 4

vessel started on her next voyage. Two engineers accordingly joined the boat, the intention being that they should leave the ship with the pilot somewhere off Lundy.

The firemen on board the ship were not in possession of their full energies when the boat started at 1.45 in the morning on 30 June 1929, owing to excessive drinking before they joined the ship. The result was that a proper head of steam necessary for making the test was not got up in time to enable the test to be made before the pilot was discharged. Accordingly, they proceeded on the voyage until the ship was off St Ives, when the ship was turned about five miles out of its course to enter the St Ives Harbour in order that the engineers might be landed. After landing them, the ship did not go straight back to the recognised route that she ought to have pursued, but hugged too closely the dangerous coast of Cornwall, and ran on a rock called the Vyneck Rock, with the result that the vessel and cargo were totally lost though, fortunately, there was no loss of life.
The accident took place at about 3.20 pm, there was a moderate wind from ENE, the weather was cloudy, but visibility was moderately good up to six miles. The respondents sought to recover damages for loss of their cargo upon the ground that there had been an unlawful deviation from the contracted course. The appellants said that by the Carriage of Goods by Sea Act 1924, the rules in the Schedule must be regarded as incorporated in the contract and, by those rules, they were entitled to make the deviation which led to the disaster.
The appellants argument upon the statute is firstly that the accident was a peril of the sea and secondly that the deviation in question was a reasonable deviation and consequently was not an infringement of the contract of carriage. The first point I think should be disregarded. It involves the view that perils and accidents of the sea are not qualified by the provisions as to deviation and that such perils exempted the shipowner from responsibility for damage if they arise from or in the course of deviation, whether such deviation be reasonable or not. In my opinion clause 4 must be

given its full effect without rendering it to a large extent unnecessary by such an interpretation, for it would follow from the arguments that a peril encountered by deviation, wholly unreasonable and wholly unauthorised, would be one for which the shipowner would be exempted from loss. In other words, the reasonable deviation would then only apply to questions of demurrage whatever the deviation might be. The real difficulty in this case, and it is one by which I have been much oppressed, is whether in the circumstances the deviation was reasonable. It hardly needed the great authority of **Lord Herschell in Hick v Raymond [1893] AC 22** to decide that in construing such a word it must be construed in relation to all the circumstances, for it is obvious that what may be reasonable under certain conditions may be wholly unreasonable when the conditions are changed. Every condition and every circumstance must be regarded and it must be reasonable too in relation to both parties to the contract and not merely to one . . . I do not think elaborate definitions whether contained in dictionaries or judgments are of much use in determining the value of a word in common use which means no more in this context than a deviation which where every circumstance has been duly weighed commends itself to the common sense and sound understanding of sensible men.

Lord Atkin: ...The position in law seems to be that the plaintiffs are prima facie entitled to say that the goods were not carried safely. The defendants are then prima facie entitled to rely on the exception of loss by perils of the sea and the plaintiffs are prima facie entitled in reply to rely upon a deviation. For unless authorised by the charter party or the Act the departure to St Ives from the direct course to Constantinople was admittedly a deviation. I pause here to say that I find no substance in the contention faintly made by the defendants that an unauthorised deviation would not displace the statutory exceptions contained in the Carriage of Goods by Sea Act. I am satisfied that the general principles of English law are still applicable to the carriage of goods by sea except

as modified by the Act: and I can find nothing in the Act which makes its statutory exceptions apply to a voyage which is not the voyage the subject of 'the contract of carriage of goods by sea' to which the Act applies. It remains therefore for the shipowners to show that the suggested deviation was authorised by the contract including the terms incorporated by the Act . (Article IV, r 4 provides that) "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom". In approaching the construction of these rules it appears to me important to bear in mind that one has to give the words as used their plain meaning, and not to colour one's interpretation by considering whether a meaning otherwise plain should be avoided if it alters the previous law. If the Act merely purported to codify the law, this caution would be well founded. I will repeat the well-known words of **Lord Herschell in the *Bank of England v Vagliano Brothers* [1891] AC 107.** Dealing with the Bills of Exchange Act as a code he says: " I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view . . .The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was".

He then proceeds to say that of course it would be legitimate to refer to the previous law where the provision of the code was of doubtful import, or where words had previously acquired a

technical meaning or been used in a sense other than their ordinary one. But if this is the canon of construction in regard to a codifying Act, still more does it apply to an Act like the present which is not intended to codify the English law, but is the result (as expressed in the Act) of an international conference intended to unify certain rules relating to bills of lading. It will be remembered that the Act only applies to contracts of carriage of goods outwards from ports of the United Kingdom: and the rules will often have to be interpreted in the courts of the foreign consignees. For the purpose of uniformity, it is, therefore, important that the courts should apply themselves to the consideration only of the words used without any predilection for the former law, always preserving the right to say that words used in the English language which have already in the particular context received judicial interpretation may be presumed to be used in the sense already judicially imputed to them.

Having regard to the method of construction suggested above, I cannot think that it is correct to conclude, as **Scrutton LJ** does, that Rule 4 was not intended to extend the permissible limits of deviation as stated in **The Teutonia (1872) LR 4 PC 171, 179**. This would have the effect of confining reasonable deviation to deviation to avoid some imminent peril. Nor do I see any justification for confining reasonable deviation to a deviation in the joint interest of cargo owner and ship, as **MacKinnon J** appears to hold, or even to such a deviation as would be contemplated reasonably by both cargo owner and shipowner, as has been suggested by **Wright J in Foreman and Ellams Ltd vs Federal Steam Navigation Co [1928] 2 KB 424, 431,** approved by **Slesser LJ** in the present case. A deviation may, and often will, be caused by fortuitous circumstances never contemplated by the original parties to the contract; and may be reasonable, though it is made solely in the interests of the ship or solely in the interests of the cargo, or indeed in the direct interest of neither: as for instance where the presence of a passenger or of a member of the ship or

crew was urgently required after the voyage had begun on a matter of national importance; or where some person on board was a fugitive from justice, and there were urgent reasons for his immediate appearance. The true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the interests of any one as conclusive. The decision has to be that of the master or occasionally of the shipowner; and I conceive that a cargo owner might well be deemed not to be unreasonable if he attached much more weight to his own interests than a prudent master having regard to all the circumstances might think it wise to do. Applying then this test, was this deviation reasonable? I do not discuss the facts except to say that I see no ground for suggesting that the deviation was due to some default of the shipowner in respect of the firemen. In the absence of evidence directed to that issue it does not seem right to impute blame to the owners in that respect . . . I think that **Greer LJ** is plainly right in applying the test of reasonableness to the deviation as a whole. It could not, however, be laid down that as soon as the place was reached to which deviation was justified, there was an obligation to join the original course as directly as possible. A justified deviation to a port of refuge might involve thereafter a shorter and more direct route to the port of destination compared with a route which took the shortest cut to the original course. On the other hand, though the port of refuge was justifiably reached, the subsequent voyage might be so conducted as to amount to an unreasonable deviation. Taking all the facts into account I am pressed with the evidence which the learned judge accepted, that after St Ives the coasting course directed by the master was not the correct course which would ordinarily be set in those circumstances. It is obvious that the small extra risk to ship and cargo caused by deviation to St Ives, was

vastly increased by the subsequent course. It seems to me not a mere error of navigation but a failure to pursue the true course from St Ives to Constantinople which in itself made the deviation cease to be reasonable. For these reasons I agree that this appeal should be dismissed

4.1.4. RIGHTS AND IMMUNITIES OF CARRIER

The Hague/ Visby Rules exempt the carrier from liability ensuing from loss or damages resulting from[54];

a. 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.
b. Fire, unless caused by the actual fault or privity of the carrier.
c. Perils, dangers and accidents of the sea or other navigable waters.
d. Act of God.
e. Act of war.
f. Act of public enemies.
g. Arrest or restraint of princes, rulers or people, or seizure under legal process.
h. Quarantine restrictions.
i. Act or omission of the shipper or owner of the goods, his agent or representative.
j. Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.
k. Riots and civil commotions.
l. Saving or attempting to save life or property at sea.
m. Wastage in bulk of weight or any other loss or damage arising from inherent defect, quality or vice of the goods.

[54] Article IV rule 2 The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968

n. Insufficiency of packing.

o. Insufficiency or inadequacy of marks.

p. Latent defects not discoverable by due diligence.

q. Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

The burden of proof is on the carrier to establish that the loss or damage falls within the above exceptions.

4.1.5 LIMITATION OF LIABILITY

The draftsmen of The Hague/ Visby Rules intended to establish a standard limit of liability and curtail carrier exploiting their bargaining powers to insert ridiculously derisory amount. The draftsmen encountered the challenge in establishing a package limitation liability formula and the monetary unit to base minimum liability.

The liability of the carrier under the Hague Rule 1924 was limited to one hundred gold worth package or unit.[55] Signatories to the Hague Rules converted the carrier liability limitation sum to the equivalent of their respective currency .[56] One unpretentious challenge encountered by The Hague Rules 1924 was the growing inflation threat created the package liability limit sum for carriers unbearably low vis-à-vis damage or loss suffered by cargo owners. Another challenge faced by signatories of The Hague Rules 1924 was the matter in deciphering the term "package "

[55] Article IX of The Hague Rules 1924

[56]Example UK 100 sterling, USA $500, Australia $200, Federal Republic of Germany 1,250 marks, India £100, Greece 800 drachmas, Norway 1,800 kroner.

and "unit" as employed in the liability limitation formula. The interpretation of these terms remain a difficult issue particularly as there was no case law pertaining on this area. The terms were perpetually used interchangeably and thus the requirement for a standard definition. Another issue that The Hague Rules draftsmen failed to envisage was the carriage of goods in containers when formulating the package limitation formula. It will be of no essence to pay a container cargo – owner the equivalent of 100 gold value for damages or loss suffered.

The English courts only had an opportunity to adjudicate on these issues recently in the case of **The River Gurara**[57] "A vessel on a voyage from West Africa had run aground on the coast of Portugal and later sank with total loss of cargo. Much of the cargo was containerised and was shipped under bills of lading incorporating The Hague Rules. Many of the containers had been stuffed privately by the shippers and were covered by bills stating that they were 'said to contain' a given number of items such as pallets, crates, cartons or bags. The point at issue was whether the cargo owner's right of recovery was limited to £100 per container or £100 per individual item listed on the bill. The Court of Appeal adopted the US approach in holding that, where the contents of the container were individually listed in the bill, each item would prima facie constitute a 'package' for limitation purposes.

According to The Hague /Visby Rules 1968[58] unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 666.67 units of account per package or unit or

[57] [1998] 1 Lloyd's Rep 225
[58] Article IV rule 5(a)

units of account per kilo of gross weight of the goods lost or damaged, whichever is the higher" The Hague/Visby Rule introduced another formula based on weight of the cargo given the shipper an opportunity to decide on the very best amount with the maintained package or unit limitation of liability for individual item of cargo of high value.

Interestingly The Hague/Visby Rules in its new Article IV Rule 5(c) settled the container test conflicting opinion as it states that "where 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" The Hague /Visby Rule so far as the monetary unit of limitation is concern adopted the IMF special drawing right which prescribe the limitation amount to 666.67 units of account per package or unit or units of account per kilo of gross weight of the goods lost or damaged, whichever is the higher.[59]

The Hague /Visby Rule [60] set down the package limitation liability for shipment of dangerous goods when it provides that " Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they will in like manner be landed at any place, or destroyed or rendered

[59] Article IV rule 5(a)
[60] Article IV rule 6

innocuous by the carrier without liability on the part of the carrier except to general average, if any"

4.2. INTRODUCTION THE HAMBURG RULE

The modifications to the Hague Rules effected by the Brussels Protocol in 1968 did not gain universal approval. The protocol was considered by many cargo-owning countries as constituting merely a short lived expedient and there was a growing demand for a radical revaluation of carrier liability with the intention to produce a comprehensive code covering all aspects of the contract of carriage. This move concluded with the drafting of a new Convention which was adopted at the United Nations sponsored conference in Hamburg, in March 1978. The Convention, referred to as the 'Hamburg Rules', became effective on 1 November 1992 on the expiration of one year from the date of the deposit of the 20th instrument of ratification, acceptance, approval or accession.[61]So far up to 34 states have adhered to the Convention, although it has not yet been ratified by any key maritime nation.[62]

The draftsmen of the Hamburg Rules have adopted the argument long advanced by cargo interest owners that carrier liability ought to be based completely on fault which a carrier should be responsible without exception for all losses or damages of cargo resulting from his own fault or that of their servants or agents. They have accordingly chosen to state an affirmative rule of responsibility based on presumed fault and to abolish the set of exceptions contained in Art IV rule 2 of the Hague and Hague/Visby Rules.

---

[61] Article 30.1 Hamburg Rule

[62] Mankabady, S (ed) *The Hamburg Rules on the Carriage of Goods by Sea* (1978)

4.2.1 SCOPE OF APPLICATION

The Hamburg Rules apply to contracts of carriage by sea which have been defined as "any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another".[63] In a circumstance were the contract envisages some form of multimodal carriage, the application of the Rules will be restricted to the sea leg. This approach differs from that of either the Hague or Hague/Visby amendment protocol which focus on contracts of carriage covered by a bill of lading or any similar document of title.[64] So far as the Hamburg Rules are concerned, it is immaterial whether or not a bill of lading or a non-negotiable receipt is issued.

The new Convention however follows its predecessors in that its provisions don't seem to be applicable to charter party or to bills of lading issued pursuant to them unless such a bill governs the relation between the carrier and the holder i.e. it has been issued or negotiated to a party other than the charterer. The application of the provisions of the new Convention is restricted to contracts of carriage by sea between ports in two different states that is to say it does not apply to coastal trade and the range of voyages covered is roughly similar to those enumerated in Article X of the Hague/Visby Rules, with one important exception. The Hamburg Rules govern both inward and outward bills a crucial factor to be taken into account by shipowners who trade with countries in which the Convention is now effective. Provision is also made for the parties expressly to incorporate the Rules into the bill of lading or other document evidencing the contract. Whereas the Hague and Hague/Visby Rules are only applicable from tackle to tackle, the Hamburg Rules are designed to operate throughout the entire carriage period during which the carrier is in charge of the goods at the port of loading and at the port of discharge[65]. The length of this period is then outlined in detail and it is clear that this provision is

[63] Article 1.6 Hamburg Rule
[64] Article 1(b) Hamburg Rule
[65] Article 4.1 Hamburg Rule

meant to remedy the existing problem in the Hague Rules/ Visby amended protocol as the result of which the carrier is entitled to exclude all liability for the cargo once it is not physically aboard his vessel.

4.2.2 BASIC CARRIER LIABILITY

In imposing a standardize test of liability, the draftsmen of the Hamburg Rules were seeking to remove a number of absurdities and discrepancies arising from confusing wording in The Hague/Visby Rules. Under the latter, the requirement of the carrier to provide a seaworthy ship was restricted to a duty to exercise due diligence while he was required to look after the cargo properly and carefully throughout the carriage. The introduction of a standard test of liability based on fault was designed to avoid these problems. The carrier's duty to provide a seaworthy ship as stipulated in the Hamburg Rules is to be treated on the same basis as his duty towards the cargo, and both duties are to run during the period of carriage. The only issue remaining to be resolved will be the interpretation to be placed by national courts on the carrier's duty to take all measures that could reasonably be expected of him so as to avoid the occurrence and its consequences. Would British courts construe this as indicating negligence liability or would they still hold the carrier liable for the negligence of independent contractors as in the case of **The Muncaster Castle**? If they took the latter view, would they extend a similar duty of care towards the cargo?

Unfortunately the search for uniformity of interpretation is not assisted by the introduction of variations in expression such Article 5 when reference is made to fault or neglect of the carrier rather than to all measures that could reasonably be required. The question that have continued to linger in the mind of maritime practitioners is whether an identical duty of care is intended in both cases. More confusion is caused by the annexing

to the Convention of a Common Understanding that the liability of the carrier under this Convention is based on the principle of presumed fault or neglect.

The Hamburg Rule eliminated all the exceptions to carrier liability as contained in Article IV Rule 2 of The Hague / Visby Rule. The Hamburg Rule[66] expressly provides that "The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage, or delay took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants or agents, took all measures that could reasonably be required to avoid the occurrence and its consequences"

In so far as the majority of the exceptions listed in the Hague/Visby Rules do not in fact involve fault on the part of the carrier[67] the effect of the abolishment of the set of carrier liability ought to be minimal. It might indeed even be beneficial from a legal point of view in removing excess uncertainty encompassing the definition and extent of such exceptions which are merely samples of circumstances in which fault cannot be attributed to the carrier. However, one major shift of responsibility is envisaged by the abolishment of the exception covering negligence in the navigation or management of the ship.[68] Cargo interests have long contended that it is unfair that a carrier, in complete control of vessel and cargo should exclude such liability that is basic to the contract of carriage. Moreover, it is a form of protection which is not extended to the carrier in the other mode of transport. Carrier interests are naturally reluctant to forgo such ancient protection and argue powerfully inter alia that such a change would result in a substantial increase in freight rates. Resistance to the abolition of the exception covering fault in the

[66] Article 5.1
[67] Art IV rule 2(c)–(p) Hague / Visby Rules
[68] Article IV rule 2(a)

management of the ship is more muted since it is generally recognised that the conflict between this exception and also the carrier's duty of care in regard to the cargo[69] has resulted in considerable uncertainty and court proceedings.

SPECIAL PROVISIONS

The question has invariably been contentious on whether or not a convention should in principle be applicable to all or any form of goods or whether certain problem cases ought to be e excluded, leaving the parties to freely negotiate their own terms for such carriage. The Hamburg regime preferred a comprehensive formula though creating special provision to cover the peculiarities of certain form of goods.

a) Carriage of Live Animals

It is worth emphasizing that although the carriage of live animals is subject to the overall obligation of care as provided in Article 5.1,[70] the carrier won't be liable for loss resulting from any special risks inherent in that kind of carriage. Moreover, provided that the carrier can establish that he has complied with any instructions given to him by the shipper respecting the carriage of the animals in question and the particular loss incurred maybe attributed to such risks, it will be assumed that the loss was therefore caused unless there's proof that all or just a section of the loss, damage or delay in delivery resulted from fault or negligence on the part of the carrier, his servants or agents. [71]

[69] Ariclet III rule 2.
[70] Hamburg Rule
[71] Article 5.5 Hamburg Rule

b) Carriage of deck cargo

According to Article 9[72] deck cargo are going to treated as normal cargo, and subject to the rules where it is shipped in accordance with an agreement with the shipper or with the usage of the precise trade or is required by statutory rules or regulations. Wherever the cargo is shipped on deck by agreement with the shipper, such agreement should be recorded on the bill of lading otherwise the burden will be on the carrier to proof its existence, though he won't be allowed to appeal to such agreement against a 3rd party who has acquired the bill in good faith. In a situation where the cargo is shipped on deck without consent or authority, this would no longer constitute a fundamental breach of contract however the carrier liability for loss, damage or delay in delivery would be limited to that ensuing exclusively from the carriage on deck. Moreover, he would still be entitled to cash in on of the provisions limiting liability under Article 6 unless he had breached an express undertaking to stow the goods below deck.[73]

c) Deviation

A lot has been mentioned concerning deviation under the Hague/ Visby Rule [74]. The draftsmen of the Hamburg Rule didn't support deviation to safe life and property as carriers takes advantage and benefit from salvage. It will be remembered that under Article IV rule 4 of The Hague/Visby Rules, a carrier won't be liable for loss caused from any deviation aimed in saving or attempting to save life or property at sea or any reasonable deviation. In discussions resulting in the adoption of the Hamburg Rules, no real objection was voiced to the carrier's continuing freedom from liability while deviating to save life at sea. On the opposite hand, there was less support for the extension of protection to cover deviation to save property, particularly when such action was

[72] Hamburg Rule
[73] Insurance Co of N America *v* Blue *Star Ltd [1997] AMC 2434.*
[74] Article IV rule 4

independent of any attempt to save life. Such exemption was criticised on the ground that it permitted a carrier to realise substantial gains from salvage typically to the disadvantage of the cargo carried on his own ship. So far as The Hague Rules exception covering reasonable deviation was concerned, this had caused some issues of construction but hardly ever has it been successfully raised in the courts. In the opinion of the legislators of the Hamburg Rules, no special provision ought to be created for deviation however liability for resultant loss, damage or delay should be brought under the general canopy of carrier liability. Accordingly, the carrier would be liable for loss resulting from deviation unless he could establish that he or his servants or agents had taken the necessary precautions that could reasonably be required to avoid the incident and its consequences. It was however felt that specific reference should be made to loss resulting from attempts to save life, but that it was undesirable to provide an unqualified immunity for attempts to save property in view of possible abuse. The Hamburg Rule provides that[75] "The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea".

d) Loss caused by delay in delivery

The Hague/Visby Rules contain no specific provision for the recovery of loss caused by delay in delivery of the cargo in as much as such delay ends up in the physical damage to the goods e.g. by deterioration in quality, there appear very little doubt that such loss is recoverable under Article III rule 2 which imposes a general duty of care in handling the cargo. The position is not thus clear, however in relation to purely economic loss, like loss of market ensuing from delay in delivery. Some countries maritime code expressly provides for the recovery of such loss while in common law jurisdictions it usually falls within the sphere of the reasonable contemplation of the parties

[75] Article 5.6

test in Hadley *v* Baxendale. [76]Elsewhere the position is obscure and it is not uncommon to see clauses in liner bills either excluding or limiting liability for delay. In order to get rid of all doubts and to bring carriage by sea in line with carriage by the three other modes of international transport,[77] the Hamburg Rules expressly provide that the carrier are going to be liable for loss resulting from delay in delivery unless he will discharge the standard burden of proof, i.e. that neither he nor his servants or agents were at fault. [78]Presumably such liability in English law will continue to be restricted to loss which was reasonably within the contemplation of the parties according to the Hadley *v* Baxendale test.

4.2.3 LIMITATION OF LIABILITY

Despite robust arguments to the effect that the retaining the principle of limitation of liability was no longer justified, the legislators of the Hamburg Rules favoured such retention on the grounds that it was advantageous to both shipper and carrier in that it enabled the latter to anticipate his risks in advance and so establish an even and low cost freight rates. Any agreed new limits should however be fixed at a high rate so as to encourage the carrier to take care the cargo. As with The Hague Rules, two aspects of the formula needed special consideration which are the acceptable unit of cargo and an appropriate monetary unit of account. In the discussions leading up to the adoption of the Hamburg Rules, there was robust support for a formula based exclusively on weight in line with the policy adopted within the two transport conventions. One explicit modification in the Hamburg draft to be welcomed is that the conflict

[76] (1854) 9 Ex 341
[77] Art 19 of the Warsaw Convention 1929
[78] Article 5.1 Hamburg Rule

between shipping and freight units [79]has been determined by a clear statement that the unit at issue is a package or other shipping unit[80].

The dual system as highlighted above relates completely to liability for loss or damage to the goods. Neither of those alternatives was considered an appropriate method for limiting liability for delay in delivery. The preference limitation liability for delay in delivery was based on an amount equivalent to two and a half times the freight payable for the goods delayed, given that such sum did not exceed the whole freight due under the contract of carriage. In any event, the overall amount recoverable for any combination of loss, damage or delay must not exceed the sum recoverable on a total loss of the goods.[81] Whether or not it is satisfactory to limit the maximum compensation for loss ensuing from delay to the amount of the bill of lading freight seems questionable. So far as container limitation is concerned, the Hamburg Rules have adopted the Hague/Visby resolution by interpreting the shipping units as the individual items listed in the bill of lading or a different document evidencing the contract of carriage. If the contents of the container or pallet are not separately listed then the container or pallet together with its contents are treated as a single shipping unit.[82] In the case of loss or damage to the container or pallet, this will be treated as a separate unit for limitation purposes, provided that it is not owned or provided by the carrier.[83] If the carrier has cause to challenge the shipper's load and count as enumerated on the bill, either as a result that he has reasonable grounds for believing them to be inaccurate or because he has no realistic opportunity

[79] Article 6.2(a)
[80] Article 16.1
[81] Article 6.1(c)
[82] Article 6.2 (a)
[83] Article 6.2 (b)

of checking them, it is now required of him not only to insert a reservation in the bill but also to specify the reasons for doing so.[84]

UNIT OF ACCOUNT

The legislators of the Hamburg Rules rejected the Poincaré franc as the unit of account in favour of the Special Drawing Right ('SDR') as outlined by the International Monetary Fund(IMF).Article 26, "provides that the relevant units of account be converted into the national currency of a State according to the value of such currency at the date of judgment or the date agreed upon by the parties". Where states are members of the IMF , the conversion of SDR units into the acceptable national currency is going to be in accordance with the rules of the Fund however, where they are not members, the mode of calculation are going to be determined by the state itself. It had been recognised, however, that the law of certain states may not permit a calculation to be made on this basis, in such a circumstance, such states could use the Poincaré franc as the basic unit of account.

In cases where the SDR is the acceptable unit of account, Article 6.1(a)[85] provides that " the carrier's liability is limited to an amount 'equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged whichever is the higher". Alternatively, states which are permissible to use the Poincaré franc, the equivalent limitation would be 12,500 and 37.5 monetary units respectively. These figures represent a twenty five per cent increase on the bounds presently agreed in the Hague/Visby Rules.

[84] Article 16.1
[85] Hamburg Rule

LOSS OF RIGHT TO LIMIT LIABILITY

While the Hague Rules entitled the carrier to limit his liability for cargo damage within the permitted amounts this phrase has now disappeared from the equivalent limitation clause in the Hamburg Rules. In its place is the unqualified statement that the liability of the carrier is limited to the amounts specified with none additional reservation except that contained in Article 8. Should the Hamburg Rules when implemented be given the force of law (as were the Hague/Visby Rules in s 1(2) of the Carriage of Goods by Sea Act 1971), it may well be that the carrier will be able to claim the benefit of limitation in all circumstances including deviation, except where the case falls within the purview of Article 8. Article 8 expressly denies the carrier the right to limit his liability for any loss, damage or delay which is as a consequence from an act or omission of the carrier done with intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result. A similar clause prevents a servant or agent of the carrier from praying the limitation clause to hide his personal liability where he has displayed a similar intent or recklessness. These clauses simply reiterate the policy introduced by the Hague/Visby Rules except for the reference to 'such loss 'which presumptively limits the operation of Article 8, unlike its counterpart in the Hague/Visby Rules, to cases where the intent relates to the actual loss, damage or delay which occurred. Attempts by cargo interests to make the carrier vicariously responsible without limit for damage resulting from intent or recklessness on the part of his servants or agents were strongly resisted and reference to them was excluded from the final draft. It remains to be seen how the courts would interpret this formula for breaking the liability limits and to what extent it would extend to situations formerly covered by the doctrine of fundamental breach. It is doubtful, for example whether deviation from the

agreed course would constitute conduct appropriate to fulfil the requirements of this article, whereas it is clearly not the intention that unauthorised stowage on deck per se should have this effect.[86]The only guideline is to be found in Article 9.1[87], which provides that 'Carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of Article 8[88].

4.2.4 LIMITATION OF ACTION

Actions are time-barred under the Hamburg Rules if judicial or arbitral proceedings have not been instituted within a period of two years from the time the goods have been delivered or should have been delivered.[89] This limitation period applies regardless of whether or not proceedings have been instituted by the cargo owner or the carrier.

This is in direct contrast with the 12-month period under The Hague/Visby Rules, applicable solely to proceedings against the carrier or the ship. The person against whom a claim is made may at any time during the running of the limitation period, extend that period by a declaration in writing to the claimant.[90] Actions for indemnity could of course be instituted outside the basic limitation period and in this respect the Hamburg Rules follow their predecessors in specifying a minimum extension of ninety days from the date on which the party seeking the indemnity has settled the claim or has been served with process in the action against himself. [91]

4.2.5 JURISDICTION

Jurisdiction of a court connotes the limit imposed on its powers to hear and decide the issues between the parties brought before it. It is the power which the court has to decide matters that are

[86] Article 14
[87] Hamburg Rules
[88] Hamburg Rules
[89] Article 20.1
[90] Article 20.4
[91] Article 20.5

litigated before it or take cognizance of matters presented in a formal way for its decision. Jurisdiction could also be territorial, divisional or geographical. The venue for instituting an action under the rules is disastrous to the case if commenced wrongly. In filing a carriage claim under the Hamburg Rule [92], the claimant is at liberty to institute judicial or arbitrary proceedings in any court within the jurisdiction where :

a. The principal place of business or in the absence thereof the habitual residence of the defendant.
b. The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made.
c. The port of loading or the port of discharge.
d. Any additional place designated for that purpose in the contract of carriage by sea

Opposition from the implementation of the Convention is based on a number of aspects. First, there is strong objection to the abolishment of the catalogue of exceptions, and specifically for the removal of the traditional exclusion of liability for negligent navigation. Secondly, fears are expressed concerning the new formulation of the fire exception, whereas the extension of the limitation period for instituting proceedings to two years is far from popular. More general concern surrounds the adoption of the language and language of the new Convention. Regardless the merits of the draftsmen of The Hague and Hague/Visby Rules, their provisions are well tested in legal proceeding and their effects are now reasonably clear. On the other hand, the introduction of new concepts phrased in ambiguous language which is often the result of diplomatic compromise, presents the chance for endless legal proceedings, the cost of which can rather be prohibitory. With the burden of proof now resting firmly with the carrier,

[92] Article 21 Hamburg Rule 1998

litigation may be encouraged to test the strength of the carrier's case. All these factors, together with the substantial rise in liability limits, lead the opponents of the Convention to the view that its implementation would inevitably result in a substantial increase in freight rates.

The response from advocates of the Rules adoption is that all these arguments have been rehearsed before. Forecasts of steep rises in freight rates preceded the implementation of both the Hague and Hague/Visby Rules and on both occasions proved to be unfounded. In their view the time is long overdue for a more equitable redistribution of risk as between cargo owner and carrier and it is appropriate that the burden of proving the cause of loss should lie on the party in possession of the relevant facts. Nor is there any justification in their opinion for protecting the carrier by sea against the consequences of his own negligent navigation when no similar immunity is granted to carriers by any other mode of transport. Finally, the desirability was urged of achieving a uniform regime of carrier liability operative throughout the world. There is widespread agreement on the need for revision of the Hague Rules but the amendments proposed in the Brussels Protocol have not proved generally acceptable. In these circumstances it is argued that the adoption of the Hamburg Rules, which has strong support among some developing countries, offers the only hope of achieving the desired uniform regime in the foreseeable future.

In retrospect it is arguable that the main criticism of the Hamburg Rules is the failure of its draftsmen to grasp the nettle by imposing strict liability on the carrier and so concentrating all the risk on him. The failure to adopt this course, coupled with the retention of the principle of package limitation of liability, means that it will still be necessary to retain both cargo and carrier's liability insurance with all the resultant problems and expense attending

the allocation of risk. The adoption of the more radical solution would not, however, be so attractive to cargo underwriters or maritime lawyers.

Some few years after the Rules came into effect, what are the chances of their widespread adoption? At present they have not been ratified by any major maritime nation but have been implemented in 34 states estimated to represent overall some 5 per cent of world trade. Despite such a modest start, there are several reasons for believing that their influence is likely to expand, apart from the likelihood of their being ratified by other trading nations in the not too distant future. First, in the states where they are operative, they are mandatorily applicable not only to outward cargoes, but also to inward cargoes irrespective of their port of origin. Secondly, they require bills of lading to include a paramount clause expressly incorporating the Rules and declaring null and void any provisions in the contract of carriage which seek to detract from them to the detriment of the cargo owner. Moreover, on failure to include such a clause in the bill, the carrier is liable to compensate the cargo owner for any loss resulting from its omission. Thirdly, the claimant has a wide choice of forum in which to litigate or arbitrate, which cannot be restricted by any express choice of forum clause in the contract of carriage.

In practice, therefore, a carrying voyage may be mandatorily subject to two conflicting conventions. To take, for example, a carrying voyage from a port in the United Kingdom to a port in a Hamburg state, the contract of carriage would be governed by The Hague /Visby Rules at the port of shipment, and by the Hamburg Rules at the port of discharge. Which set of Rules would actually be applied would depend on the forum in which the dispute was litigated. On the presumption that, as the cargo was destined for a Hamburg state, the bill of lading would incorporate the appropriate paramount clause, the cargo owner could exercise his option to litigate in the Hamburg state, irrespective of any choice of forum clause in the contract of carriage. Even

if suit was brought in an English court, the paramount clause would still be effective, since Art V of the Hague/Visby Rules permits the enforcement of terms which are more favourable to cargo interests than its own provisions.59 Should the English court enforce the Hague/Visby regime, however, because the carriage contract failed to incorporate a Hamburg paramount clause, then the cargo owner would be entitled in a subsequent action to claim an indemnity from the carrier to cover any resultant loss.

For the above reasons the Hamburg Rules may come to exert a wider influence than may be at first apparent. In particular, it may be difficult to draft a clause which effectively will exclude their application in circumstances other than where they are mandatorily applicable. Certainly, their operation cannot be excluded, as can the Hague/Visby regime, by the simple expedient of issuing a waybill instead of a bill of lading.

4.3 INTRODUCTION THE ROTTERDAM RULE

The UNCITRAL search for a more elaborate and sophisticated instrument to control carriage of goods by sea, led to the adoption a new legislation known to as the Rotterdam rule in 1998. The Rotterdam Rule regulates carriage of goods from door –door provided the carriage includes a sea leg that involves cross-border transport.[93] This however stretches the carrier responsibility period from the time the goods are received to the delivery time to the consignee and embraces liability for damages, delays or loss during inland carriage. The rules however gave authority to the carrier to enter into an agreement with the shipper that certain aspects of the carriage contract like loading, handling, storage and unloading ought to be handled by a third party. In such an agreement the carrier is relieved from liability if established that loss, damage or delay was triggered by such a third party.[94]

4.3.1 SCOPE OF APPICATION

Concerning the scope of application, The Rotterdam Rule is applicable to contract of carriage by sea regardless of the sort of document used but to the exclusion of charter parties.[95]Furthermore , the rule is applicable once in agreement that electronic equivalent be used to substitute traditional documentary paper [96] and lastly to both inward and outward voyage from the contracting states thereby extending its scope tremendously.

[93] Article 1.1 21Rotterdam Rule 1998
[94] Article 31.1 Rotterdam Rule 1998
[95] Article 1.1 and 35 Rotterdam Rule 1998
[96] Article 8(a) Rotterdam Rule 1998

SPECIAL PROVISIONS

The question has invariably been contentious on whether or not a convention ought to be in essence applicable to all forms of goods or whether certain difficult cases should be excluded thereby giving the parties liberty to freely negotiate their own terms for such carriage. The Hague regime approved an exclusive approach to such problem cases while the Hamburg regime preferred an inclusive formula though making special provision to hide the peculiarities of such form of goods. The new Convention adopts the Hamburg model in respect to the carriage of deck cargo while following the Hague/Visby approach for the remaining special cases.

a) Carriage of deck cargo

The Convention permits shipment on deck where such shipment is in accordance with the contract of carriage, customs, usages or practices of a specific trade or wherever it is required by law.[97] In such cases the normal provisions of the Convention will apply except for the actual fact that the carrier won't be liable for loss, damage or delay caused by the special risk in the course of the deck carriage.[98] Where cargo has been shipped on deck without such consent or authority, there won't be any question of fundamental breach however the carrier will be liable for such loss, damage or delay that is wholly caused by their carriage on deck and it will lose the protection of the defences provided in the convention.[99] The carrier's liability for goods shipped in containers or on vehicles is associated with that for normal goods under the Convention, regardless of whether or not the containers or vehicles are carried under or above deck, provided that in the latter case they are carried on decks appropriately fitted for the

[97] Article 25.1(a) and (c)
[98] Article 25.2
[99] Article 25.3

purpose.[100] Where consent to deck carriage is reliant on agreement between the parties or reliance on customs, usages and practices of a specific trade, a carrier won't be allowed to invoke such consent or authority against a third party who has acquired a negotiable bill or its electronic equivalent in utmost good faith except the contract particulars state that the goods may be carried on deck.[101]The carrier will however lose its right to limitation of liability where goods are carried on deck in breach of an express agreement between shipper and carrier sanctioning such a carriage.[102]

b) Live animals and certain other goods

In direct opposite to deck cargo, the Hague/Visby exclusionary approach is adopted towards the carriage of live animals and particular goods as defined in Article VI of the Hague/Visby Rules. In the case of live animals, the carrier is permissible to exclude or limit liability except where it is verified that the loss, damage or delay occasioned from an act or omission of the carrier done with intent or recklessly and with knowledge that such loss, damage or delay would be the probable result.[103] Although the new Convention does not use the term particular goods, the object of its provision relating to certain other goods is a replica as that of the Hague regime. The carrier could exclude or limit his liability wherever character or condition of the goods, or the circumstances and terms under which they are to be carried, fairly justify a special agreement given that the commercial shipments created in the course of a normal

[100] Article 25.1 (b)
[101] Article 25.4
[102] Article 25.5
[103] Article 81(a)

course of trade doesn't seem to be concerned and that no negotiable transport document or electronic equivalent is issued for the carriage of the goods.[104]

c) Dangerous Goods

For the first time in a maritime carriage convention a definition is provided for dangerous goods. They are classified as goods which by their nature or character are, or appear likely to become, a danger to persons, property or the environment. Otherwise the provisions relating to the handling of dangerous goods are broadly in line with those contained in the Hamburg Rules. It is required for the shipper to mark or label them in accordance with any regulation and also to inform the carrier or performing party of their dangerous nature or character in a timely manner before delivery to them. If the shipper fails to do so and the carrier is ignorant of the danger, the shipper will be answerable for all loss or damage ensuing from such failure.[105]Carriers could decline to load such cargo or once they became aware of the danger could take realistic measures to unload destroy or render the goods harmless if they are or reasonably appear likely to become an actual danger to persons , property or the environment.[106]

4.3.2 BASIS OF CARRIERS LIABILITY

Carriers liability under the Rotterdam rule is based on fault with a reverse burden of proof.[107] If the claimant can establish that the loss, damage or delay occurred during the carrier's period of responsibility for the carrier to be liable unless he can prove that it was neither his fault nor the fault of any other performing party resulting that resulted to the loss, damage or delay[108]. In

[104] Article 81(b)
[105] Article 32
[106] Article 15
[107] Article 17.1 Rotterdam Rule 1998
[108] Article 17.2 Rotterdam Rule 1998

addition, the Rotterdam rule reiterates the requirement of carriers to provide a seaworthy ship as well as a correspondent duty to handle cargo properly during the responsibility period[109].

4.3.3 LIMITATION OF LIABILITY

The provisions on limitation of liability broadly follow the Hague/Visby pattern as modified by the Hamburg convention. SDRs are retained as the unit of account with liability for loss or damage being now restricted to 875 units of account per package or other shipping unit, or 3 units of account per kilo of the gross weight of the goods, whichever produces the higher amount.[110] Provision is made for a higher amount either where the nature and value of the products have been declared by the shipper before shipment and included in the contract particulars or where the carrier and shipper have expressly in agreement on a higher figure. Interestingly the container clause has also been retained but extended to incorporate goods shipped on a vehicle.[111] The limit for economic loss caused by delay is an amount equivalent to two and one half times the freight payable on the goods delayed provided that the amount payable does not exceed the limit for total loss of the goods. As with earlier conventions, the carrier's right to limit will be lost where the claimant proves that the loss, damage or delay was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.[112] As noted above, the Convention incorporates a limited form of network liability in circumstances where an existing international convention applies mandatorily to a leg other than the sea leg. This has particular relevance in regard to limitation of liability where

[109] Article 13.1 Rotterdam Rule 1998
[110] Article 59.1 Rotterdam Rule 1998
[111] Article 59.2 Rotterdam Rule 1998
[112] Article 61 Rotterdam Rule 1998

the limitation amounts differ radically between the different conventions. The problem is particularly acute where the shipper is unable to establish on which particular leg the loss, damage or delay occurred. Many bills of lading currently raise a presumption that such loss was incurred on the sea leg, i.e. the leg with the lowest limitation amounts. It would appear that application of the new convention would be likely to produce the same result since it would be mandatorily applicable from door-to-door and would only be required to defer to an alternative convention where the loss, damage or delay was solely incurred on a leg other than the sea leg. The burden of proof of that fact would presumably lie with the claimant.[113]

4.3.4 LIMITATION OF ACTION

The time limit for judicial for judicial and arbitrary proceeding is set at two years from the time the goods have been deliver or should have been delivered[114].The time bar is applicable to both claims by or against the carrier and also a defense by the other party.

4.3.5 ARBITRATION AND JURISDICTION

An arbitration agreement is where two or more persons agree that a dispute or a potential dispute between them shall be resolved and decided in a legally binding way be one or more impartial persons in a judicial manner upon evidence put before them.[115] The Rotterdam rule allow parties to attempt arbitration as means of resolving their disputes arising under a contract of carriage. In case of total or partial non-conciliation in the arbitration proceeding, a claimant can institute an action in a competent court situated either in;

[113] Article 62 Rotterdam Rule 1998
[114] Article 62 Rotterdam Rule 1998
[115] CN Onuselogu Ent Ltd Vs Afribank Nig. Ltd (2005) I NWLR Pg. 940

a. The principal place of business or in the absence thereof the habitual residence of the defendant.
b. The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made.
c. The port of loading or the port of discharge.
d. Any additional place designated for that purpose in the contract of carriage by sea[116]

Finally, The Rotterdam rule provides for recognition and enforcement in another contracting state of decision made by a competent court[117].

[116] Article 72.2 Rotterdam Rule 1998
[117] Article 72.1 Rotterdam Rule 1998

CHAPTER FIVE

5.1 SUMMARY

In tracing the legal regime of package limitation in carriage of goods by sea from an international perspective, this research work recognized the applicable legal regimes to wit:- The Hague / The Hague –Visby Rules, The Hamburg Rules and The Rotterdam Rules. This dissertation was able to analyse these rules in determining the package liability limitation in situations of loss/damage of goods. This research had as its aim evaluate the legal regimes of package limitation in carriage of goods by sea from an international perspective so as to better allocate liability of damage or loss cargo between contracting parties to the carriage contracts . The objectives include: analyzing the limit of package liability under the main regimes, examine the rights and liabilities of cargo owners, examine the rights and liabilities of ship-owners under the main regimes and to advocate for uniformity in interpreting these rules among contracting states. All the legal regimes regulating package limitation in carriage of goods by sea was aimed at not only protecting cargo-owners from the exploitative nature of carriers who enjoyed a strong bargaining power but to strike a fair balance on the liability limit in cases of loss or damage caused to goods under carriage contract. This could be clearly seen as the liability of carrier developed from a strict liability regime to freedom of contract /liability and later developed by recognizing a limitation amount under The Hague/ The Hague-Visby Rules which later registered an increase in The Hamburg Rules / The Rotterdam Rules which gave cargo owners an opportunity to choose which ever claim is highest in cases of loss/damage claims. The Rules clearly spelled out their scope of application so as to easily exclude unrecognized transactions in carriage contract e.g., The Hague-Visby Rules

application scope was limited to contract of carriage covered by a bill of lading thereby excluding charter party or waybill carriage.

All the rules applicable to package limitation in carriage of goods by sea expressly spelled out the obligation of the carriers for example obligation to ensure the vessel is seaworthy, duty of care, issue bill of lading etc. with a purposeful motive to easily identify carrier breach which may give rise to action for loss or damage of goods and thus a step towards solving the confusion that usually characterized liability claims. The rules did not just guarantee a degree of immunity to carriers but encouraged arbitration and stated the time to institute claims in the competent court with competent jurisdiction.

5.2 CONCLUSSION

Conclusively the entire maritime regime needs to be reviewed so there can be a holistic approach towards unification of the laws regulating carriage of goods by sea so all the controversies can be put to rest.

5.3 RECOMMENDATION

It is our recommendation that in determining whether a container is a package, the intent of the parties as evidence in the bill of lading should be crucial. In this regard, the wordings used to describe cargo on the face of the bill of lading when it is drawn up and how to construe the wordings in the event of a claim for loss or damage.

It is our recommendation that carriers should not be exempted from liability for loss or damage of their servants like pilot, marines taking into consideration the advancement of technology, a carrier should rather hold a higher degree of control and should not be exempted.

Also it is our recommendation that the formula to determine package liability limit in carriage of goods be sea should be clearly defined so as to curb the confusion that's often generated by different judicial decisions.

5.4 LIMITATION OF STUDY

Firstly, on the definition of contract of carriage, it is our finding that The Hague- Visby Rules did not expressly cover the definition but merely connect the notion of contract of carriage to the document issued under the bill of lading thus adopting a documentary approach.[118] The Hamburg Rules and The Rotterdam Rules defined a contract of carriage but it differs in respect of the description of the obligation of the carrier, which is merely the carriage of goods by sea from one port to another in the Hamburg Rules and the carriage of goods from one place to another in the Rotterdam Rules. The Hamburg Rules expressly exclude their application to the carriage by modes other than sea in case the contract involves the carriage by other modes whereas the Rotterdam Rules extend their application to the carriage by other modes if the parties have so agreed.[119]

Secondly, on the geographical scope of application, it is our findings that carriage of goods by sea in all the conventions must be international and must be link to contracting states. We observe that for the application scope under The Hague-Visby Rules the bill of lading or the port of loading must be located in the contracting States [120]whereas in the Hamburg Rules[121] the place of issuance of the bill of lading is rightly ignored because it may not be connected at all with the voyage. However, reference is made to both the port of loading and to the port of discharge. Therefore,

[118] Article 1 Hague-Visby Rules
[119] Article 1 Hamburg rule and Rotterdam rule
[120] Article 10 Hague –Visby Rules
[121] Article 2 Hamburg Rules

The Hague-Visby Rules do not apply to a contract from a port located in a non-contracting State to a port of discharge located in a contracting State, while the Hamburg Rules do apply. In the Rotterdam Rules the geographical connecting factors are instead the places of receipt and of delivery and the ports of loading and of discharge.[122]

In addition, the period of application under The Hague's Visby rule runs from the period from the time when the goods are loaded on the ship to the time they are discharge from the ship.[123] In The Hamburg Rules,[124] the period of application as well as the period of responsibility of the carrier runs from when the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge. Therefore, in a port-to-port contract the Rules normally apply to the exclusion of door-to-door contract or when the terminals of the carrier are outside the port area, Under the Rotterdam Rules [125]the period of application and the period of responsibility of the carrier coincide with that during which the carrier is in charge of the goods, wherever he receives and delivers them, except where the goods must be handed over to an authority in the place of receipt or in the place of delivery.

Further with respect to the obligation of carrier, this research finds that unlike The Hague-Visby Rules and Rotterdam Rules[126] were carrier have an obligation to make the ship seaworthy i.e. 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 in which goods are carried, fit and safe for their

[122] Article 6 Rotterdam Rules
[123] Article 2 Hague Visby Rules
[124] Article 4 Hamburg Rules
[125] Article 12 Rotterdam Rules
[126] Article 11 Rotterdam Rules

reception, carriage and preservation the Hamburg rule did not make any reference with regards such obligations[127]

The first difference between the three Conventions in the area of liability of carrier and allocation of burden of proof consists in the fact that The Hague- Visby Rules do not cover liability for delay while both the Hamburg Rules and the Rotterdam Rules do. [128]

The basis of liability carrier under all the Rules is base on fault. However there are significant differences between them in respect of the exceptions to the general rule Under the Hague-Visby Rules[129] the carrier is exonerated from liability a) in respect of loss of or damage to the goods arising or resulting from unseaworthiness unless caused by the breach by the carrier of his due diligence obligation and, b) as well as for loss of or damage to the goods arising from fault of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship and for loss of or damage to the goods due to fire caused by fault of the crew. Under the Hamburg Rules and the Rotterdam Rules instead the carrier is always liable for loss, damage or delay caused by fault of the carrier, his servants or agents. There is a difference between the Hamburg Rules and the Rotterdam Rules in respect of the liability regime for live animals. Pursuant to article 5(5) of the Hamburg Rules the carrier is not liable for loss, damage or delay resulting from any special risks inherent in their carriage. Under the Rotterdam Rules instead no particular rules are provided but freedom of contract is granted by article 81(a) except where loss, damage or delay results from an act or omission done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

[127] Article 3 Hague –visby Rules
[128] Article 1,5 and 17 Hague visby Rules, Hamburg Rules and Rotterdam Rules
[129] Article 4 Hague visby rule

This dissertation also finds that the notice of loss, damage or delays under The Hague-Visby Rules[130] must be given before or at the time of delivery and, if the loss or damage is not apparent, within three days of delivery. Under the Hamburg Rules [131]the notice must be given not later than the working day after delivery or, when the loss or damage is not apparent, within 15 days after delivery. Both Rules provide that failing such notice delivery is prima facie evidence of delivery of the goods as described in the bill of lading or transport document. The Rotterdam Rules [132]provide that the notice must be given before or at the time of delivery and, if the loss or damage is not apparent, within seven days of delivery.

This work also finds out that the scope of application of the liability limit has been widened in the Rotterdam Rules. The limits under The Hague-Visby Rules was 666,67 SDR per package or unit and 2 SDR per kilogram[133] which witnessed an increased in the Hamburg Rules to 835 SDR and 2.5 SDR [134]respectively and further increased in the Rotterdam Rules to 875 SDR and 3 SDR.[135]

In addition, this work finds significance difference in the limitation period to entertain maritime claims. Under The Hague Visby Rule[136], the limitation period is one year and two years respectfully for the Hamburg Rules and the Rotterdam Rules.[137]

[130] Article III Hague's visby Rules
[131] Article 19 Hamburg Rules
[132] Article 23 Rotterdam Rules
[133] Article 4 Hague's visby Rule
[134] Article 6 Hamburg Rule
[135] Article 59 Rotterdam Rule
[136] Article 3 Hague Visby Rules
[137] Article 20 and 62, Hamburg Rules and Rotterdam Rules

There is also a significant difference between the provisions on carriage of live animals in the Hamburg Rules [138]and those of the Rotterdam Rules[139]. In that while in fact the former regulate the liability of the carrier, the latter grant the carrier freedom of contract.

The Hamburg Rules[140] mention three situations in which carriage of goods on deck is permitted: when it is in accordance with usage of the particular trade, when it is required by statutory rules or regulations and when it is in accordance with an agreement with the shipper. The Rotterdam Rules add a fourth situation, which at present is by far more important: when the goods are carried in or on containers or vehicles; but they require that such containers or vehicles be fit for deck carriage and the decks be specially fitted to carry them. This brings the rule in line with carriage of containers on modern container ships and with the carriage of vehicles on modern roll-in and roll-off ships. The Rotterdam Rules[141] however differ from the Hamburg Rules in that they regulate the consequences of loss, damage or delay occurring where the goods are legitimately carried on deck.

This work further finds in respect to freedom of contract that The Hague-Visby Rules allow generally freedom of contract in situations in which they do not apply. They in fact provide in 6 that the carrier may enter into any agreement in respect of its obligations and its liability if no bill of lading has been or will be issued and the goods carried are not ordinary commercial shipments; they further provide in article 7 that freedom of contract is permitted prior to loading and after discharge. The Hamburg Rules instead provide in article 23 that any stipulation is null and void to the extent that it derogates from the provisions of the Convention but that the carrier may increase his responsibilities and obligations under the Convention. They further increase the protection of the shipper or consignee by providing that if it has incurred loss as a result

[138] Article 5 Hamburg Rules
[139] Article 81 Rotterdam Rules
[140] Article 9 Hamburg Rules
[141] Article 25 Rotterdam Rules

of a stipulation which is null and void by virtue of that article the carrier must pay compensation. The Rotterdam Rules generally provide in article 79 that the rules on the obligations and liability of both the carrier and the maritime performing parties as well as of the shipper, consignee, and controlling party are mandatory, but then allow, under certain conditions, freedom of contract for volume contracts, defined in article 1 as the contracts that provide for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time.

In both the Hamburg Rules and the Rotterdam Rules the general rules are parallel to those for jurisdiction: the person asserting a claim against the carrier may in fact chose as place of arbitration any of the places mentioned respectively in article 22(3) and in article 75(2)(b) such places being the same as those mentioned for jurisdiction respectively in article 21(1) and in article 66(a). However, in the Rotterdam Rules the designation of the place of arbitration, if contained in a volume contract is binding on the parties to the agreement and is binding on persons other than the party to the volume contract subject to the same conditions required for jurisdiction clauses, except that the reference to the law of the court seized is replaced by a reference to the applicable law. Such law is the national law of the place where arbitration proceedings are instituted by the person asserting a claim against the carrier and, therefore, the same comment made in respect of jurisdiction clauses applies.

On the issue of jurisdiction , basic difference between the provisions of the Hamburg Rules and those of the Rotterdam Rules consists in that the Rotterdam Rules allow exclusive jurisdiction clauses in respect of volume contracts, even though such clauses are binding on third parties only if the conditions set out in article 67 (2) are met, such conditions being a) that the court chosen is in one of the places designated in article 66 (a), b) that the clause is contained in a transport document or electronic record, c) that the third party is given adequate notice of the court chosen

and that its jurisdiction is exclusive and, d) that the law of the court seized recognizes that that person may be bound by such clause.

5.5 CONTRIBUTION TO KNOWLEDGE

The primary aim of the research is carry an analysis of the legal regimes in package limitation in carriage of goods by sea from an international perspective.

So far most studies on package imitation regimes in carriage of goods by sea have focused on sovereign nations. In this study, the researcher has tried to shift the focus to a broader perspective, which has led to development of international maritime community. The expected contribution from this study is wide and immense in scope;

Firstly, the study provides a framework for the discussion on the subject of legal regime of package limitation in carriage of goods by sea from an international perspective.

Secondly, it provides an issue based model which can be used in developing an integrated approach in harmonizing package liability limit.

Also, the study provides a useful basis for maritime organizations to develop the legal regimes of package limitation in carriage of goods by sea.

Furthermore, this study provides a framework for developing an academic curriculum and also acts as a guideline for evaluating the different legal regimes of package limitation in Carriage of goods by sea.

In addition, this dissertation provides reference for maritime organizations or institutions for developing vision/mission statements for long term performance.

Interestingly,

BIBLIOGRAPHY

BOOKS

1. Yerokun.O, Insurance Law in Nigeria (2nd ,Folarine Nigeria Company, 1992)p.443
2. Alane . E, Element of shipping (9th edn, Routledge Publishers)2015
3. Debattista . C, Maritime Law (3rd edn,Routledge Publisher)2014
4. Todd . P, The principles of carriage of goods by sea (1st edn, Routledge publishers0,2016
5. Boughen. S, Shipping law (6th edn, Routledge publisher,2015
6. Wilson. J, Carriage of goods by sea (7th edn, pitman publishing 2010

ONLINE SOURCE

1. http://heinonline.org/article/view/accessed