

# **COMPARISON OF HAGUE-VISBY AND HAMBURG RULES**

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## **INTRODUCTION**

A contract of carriage of goods by sea is between the shipper and the ship owner or carrier. The terms of the contract of carriage are generally evidenced by a document called a bill of lading. This is a receipt issued by the ship owner acknowledging that goods have been delivered to him for the purpose of carriage and the terms of the contract are incorporated in the bill of lading. This document is generally issued only after the contract of carriage is well on its way to performance.

Under the common law the parties to contract of carriage of goods by sea covered by a bill of lading or similar document had complete freedom to negotiate their own terms. This led the carrier to a stronger bargaining position. Ship owners/carriers went on incorporating exclusion clauses in the bills of lading, which provoked the cargo owners. Most shippers were expected either to ship on terms dictated by the carrier or not to ship at all. In England, these considerations led to the promotion of model bills of lading, which attempted to achieve a fairer balance between carriers, shippers and consignees. In other countries cargo owners were powerful enough to obtain legislation in order to adjust the balance in their favour. The first codification of law concerning the carriage of goods by sea is the Harter Act 1893 of U.S.A., which was followed by the Australian Sea Carriage of Goods Act of 1904 and Canadian Carriage of Goods by Water Act of 1910. These Acts influenced the formulation of the Hague Rules of 1924.

At the International Conference on Maritime Law held at Brussels in October 1922, the delegates at the conference, agreed unanimously to recommend their respective government to adopt as the basis of a convention a draft convention for the unification of certain rules such as responsibilities, liabilities, rights and immunities attaching to carriers under the bills of lading.

In Great Britain the Draft Convention of 1923 was given statutory effect by the Carriage of Goods by Sea Act 1924. Subsequently the Draft Convention of 1923 was signed at Brussels on the 25<sup>th</sup> of August, 1924.

The United States adopted the Hague Rules subject to some modifications, in the Carriage of Goods by Sea Act of 1936. This Act did not replace the Harter Act.

In 1963 after study by the Comité Maritime International, (C.M.I.)<sup>1</sup> at Visby on the Swedish Island of Gotland adopted the text of a draft Protocol intended to make limited amendments to the 1924 Convention. This draft was considered at the 12<sup>th</sup> session of the Brussels Diplomatic Conference on Maritime Law in 1967 and 1968.

The U.K. Carriage of Goods by Sea Act of 1971 was passed to give effect to the protocol. The 1971 Act was brought into force in June 1977 and it repealed the 1924 Act and re-enacted the Hague Rules in their amended Hague Visby form.

Although the 1968 Protocol made important changes, it did not radically alter the compromise between the demands of the carriers on the one hand and cargo interest on the other which was embodied in the Hague Rules.

A report requesting for the revision of Hague Rules by the secretariat of United Nations Conference on Trade and Development (UNCTAD) was published by the United Nations in 1971. The movement for reform, which began with the UNCTAD report, culminated at the United Nations Conference on the Carriage of Goods by Sea at Hamburg in 1978, with the adoption of a new convention of the Carriage of Goods by Sea "the Hamburg Rules". The Hamburg Rules became effective on 1<sup>st</sup> November, 1992. Although there are already 25 parties to the convention it has so far had no major impact on world trade.

## **COMPARISON OF HAGUE RULES AND HAGUE-VISBY RULES**

The object of Hague Rules and Hague-Visby Rules was to protect cargo owners from widespread exclusion of liability by sea carriers. This objective was achieved by incorporating standard clauses into the bills of lading, defining the risks which must be borne by the carrier and specifying the maximum protection he could claim from exclusion and limitation of liability clauses.

Hague Rules and Hague-Visby Rules are substantially the same except in the areas discussed below:

### **Applicability**

Hague Rules was restricted by the Carriage of Goods by Sea Act 1924 to bills of lading issued in respect of outward voyages from the U.K.

Article X of the Hague-Visby Rules has extended it to a wider ambit.

The wording of Art X clearly envisages an international contract of carriage 'between ports in different states' although Section 1 (3) of the Carriage of Goods by Sea Act 1971 extends the operation of the Rules, so far as the United Kingdom is concerned, also to cover the coastal trade. Under Section (1) (6) (B) of the 1971 U.K.

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<sup>1</sup> A representative body of National Maritime Law Associations, whose main object is the unification of maritime laws.

Act, the rules are given the force of law in relation any receipt which is a non-negotiable document marked as such, if the contract contained in or evidenced by it is a contract of the Carriage of Goods by Sea which expressly provides that the rules are to govern that the contract as if the receipt were a bill of lading.

In the case of *the European Enterprise*<sup>2</sup> it was held the legal effect of a clause in a negotiable receipt expressly incorporating the rule rather than any attempt to delimit the circumstances in which the Rules will be applicable to such a document.

The Hague Rules did not use the expression “contracting State” but named a country in which the law was enacted and usually provided. The bill was to contain an express statement (paramount clause) that the bill was subject to the Rules:

The Hague-Visby Rules used the words “contracting States” so that no conflict of law situations would arise.

The Hague-Visby Rules will apply to a contract of carriage covered by a document of title similar to the bill of lading. It was seen in *Kum v. Wah Tat Bank Ltd*,<sup>3</sup> how a mate’s receipt by virtue of custom and trade usage could be treated as document of title. The burden of proof however is not light for the party alleging that fact.

#### Limitation of Liability

Limitation of Liability in respect of Hague Rules was £ 100 per package coupled with the provision that it was to be “gold value”. [This in practice was not satisfying any objections being achieved by a limit of liability in an international convention].

The amendments to the limitation of liability are contained in Article 4 Rule 5 (a) of the schedule of the 1971 U.K. Carriage of Goods by Sea Act. Article 4 Rule 5 (a) provides 10,000 francs per package or unit or 30 francs per kilo.<sup>4</sup>

Problems have arisen in many countries in interpreting the term ‘package and unit’ as used in the formula.

A further problem that arose in applying the Hague Rules formula was to containers, pallets and other devices for the consolidation of goods and the rules limited the liability of the carrier to US\$ 500/- for the entire contents of the container.

In the case *The Mormaclaynx*<sup>5</sup> the cargo was described in the bill of lading as one container said to contain 99 bales of leather, it was held that each bale constituted a separate package. Conversely in the case of *Standard Electrica S/A v. Hamburg*

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<sup>2</sup> (1989)2 Lloyds Report (185)

<sup>3</sup> (1971) 1 Lloyds Report 439

<sup>4</sup> A Francs is not a unit of currency but unit of gold

<sup>5</sup> (1971) 2 Lloyds Report 476

*sudarmericaniche*<sup>6</sup> it was held that the bill of lading merely referring to the container without listing its contents then the container itself will be treated as a package. In the case of *Kulmerland*<sup>7</sup> where a consignment of adding machines had been shipped inside a container in individual corrugated cartons sealed with thin paper tapes were considered as individual packaging.

The Hague-Visby Rules retained the “package or unit” limitation of liability for individual items of cargo of high value but also introduced an alternative formula based on the weight of the cargo, the shipper being entitled to invoke whichever alternative produced the higher amount [Article IV Rule 5 (a)].

There was some controversy as to whether the Hague Rules package or formula was applicable to bulk cargo.

The problem of the conflict of opinion surrounding the container test has been solved as far as U.K. and the States which are implementing Hague-Visby Rules by the incorporation of Article VI Rule 5 (c).

The value of the goods is fixed according to the value of the goods at the relevant time and place at which they were discharged or should have been discharged according to the contract.

Article IV rule 5 recognizes a right in the cargo owner to override the aforementioned limitations of liability by declaring, before shipment the nature and the value of the goods shipped, and having that declarations recorded on the bill of lading. Such a declaration puts the ship owner carrier on notice of the precise nature of the goods and their value.

## **RULES AND HAMBURG RULES**

The Hamburg Rules constitute a new Convention on maritime transport agreed under the auspices of the United Nations at a conference at Hamburg on 31<sup>st</sup> March 1978. Their official title is the United Nations Convention on the Carriage of Goods by Sea 1978. The Rules were devised with the intention that they should supersede the 1924 Hague Rules together with the 1968 Visby amendments.

### Applicability

#### Hague – Visby Rules

The Hague-Visby Rules apply to contracts for the carriage of goods by sea that are evidenced by a bill of lading or a similar document of title between ports in different States (Article I).

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<sup>6</sup> (1967)2 Lloyds Report 193

<sup>7</sup> (1973)2 Lloyds Report 428

The rules applies to all outward shipments from the U.K. but to imports only if the carriage is from one of the states has referred to above or the bill of lading was issued in one of those states or clause paramount in the bill of lading expressly applies them.

If no bill of lading is issued the carrier is not legally bound to apply them and can be subject to the applicability of national law.

These rules does not apply to charter parties (Article V)

## Hamburg Rules

Hamburg Rules applies to all contracts for the carriage of goods by sea between two states (Article II).

It can be seen that the application of rules does not depend on issue of bill of lading and it is likely to apply for imports as well as exports. The Hamburg rules too are not applicable to charter parties [Article 2 (3)].

## Documents

### Hague – Visby Rules

Hague – Visby Rules come into operation where a bill of lading or similar document of title covers the contract of carriage by sea [Article I ((b))]

Section 1(b) of the U.K. Carriage of Goods by Sea Act 1971 provides that the rules will have the force of law where the bill of lading concerned expressly provides that the rules shall govern contract.

The Rules are not designed to cover contracts of carriage which envisage the issue of a way bill or other non negotiable document since they are not considered documents of title.

In the case of *Pyrene Co Ltd., v. Scindia Navigation Co Ltd.*,<sup>8</sup> it was established that if the parties envisaged that the contract of carriage will be covered by a bill of lading, it would appear that the Rules will take effect even though, in the event, no such documents is in fact issued.

### Hamburg Rules

Hamburg Rules apply to the contract of carriage and not to the bill of lading but the Hamburg Rules still envisage that the carrier should issue a bill of lading. Provision has been made for facsimile and electronic transmission of bills of lading.

## Types of Cargo

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<sup>8</sup> (1954)2 QB 402

## Hague – Visby Rules

Hague – Visby Rules provides in Article (1) (c) that Rules are applicable to all goods, ware, merchandise and articles of every kind except *live animals* and *deck cargo*.

In respect of both these cases parties are free to negotiate their own terms of carriage. The exclusion is justified due to the peculiar risk attached to the carriage by both categories of cargo.

### **Deck Cargo**

If the cargo is actually stowed on deck and this factor is clearly stated in the bill of lading deck cargo can be excluded from the Rules.

In the case of *Svenska Traktor v. Maritime Agencies*<sup>9</sup> 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 ship owners sought to rely on a clause in the bill of lading excluding his liabilities for loss or damage to the deck cargo. The Court held that he was unable to do so, since a mere general liberty to carry goods on deck is not, a statement in the contract of carriage that the goods in fact carried on deck.

In the case of *Encyclopedia Britannica v. Hongkong producer*<sup>10</sup> it was held that a clause in a bill of lading providing that the carrier is entitled to carry deck cargo is not within the specific reference to the carriage of goods on deck.

### Live Animals

The carrier is at liberty to negotiate the terms of carriage of such cargo.

The carriage may be made subject to Hague – Visby Rules through express stipulation.

### Hamburg Rules

**Hamburg Rules** cover all kinds of cargo including live animals.

### Live Animals

Article 5 (1) of the Hamburg Rules refers to the carriage of live animals subject to the general obligations of care outlined in the said article and the carrier will not be liable for loss resulting from any special risk inherent in that kind of carriage.

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<sup>9</sup> (1953) 2QB 295

<sup>10</sup> (1969)

## **Deck Cargo**

Article 9 of Hamburg Rules provides for deck cargo. The carrier is entitled to carry the goods on deck only if it is in accordance with an agreement/undertaking with the shipper or is in accordance with the usage, rules or regulations.

Such an agreement between the carrier and shipper must be included in the bill of lading.

## **Dangerous Cargo**

Article 4 Rule 6 defines the liability for the shipment of dangerous cargo.

This reinforces the implied term at common law that the shipper will not ship dangerous goods without the consent of the carrier.

Rule 6 provides that when such goods are shipped without the knowledge or consent of the carrier, not only he is entitled to neutralize them at the expense of the shipper, and without any obligation to compensate the cargo-owner, but the shipper is also liable for any loss or damage resulting from their shipment.

Hamburg Rules introduced Three new requirements for the shipment of dangerous goods.

- (a) There should be an indication in the cargo that it is dangerous.
- (b) The dangerous character of the goods has to be informed to the carrier.
- (c) Necessary precaution to be taken and the bill of lading must include an express statement that the goods are dangerous.

## **Period of Coverage**

The Hague – Visby Rules apply to the contract of carriage under Article (1) (c) from the time when the goods are loaded on to the time they are discharged from the ship (Tackle to Tackle).

The Hamburg rules covers the period during which the carrier is in charge of the goods at the port of loading during the carriage, and at the port of discharge. Carrier is deemed to be in charge of the goods at the time of receipt of goods to the time of delivery.

The Rules in fact cover the entire period of carriage even during transshipment. Under the Hamburg Rules the carrier is in greater responsibility for deck cargo. In the absence of a statement in a bill of lading that deck carriage is permitted the carrier has

unlimited liability if it in fact carries on deck having the burden of providing permission. Where the carrier is authorized to carry on deck, it has the same liabilities as in the case of under deck carriage. This differs from the Hague-Visby Rules when there is no mandatory application of those Rules of deck carriage.

In the case of *Pyrene Co Ltd., v Scindia Navigation Co Ltd.*<sup>11</sup> it was held that although the damage was caused before the goods had crossed the ship rails this did not essentially mean the exclusion of the rules. In the said judgement it was stated that no special significance should be placed on the phrase “loaded on”.

### **Carrier’s Covered**

Hague – Visby rules

Under the Hague – Visby rules carrier includes the owner or charterer who enters into a contract of carriage with a shipper [Article 1 (a)].

Hamburg Rules

Under the Hamburg Rules carriers conclude a contract of carriage of goods by sea with a shipper. These Rules also cover actual carriers, which include any person entrusted by the carrier to perform all or part of the carriage of the goods.

### **Carriers duties and liabilities**

Hague – Visby rules

Under the Hague – Visby rules the carrier must exercise due diligence to (Article III).

- (a) make the ship seaworthy
- (b) properly man, equip and supply ship
- (c) make the parts of the ship in which goods are carried fit and safe for the receipt, carriage and preservations of the goods [Article (III) Rule (1)].

The carrier shall properly load, handle, stow, carry, keep, care for and discharge the goods carried (Article (III) Rule 2).

Hamburg Rules makes a distinction between the “carrier” and the “actual carrier”.

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<sup>11</sup> (1954)2QB 402

## Hamburg Rules

Under the Hamburg Rules the carrier is liable for loss, damage, or delay in delivery of goods, if the loss occurred while the goods were under the carriers charge, unless the carrier proves that he, his servant or agents took all measures that would reasonably be required to avoid the occurrence and its consequences (Loss or damage) [Article 5 (1)].

Article 5 (2) defines delay as occurring when the goods have not been delivered at the port of discharge within the time expressly agreed in the Contract of Carriage.

## Carrier Immunities

### Hague – Visby Rules

The Hague – Visby Rules provide a wide list of exceptions in favour of the carrier. Loss or damage resulting from Article IV (I) (i) – (xviii)

Whenever loss or damage has resulted from un-seaworthiness the burden of proving the exercise of due diligence shall be on the carrier.

In the case of *Riverstons Meat Co Ltd., v. Lancashire Shipping Co. Ltd*<sup>12</sup> the defendants had engaged a firm of reputable repairers to repair the ship before sailing. The repairers were negligent and caused water to enter the ships hold damaging the claimants' goods. Lord Radcliffe held that the carrier must answer for anything that has been done a miss in the repairs. Their duty is to exercise due diligence in ensuring that the ship is seaworthy, and not due diligence in securing the Services of a reputable and competent professional fulfil that task.

By contrast to the Hague – Visby Rules, the Hamburg rules do not have an extensive list of exception clauses.

There are three main exceptions which operate in the carriers favour.

- (i) Live Animals
- (ii) Deviation
- (iii) Fire

### (i) Live Animals

Under Article 5 (5) where live animals are carried, the carrier is not liable if he can show that he has complied with the shipper's a special instructions and the loss or damage was caused by special risks inherent in the kind of cargo carried.

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<sup>12</sup> The Muncaster Castle (1961) AC 807

(ii) **Deviation**

Under Article 5 (6) of the Hamburg Rules provides that 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 measure to save property at sea. However, in the event of deviations, the carrier will still be liable for all loss, damage or delay in deliver that results after deviation.

In contrast Article 4 Rule 4 of Hague – Visby Rules a carrier will not be liable for loss resulting from any deviation in saving or attempting to save life or property at sea or any reasonable deviation.

(iii) **Fire**

Under Article 5 (4) (i) (a) if a carrier is liable, if a claimant can prove that the fire arose from the fault or negligent on the part of the carrier, his servants or agents. The carrier must prove that he, his servants or agent took all measures that could reasonably be required to avoid the occurrence and its consequences.

**Limitation of Carriers Liability**

Hague – Visby Rules – Liability limits for loss or damage: 666.67 SDRs per package (approx. \$ 970.00) or 2 SDRs per kilogram (approx S 1.32 per pound), which ever is higher and in terms of the Hamburg Rules 835 SDRs per package or (approx \$210.00) or 2.5 SDRs per kilogram (approx \$1.65 per pound), whichever is higher.

**Liability limit for delay**

Hague-Visby Rules

no applicable aprovision

Hamburg Rules

2.5 times freight payable for goods delayed but the recovery may not exceed the total freight payable under the contract of carriage.

**Apportionment of Liability**

Hague – Visby Rules

no applicable provision

## Hamburg Rules

Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery, the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to its fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable to its fault or neglect.

### **Notification of loss or damage**

#### Hague – Visby Rules

Notice of loss or damage must be given in writing to the carrier or his agent at the port of discharge before or at the time of delivery, or where the loss or damage is latent, within 3 days of delivery.

A failure to give such notice is *prima facie* evidence of delivery in accordance with the Bill of Lading.

#### Hamburg Rules

Notice of loss or damage must be given in writing by the consignee or carrier no later than 1 working day after the goods were delivered to consignee, or where the loss or damage is latent, within 15 consecutive days after delivery to the consignee (Article 19).

A failure to give such notice is *prima facie* evidence of delivery in accordance with the document of transport, or if no such document have been issued in good condition.

Compensation for loss resulting from delay in delivery may not be provided unless notice has been given in writing to the carrier within 60 consecutive days after delivery to the consignee.

#### Hague – Visby Rules

A civil suit must be brought within one year of the date of delivery of the goods, or the date when the goods should have been delivered.

#### Hamburg Rules

A civil action or arbitration proceeding related to the carriage of goods must be commenced within two years of the date delivery of the goods, or where no delivery, on the last day on which the goods should have been delivered.

## CONCLUSION

The Hamburg Rules has been strongly opposed by ship owning interests as it is feared that they would tend to increase carrier's liability and therefore affect the cost of insurance through the P & I clubs.

They have been equally strongly supported by shipper interests who believe they set a fairer balance between the responsibilities of carrier and shipper.

Freight forwarders' interests have moved to a position of broad support, seeing the Hamburg Rules as offering the potential for greater uniformity between the liability regimes for the different transport modes, and also reducing the gaps in liability which can be a source of difficulty at present for the forwarder who acts as a principal. The Hamburg Rules came into force on 1 November 1992 and although there are already 25 parties to the Convention it has so far had no major impact on world trade.

In recent years a number of States have unilaterally adopted a hybrid of Hague-Hague Visby-Hamburg Rules and the application differ from state to state. These countries include Australia, Japan, China and the Scandinavian States.

The respective approaches of both the Australian and U.S. draft Bill are similar and are broadly in line with developments elsewhere.

While substantive law relating to carrier liability follows the Hague – Visby pattern the Scope of application of these provisions is expanded in line with Hamburg Principles. The overall result of these developments is a further step away from the ultimate objective of international uniformity.

In an attempt to prevent further fragmentation the CMI in conjunction with UNCITRAL, has launched a project seeking to gain international agreement on a new updated liability regime capable of meeting the requirements of modern commerce to promote a great degree of uniformity as possible.

