

THE WEAKNESSES OF THE HAGUE RULES AND THE EXTENT OF REFORMS MADE BY THE HAGUE-VISBY RULES

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ABSTRACT

The essential feature of an international trade is that it will involve a transaction between a buyer in one country and a seller in another, requiring the movement of goods from the seller's country to the buyer's, typically by sea. At present, there are three regimes which govern the carriage of goods by sea namely the Hague Rules, the Hague-Visby Rules and the Hamburg Rules. Despite the existence of these three regimes, Malaysia continues to adopt the Hague Rules in its Carriage of Goods by Sea Act 1950 though there are serious defects which are inherent in the Hague Rules. In relation thereof, this paper intends to examine the weaknesses of the Hague Rules and the reforms made by the Hague-Visby Rules in order to overcome the shortcomings of its predecessor. Further, this paper will put forward some suggestions and recommendation as part of its conclusion.

INTRODUCTION

The quest for an internationally recognised, uniform liability regime which allocates the risk of loss or damage to cargo carried by sea has been a dominant theme of maritime law. After a number of false starts, the International Law Association and the *Comit'e Maritime International* (CMI) held a series of diplomatic conferences in the Hague, London and Brussels from 1921 to 1924 which culminated in the signing of the Hague Rules 1924.¹

Later, due to the prominent weaknesses of the Hague Rules, they were later replaced by the Hague-Visby Rules 1968.² Nonetheless, the Hague-Visby Rules do not stand alone but are amendments to the Hague Rules. Thus, the purpose of this paper is to examine and analyse the weaknesses of the Hague Rules and then to examine the extent of reforms

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¹ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels, August 25 and entered into force June 2, 1931. Although the Convention was adopted in Brussels in 1924, it was based on an earlier draft adopted by the International Law Association at the Hague in 1921, as amended at a diplomatic conference held in Brussels in 1922 and at a meetings of a *sous-commission* of that conference in Brussels in 1923.

² The Hague-Visby Rules refers to the Hague Rules 1924, as amended by the "Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading" adopted at Brussels, February 23, 1968 and entered into force June 23, 1977.

made by the Hague-Visby Rules. As such, the Hamburg Rules 1978³ will be nowhere dealt with in this paper.

THE HAGUE RULES

The Hague Rules represented the effort made by the international community to achieve uniformity in ocean bills of lading in order to provide a degree of predictability for international shipping. Prior to these rules, shipowners often thwarted cargo damage claims by inserting limits in bills of lading. The Hague Rules were generally well-received and have been adopted by 58 maritime nations⁴ including Malaysia.⁵

WEAKNESSES OF THE HAGUE RULES

The Hague Rules are not free of substantive and drafting problems and the weaknesses in the Rules are as follow:

The Scope of Application and Conflict of Laws

The scope of application of the Hague Rules is stated in Article 10 which provides that:

“The provisions of this Convention shall apply to all bills of lading issued in any of the contracting States”.

Thus, the Hague Rules shall only apply to the outward shipment i.e. shipment from a port of the contracting states to a foreign port. As for the inward shipment i.e. shipment from any port outside the contracting states to any port in the contracting states, presumably, the Hague Rules do not apply but rather the law of the country from where the goods were shipped would be the applicable law.

³ United Nations Convention on the Carriage of Goods by Sea adopted at Hamburg on March 30, 1978, and entered into force November 1, 1992.

⁴ John Richardson, *The Hague and Hague-Visby Rules*, 4th Ed, 1998 at pp 107-108.

⁵ The Carriage of Goods by Sea Act 1950 (as revised in 1994) which is applicable to the West Malaysia adopted the Hague Rules 1924 in its schedule. As for Sabah and Sarawak the Hague Rules 1924 apply by virtue of the Merchant Shipping (Applied Subsidiary Legislation) Regulation 1961 and the Merchant Shipping (Implementation of Conventions relating to the Carriage of Goods by Sea and to Liability of Shipowner and Others) Regulation 1960 respectively.

Another interesting point to note is regarding the ‘clause paramount’ technique which is common for countries applying the Hague Rules.⁶ The problem is that it creates a loophole which allows parties to contract out of the Hague Rules by choosing any law other than the law where the bill of lading was issued as the governing law. If they did so, the Hague Rules would not govern their contract, as the contract was governed by foreign law.

The Maximum Limit of Carrier’s Liability Is Too Low

The limitation of carrier’s liability is stated in Article IV Rule 5 which provides that:

“Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pound sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading”.

Thus, the Hague Rules limits the liability of the carriers to 100 pound sterling per package or unit,⁷ or the equivalent of that sum in other currency. Unless, the shipper has made a declaration of value, in which case the carrier’s liability is limited to the higher declared value.

However, there was considerable confusion as to whether the 100 pound sterling or other equivalent sum referred to the nominal or face value of the paper currency, or to its gold value. In order to resolve this confusion, the said rule has to be read in conjunction with Article IX of the Hague Rules which reads:

“The monetary units mentioned in this Convention are to be taken to be gold value”

⁶ Section 4 of the Malaysian Carriage of Goods by Sea Act 1950 adopted the ‘clause paramount’ technique whereby it provides that ‘every bills of lading, or similar document of title, issued in Malaysia which contains or is evidence of any contract to which the rules apply shall contain an express statement that it is to have effect subject to the said rules as applied by this Act’.

⁷ Equivalent to RM 688.00 per package or unit as at 23rd August 2006.

Therefore, the monetary unit refers to the gold value by virtue of Article IX of the same rules. It is worthwhile to note the rationale why the drafters of the Hague Rules referred to the gold clause instead of nominal or face value. At the time when the rules were drafted, the United Kingdom and other major shipping nations adhered to the gold standard i.e. all currency issued was backed by gold to that value. Hence, one pound sterling was represented by one gold sovereign.⁸

The Hague Rules Are Not Compatible With Container Transport

The transportation of goods is nowadays frequently carried out in containers.⁹ The containers are not necessarily owned by the carrier. There exist container companies which own containers and let them to carriers under the container leasing contract. The container itself, as distinguished from the individual cargoes contained therein, is normally shipped under an ordinary bill of lading. However the Hague Rules is silent on the interpretation of ‘package or unit’ which are stored in a container. It is important to ascertain whether the whole container or each of the individual cargoes contained therein constitutes a ‘package or unit’ with the meaning of Article IV Rule 5 of the Hague Rules which provides a maximum limit of 100 pound sterling per package or unit.¹⁰

Carrier’s Period of Responsibility

Article 2 of the Hague Rules states that:

“Subject to Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth”.

⁸ Paul Myburgh, *“All That Glitters”*: The Gold Clause, the Hague Rules and Carriage of Goods by Sea.

⁹ Schmitthoff’s *Export Trade: The Law and Practice of International Trade*, 9th ed., London, Sweet & Maxwell, 1990 p. 609.

¹⁰ *Supra* n.7

The term ‘carriage of goods’ is defined in Article 1(e) as covering the period from the time when the goods are loaded on to the time when they are discharged from the ship. This classic rule is known as “tackle to tackle” which has traditionally meant from the moment when the ship’s tackle is hooked on at the loading port until the moment when the ship’s tackle is unhooked at discharge.¹¹

In *Pyrene Co Ltd v Scindia Navigation Co Ltd*,¹² Devlin J construed that the carrier's period of responsibility begins under the Hague Rules when the contract of carriage of the goods by sea is expressed to begin, usually from when and including the loading of the goods onto the vessel.

Similar reasoning was upheld in *KMA Abdul Rahim & Anor v Owners of 'Lexa Maersk' & Ors*¹³ Choor Singh J held that a carrier is responsible under the rules for any damage or loss in connection with the goods until the carriage of goods by sea is deemed to end upon the goods being discharged by the carriers in a safe and proper manner.

However, the carrier could not be held liable if the loss or damage occurs prior to or after shipping even though the carrier has taken charge of the goods.

The Scope of the Subject Matter Coverage

Article 1(c) of the Hague Rules provides that:

“Goods” includes goods, wares, merchandises, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

Thus, deck cargo is entirely excluded and the carrier can claim exemption from liability. But, where cargo is carried on deck without specific agreement between the parties as to

¹¹ William Tetley, *Application of the Hague Rules*.

¹² [1954] 2 QB 402

¹³ [1973] 2 MLJ 121

the carriage on deck, and no statement appears on the face of the bill of lading that goods carried on deck are in fact so carried, the carriage is subject to the Rules.

This can be seen in the case of *Svenska Traktor v Maritime Agencies (Southampton) Ltd.*¹⁴ whereby the court ruled that a mere general liberty to carry goods on deck was not a statement in the contract of carriage that the goods were in fact carried on deck and therefore, the Hague Rules applied.

No Liability for ‘Delay’ in Delivery of the Goods

The carrier, under the Hague Rules, shall only be liable to the loss or damage to the goods if it is proved that the vessel was unseaworthy, improperly manned or unable to safely transport and preserve the cargo¹⁵. The Rules does not impose any liability on the carrier if the delivery of the goods is late or if the voyage takes longer than that contracted for.¹⁶ This is one of the lacunae in the Hague Rules as in modern international trade, financial loss due to the delay in the delivery of the goods is very grave as the time is very important and significant in any business dealings.

Navigational Fault Exception

Article 4 Rule 2 provides that:

“Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from – (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;...”

Thus, the carrier may escape liability by claiming defense of navigational fault. However, many oppose to the persistence of this defense as the advent of science and technology particularly in communication technology, vessel navigation and safety provide the carrier with a higher degree of control of the vessel and cargo than was available in the

¹⁴ [1953] 2 QB 295

¹⁵ Article 4 of the Hague Rules inter alia provides that the carrier can avoid liability for risks resulting from human errors provided they exercise due diligence and their vessel is properly manned and seaworthy.

¹⁶ A. Vijayalakshmi Venugopal, *The Carrier’s Duty Regarding the Vessel and Voyage under The Hague Rules, Hague Visby-Rules and the Hamburg Rules*, [2001] 4 MLJ xci.

previous century when this defense was adopted. Thus, it is suggested that the navigation defense should be eliminated.¹⁷

The Hague Rules Are Not Compatible With Electronic Commerce

The phenomenon growth of information, communication and technology (ICT) has tremendous effects in commercial transactions including the shipping industry. With the advent of Internet age, international trade is now moving towards electronic commerce particularly with the introduction of Electronic Data Interchange (EDI).¹⁸

The EDI systems have been developed to replace traditional paper bills of lading.¹⁹ EDI's popularity is rapidly increasing due to advantages that include the saving of time, the ease of doing business over long distances, the reduction of costs, the decrease in the number of middlemen involved in a transaction and the increased accuracy and standardisation of business communications.

Thus, the Hague Rules, which were enacted far back in 1924 and were not drafted with computer technology in mind, are no longer relevant and appropriate to suit the current practice in the modern shipping industry.

THE HAGUE-VISBY RULES

After half a century of global change, there was a movement to modernize the Hague Rules. The *Comit'e Maritime International* (CMI) initiated a reconsideration of the Rules. The diplomatic conference at Brussels adopted a Protocol to amend the Hague Rules on 23 February 1968. The 1968 Brussels Protocol brought the Hague Rules a little

¹⁷ Nicholas J. DiMichael and Karyn A. Booth, *Comparison of the Hamburg Rules, Hague-Visby Rule, and the MLA Proposal to Reform the Carriage of Goods by Sea Act (COGSA)*, www.globalshippersnetwork.net/NorthAm/COGSA.htm

¹⁸ Article 2 of the UNCITRAL Model Law on Electronic Commerce 1996 defines Electronic Data Interchange as 'the electronic transfer from computer to computer using an agreed standard to structure the information'.

¹⁹ Abdul Ghaffur Hamid, "The Legal Implications of Electronic Bills of Lading – A Challenge of the New Millenium", Paper given at the International Conference on Law and Commerce 2002 – "Law and Commerce in the New Millenium: Adapting to Changing Legal Business Environment" International Islamic University Malaysia, Kuala Lumpur, Malaysia held on 25 & 26 June 2002.

more in line with the needs of the changed world. The amended Hague Rules have become known as the 'Hague-Visby Rules' ("The Rules").²⁰

The Rules (the Brussels Protocol of February 23, 1968) should not be considered as a separate convention with the Hague Rules. The Rules are amendments to the Brussels Convention 1924 and article 6 of the Protocol shall be read and interpreted together as one single instrument.

REFORMS UNDER THE HAGUE-VISBY RULES

Territorial Application

It is clear from the wordings of the section that the Hague Rules shall only automatically apply to the carriage of goods by sea if the shipment is 'outward' for example shipment from a port of Singapore to a foreign port.

The Rules has made an important amendment to the Hague Rules whereby its territorial application is extended in order to solve the conflict of laws problems of the Hague Rules. Article X of the Rules Amendments provides that the Rules apply in three types of voyages where:

- i. The bill of lading is issued in a Contracting State; or
- ii. The carriage is from a port in a Contracting State; or
- iii. The contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract.

The Rules attempt to overcome the problem created by the *Vita Food Products v. Unus Shipping Co.*²¹ decision, where the Hague Rules were not deemed by an English Court to have the force of law and were held to have effect more by agreement than law in the absence of a paramount clause.

²⁰ Schmitthoff's Export Trade: *The law and practice of international trade*. 9th ed., London, Sweet & Maxwell, 1990 p. 268.

²¹ [1939] AC 277 (PC).

The Rules would seem to give much more authority to the application of the Rules by their wording. For example U.K.'s *Carriage of Goods by Sea Act, 1971* which adopted the Rules specifically gives the Rules "the force of law" as provided under sections 1(2), (3), (6) and (7). The Rules clearly provided that when the contract of carriage falls within one of the cases set out in Article X of the Rules, then the Rules must apply whatever be the proper law of the contract. In other words, the Rules apply by force of law and often inwards and outwards shipment.

Increase in Maximum Limitation of Liability

The Rules increase the maximum amount for limitation of liability of a carrier and introduce a new weight-based criterion: 10 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged. Article IV Rule 5 provides that neither the carrier nor the ship in any event be or become liable for any loss or damage to the goods in an amount exceeding the equivalent of 666.67 units of account per package or unit, or 2 units of account per kilo, of gross weight of the goods lost or damaged, whichever is the higher. The term 'package' refers to indication that something is packed and the term 'units' refers to freight units in use in various trades.²² Article IV Rule 5(a) of the Rules changed the application of the Hague Rules, the package limitation under the Rules is higher than U.S. \$500.00 and the Rules provides a per kilo as well, which latter limitation can be very high.

Where goods have been containerized, then these limits will apply to each package or unit in the container rather than the container as a whole.²³ The unit of account is the Special Drawing Rights (SDRs) of the International Monetary Fund (IMF).²⁴

The package and kilo limitations under the Rules are uniform, being in Poincaré gold francs or in SDR's as are determined by the IMF. It gives an advantage to the contracting

²² Per Goddard J. in *Studebaker Distributors Ltd v. Charlton Steam Shipping Co. Ltd* [1938] 1 K.B. 459.

²³ Article IV Rule 5 (c)

²⁴ Article IV Rule 5 (d)

parties whereby the standard of limitation is uniformed. It is an intention of the Rules for the unification of the terms in the international trade.

The effect of the Rules can be illustrated in the case of *The Happy Ranger*.²⁵ In this case, the claim against the ship owners focused on the nature of the initial contract and which Rules applied, Hague or the Rules, which would determine the extent to which the ship owners could limit their liability. Ship owners claimed their liability was either excluded entirely by the contract or limited to £100 under the Hague Rules. Parsons asserted that the contract was a contract of carriage within section 1(4) of the Carriage of Goods By Sea Act 1971 because it provided for a bill of lading, and therefore that the Rules applied, making the limit of the ship owner's liability US \$ 2 million in this case. Article 1(b) of the Rules stated that the term 'Contract of Carriage' used within the Rules applied only to contracts of carriage covered by a bill of lading or any similar document of title. At first instance, the court had given considerable weight to the clause on the reverse of the specimen bill of lading in deciding. Instead, the Hague Rules applied, limiting the defendant's liability to £100 per package. The Court of Appeal reversed. Tuckey LJ held that the Rules would apply when a bill of lading is, or is to be issued and the contract is covered by it within the definition of Article 1(b) of the Rules.

The maximum limits provided by the Rules for the carrier's liability are not of an absolute character. They may be increased by the agreement between the parties or even by declaration of the nature and value of the shipped goods by the shipper before shipment and also by insertion of the declaration in the Bill of Lading.²⁶ However, in the case of *the Hollandia*²⁷ it was decided that the maximum limits for the liability of the carrier could not be reduced by the agreement below the limits provided.

The Rules are compatible with container transport

The Rules incorporate a container clause in recognition of the new cargo packaging techniques adopted throughout the shipping industry. Container Bills of Lading are

²⁵ [2002] E.W.J No. 2245.

²⁶ Article IV Rule 5(a) and (f)

²⁷ [1983] A.C. 565

normally received for 'shipment bills' and not 'ship on board bills' and it could not be otherwise where the goods are received at a container freight station inland.²⁸ For example where the ship owner may issue container Bills of Lading when the carriage involves combined transport. The liability for the loss of the container in the sea is well governed by the Rules. The Rules contained express provisions applying to the carriage of goods in a container, pallet or similar article of transport.²⁹

COMMENTS AND CRITICISM

Since the reforms made by the Rules only to the extent of three aspects which are in favour of the ship owner, some interests principally in developing countries, were not satisfied with the 'reform' of the Hague Rules by the Rules Amendments and thought that a new comprehensive approach to the carriage of goods by sea was needed.

The Rules still do not resolve the weaknesses of the Hague Rules and not compatible with the change of the modern world in certain aspects. The period when carrier is liable still too limited whereby it only covers the period from the time when the goods are loaded on to the time when they are discharged from the ship. Deck cargo is also still being excluded from the subject matter for which the carrier may be held liable.

Besides that exemptions from carrier's liability that neither the carrier nor the ship should be responsible for loss or damage arising or resulting from 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 as per paragraph 3.7 above is not realistic and too wide. By reason of advance communication technology, vessel navigation and safety the carrier with a higher degree of control of the vessel and cargo should not be exempted. The defense 'in the navigational fault' should not be applicable when the ship and the facilities of the carriage have a higher standard of control over the goods.

²⁸ Schmitthoff's Export Trade: *The Law and Practice of International Trade*, 9th ed., London, Sweet & Maxwell, 1990 p. 320.

²⁹ Article IV Rule 5(c)

21st Century and Globalisation mainly refers to paperless means of doing business. The Rules is still not compatible with the electronic means of doing business whereas international trading is increasingly use by means of electronic commerce and data interchange.

The Rules also does not provide a provision to differentiate the terms of ‘carrier’ and ‘actual carrier’. The Rules should clearly define these two terms such as the ‘carrier’ is the person who enters into a contract of carriage of the goods with the shipper and the ‘actual carrier’ is the person to whom the actual carriage of the goods has been entrusted. It is essential for the cargo owner to know who the actual and legal carrier is in the event that he needs to sue any one of them.

The Rules still do not resolve several weaknesses of the Hague Rules, which is very material. That is why the UNCITRAL initiated the re-examination of the appropriate rules to regulate carriage of goods by sea by adopting the UN Convention on the Carriage of Goods by Sea in Hamburg in 1978 known as Hamburg Rules. Malaysia still practices the Hague Rules by virtue of the Carriage of Goods By Sea Act 1950 (Revised 1994).

CONCLUSION

The Rules changed the application of the Hague Rules in three ways. First, the package limitation under the Rules is higher than U.S. \$500.00 and the Rules provides per kilo as well, which latter limitation can be very high. Secondly, the Rules apply by force of law and often inwards and outwards. Thirdly, the package and kilo limitations under the Rules are uniform, being in poicare gold francs or in SDR’s. In contrast to the Hague Rules limitation which varies from nation to nation, the Rules have done away with much of the conflict of laws arising from the Hague Rules.

It is reported that many countries adopted the Rules such as France, UK, Canada, Japan, Singapore, Republic of Korea, Hong Kong, Germany, Indonesia and Taiwan. China and Thailand apply the hybrid regime of the Hague Rules, the Rules and the Hamburg Rules.

There was a proposal in the US Senate COGSA 1999 contains some useful the Rules and Hamburg Rules provisions but United States still reluctant to adopt the Rules.

How about Malaysia? It is important to discuss Malaysian approach towards overcoming the weaknesses of the Hague Rules. Malaysia still apply the old Hague Rules and there is no much development of the Carriage of Goods by Sea Act 1950 (as revised in 1994) and to the East Malaysian states of Sarawak by virtue of the Merchant Shipping (Implementation of Conventions relating to the Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960, and Sabah by the Merchant Shipping (Applied Subsidiary Legislation) Regulations 1961 which adopted the Hague Rules.

The reason why Malaysia does not adopt the Rules may be referring to the status of Malaysia in the area of international trade. Malaysia is still a country of shippers rather than ship owners and the Rules are more favourable to the carrier interests and not to the cargo interests.

As a conclusion therefore, it is submitted that it would be in the best interest of Malaysia to have some reforms to Carriage of Goods by Sea Act 1950. The Rules show that there was some reforms made to the Hague Rules and even Hamburg Rules can be considered as reforms to the Rules itself. Hence, Malaysia also has to amend, change and incorporate provisions of the Rules and Hamburg Rules. However, it is advisable for Malaysia to adopt only relevant provisions, which are suited with the practical aspects and safeguarded Malaysian interest. Several countries such as France, Australia and Canada have adopted the Rules and Hamburg Rules with special innovation have been made so as to meet their requirements.