

Carriage and legal conditions of maritime transport in the process of globalization

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Abstract.

Research background: The paper contains a comprehensive analysis of the marine, primarily from the perspective of English law but with reference to cases in other major marine developed countries. Coverage includes all the traditional topics, such as bills of lading and charterparties (voyage, time, and demise), and focuses also on each of the international conventions regulating the subject. Additionally, the content extends to such issues as limitation, claims (in the cargo context), and a brief discussion of maritime arbitration.

Purpose of the article: The main purpose of this paper is to analyse the bill of lading and other documents of carriage. It also focuses on international carriage measures, such as the Hague, the Hague-Visby, and the Hamburg Rules and discusses current developments towards uniformity. The analysis includes: analysis of shippers' and carriers' obligations and the analysis of rights and immunities of the carrier.

Methods: The main methods used in this paper are the theoretical methods of analysis and synthesis. Every synthesis is built upon the results of a preceding analysis, and every analysis requires a subsequent synthesis to verify and correct its results.

Findings & Value added: The paper seeks to examine in a commercial context the legal problems facing shipowners, charterers, shippers and receivers of goods and the solutions adopted by the courts and international conferences to those problems. Many of the legal principles involved are not restricted to shipping, but serve the wider area of commercial law generally.

Keywords: *good; law; regulations; maritime transportation; legislation*

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1 Introduction

Most goods traded internationally are carried from the seller's country to the buyer's country by sea, either on liner vessels which travel on a regular route between ports, or on

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tramp vessels that ply from port to port searching for cargoes to carry. During the process of loading and unloading the goods, stowing them in the hold, or – in the case of containers – on the deck, and throughout their carriage by sea, much can go wrong. A container or package can be dropped by the crane loading it onto a ship. Fumes from a gaseous cargo such as coal or oil can build up in the hold of a ship and ultimately cause an explosion. The master of the ship might be a drunk and incompetent, or a member of the crew careless in disposing of a cigarette. A ship might sail into a port only to find itself trapped as a result of war, or be boarded by pirates (m/v Arctic Sea) who divert the vessel and steal the cargo. A massive ‘freak’ wave may be encountered in the middle of the ocean, causing the ship to sink within minutes (waves with such force were once considered to be just a myth, but recent scientific research has shown them to be a reality and of surprisingly common occurrence – Cape of Good Hope). Who is liable to whom, for what, in circumstances such as these?

2 Methodology

Moving on to the origins of maritime law, nations have applied maritime law for thousands of years. It is one of the world’s oldest bodies of law, its beginnings arising out of commerce between ancient people bordering the Mediterranean basin. Dating back to ancient Greece and Rome, maritime law codifications have been preserved throughout the years bearing many similarities, constituting a longtime maritime tradition based on *lex maritima* and *lex mercatoria*. Substantial methodological process is the analysis of sources of maritime law, including the national legislation, as individual nations base their own maritime laws on the general international regulations with the modifications and qualifications they consider to be essential to their particular needs. Furthermore, among the sources of maritime law are European laws, Public international bodies (such as the UN, CMI, UNCTAD, IMO), trade and professional organizations (such as BIMCO, ILO and others), international conventions and treaties, decisions of international courts and international arbitral tribunals on certain important cases, international custom. The reference point of this body of law is the ship and all legal matters arising from its operations, and more specifically the carriage of goods and persons. It includes the in rem actions in vessels, ownership and registration of vessels, pollution incidents on the sea, cargo insurance.

The paper contains a lucid analysis of the marine law on the subject written primarily from the perspective of English law but with reference to cases in other major marine developed countries. The paper also includes an analysis of the bill of lading and other documents of carriage (including sea waybills and delivery orders). The main output focuses on international carriage measures, such as the Hague, the Hague-Visby, and the Hamburg Rules and discusses current developments towards uniformity. There are analysis of shippers' obligations, the obligations of the carrier, and the rights and immunities of the carrier and there is full coverage of the main issues in charterparties: voyage (including problems of laytime and demurrage); time; and demise. Uniquely the paper also covers an analysis of cargo claims. This paper seeks to examine in a commercial context the legal problems facing shipowners, charterers, shippers and receivers of goods and the solutions adopted by the courts and international conferences to those problems. Many of the legal principles involved are not restricted to shipping but serve the wider area of commercial law generally. The analysis shows that international maritime rules present similarities in certain fields of maritime transport, however considerable differences exist (as each treaty was signed decades after the other) and to this respect we compare the three most important rules with respect to the contract of carriage by sea by the method of comparison. We also

shows dissimilarity of maritime legislation) and also bring suggestions for further research in this area.

3 Results

3.1 Maritime law - the current situation in Slovak Republic and around the world

For many years, the international law community has sought uniformity and harmonization of international maritime law on cargo liability that would equitably address the often-conflicting interests of shippers and carriers. Historically, there have been several well known attempts at establishing uniform international law in this field, including: the Hague Rules (1924); the Hague/Visby Rules (1968); the Hamburg Rules (1978); and the International Multimodal Transportation Convention (1980), but none of these attempts has managed to achieve the level of acceptance necessary for international uniformity.

In 1996, the UNCITRAL Commission, during its 29th session, considered a proposal to review current practices and laws in the international carriage of goods by sea, particularly the need for uniform rules where no such rules exist [1].

UNCITRAL decided to commence work on this project and, in 2001, established a "Working Group on Transport Law" to carry out this task. In keeping with its longstanding policy of approaching international maritime law on a multilateral basis, Slovakia same as many others EU countries welcomed this new initiative by UNCITRAL. Slovakia had previously given positive consideration to the Hamburg Rules, but it seemed that they were unlikely to ever attract the level of international acceptance necessary to replace the Hague/Visby Rules. Thus, EU supported this renewed effort by UNCITRAL to build international uniformity on liability for the carriage of goods by sea [1].

3.2 Hague-Visby Rules

The Carriage of Goods by Sea Act 1971 incorporates the Hague-Visby Rules into English law and applies to the carriage of goods by sea when the cargo is loaded in a UK port. Similar legislation to incorporate the Hague-Visby Rules into their law has been enacted in many other countries. The Rules define the carrier's liabilities and rights with regard to the cargo carried in the vessel and can be summarized as follows.

3.2.1 Liabilities of a carrier under the Hague-Visby rules

- To make ship seaworthy and properly man, equip and supply it;
- To make the cargo holds, refrigerated spaces and any other parts of the ship where cargo is intended to be carried fit and safe for its carriage and preservation;
- On demand of shipper, to issue a bill of lading describing the condition of cargo, the number of pieces or packages or the quantity or weight, as stated by the shipper, and the leading marks on the packages to assist in identifying the goods [2].

It should be borne in mind that the obligation under the last paragraph does not go beyond the wording. The shipper cannot demand a bill of lading with a wrong description of the goods when the situation does not justify this. Indeed, if the master fails show "the apparent order and condition of the goods" the shipowner will forego any possible defences to a claim brought by a third party. The clausing of the bill of lading, should this be necessary, is not a choice but an obligation.

3.2.2 The rights and defences of a carrier under the Hague–Visby rules

The carrier cannot be held liable for loss or damage to the goods unless an action is brought within one year from the date of delivery of the goods.

The carrier is not liable for loss or damage arising from the unseaworthiness of the vessel unless it was caused by the want of due diligence on the part of the carrier to make the ship seaworthy and fit for carriage of the cargo [1].

The carrier is not responsible for loss or damage to the goods arising from neglect of the master and crew in the navigation or management of the ship, from fire, perils of the sea, act of God, war, public enemies, quarantine restrictions, strikes or lockouts, riots, when attempting to save life or property at sea, wastage of bulk goods or damage arising from inherent defects, quality or vice of the goods, nor for insufficiency of packing, inadequacy of marking and latent defects of the goods not discoverable by due diligence, and finally from any other cause arising without the fault or privity of the carrier.

If the carrier is responsible for damage to or loss of the goods then he is entitled to limit his liability by application of the “package limitation” as provided in Article IV, rule 5 of Hague-Visby Rules [2].

If the carrier receives a claim for damage to or loss of the goods while they were in his custody and wishes to use one or more of above defences to disclaim liability, the burden of proof that the loss is covered by those defences is on him. The need to keep a careful record of any incident which might affect the carrier’s duty of care in respect of the cargo is apparent. Many potential claims for loss or damage can be averted before the goods are stowed on board by careful inspection of them for any apparent defects. This is particularly so with shipments of steel [1]. These are normally brought to the attention of the shipper who than can substitute sound goods. If shipper declines to do this and insists that the discrepant cargo be loaded, then the master can still refuse to load it, most likely on the ground that it may cause damage to the other cargo on board or to the ship itself. Alternatively, the master can accept the cargo and clause the bill of lading in accordance with the discrepancies found [2].

3.3 Bill of lading

The contract of carriage which contains the relevant provisions of the Hague or Hague-Visby Rules is evidenced by bill of lading which is best written evidence of the contract for the carriage of cargo and, in relation to carriage by sea, must contain terms no less favourable to the cargo interest than those laid down in the Hague or Hague-Visby Rules or Hamburg Rules since otherwise, those provisions that are less favourable will be upheld by a court. These rules provide various defences where disputes arise, such as: negligent navigation or management of a vessel, fire (unless caused by the carrier’s actual fault or privity), insufficiency of packing, etc., as well as rights, obligations and limitation of liability [3].

The bill of lading not only confirms that loading of the goods on board and implies their apparent good condition but is also the document by which the goods are claimed at the port of discharge. In law it is a negotiable instrument, which means it may be used to pass title in the goods together with all rights and liabilities of the original shipper. While ship is at sea a third party may well buy the goods, relying on the representation made by master in the bill of lading. The bill of lading will be compiled from the mate’s receipt issued by ship. In the hands of third party, statements contained in a bill of lading are conclusive evidence and the person making that is stopped from later denying such facts. The goods must be carefully tallied and all leading or distinguishing marks noted so that the quantities presented in the bill of lading can be checked. Tankers can have a problem as a shore figure

inserted in the bill of lading will often not agree exactly with the ship's figure. A tolerance of 0.5 per cent. Is usually allowed, but if the discrepancy is greater ship's figure must be stated on bill of lading. A similar tolerance is permitted on bulk shipments. The shipper is also entitled to a bill of lading as proof that the goods were shipped in apparent good order and condition [4].

The vessel's command is not under duty to exercise anything more than the normal expertise of a seafarer when confirming the quality and quantity of the goods laden on board. This "reasonable inspection" contemplates inspection by unskilled person, as distinct from skilled person such as marine surveyor. However, when goods are accepted in "apparent good order and condition" and delivered in a damaged state, it is for the carrier to establish that the defective condition of goods would have been apparent to the shippers on reasonable inspection at the time of shipment. Endorsements describing the damage need not to be technical but must be precise and factual, e.g., "six bundles wet-stained". Unclear words like "several" must be avoided and, dealing with apparent condition only, master should not put remarks like "condition unknown". Any endorsement made on Mate's receipt or Shipping Note should be brought to the attention of the shipper to give him the opportunity to make good the defect. All endorsements should be made on the face of the bill and be initialed or signed by master or agent [4].

An "unclean" bill of lading will rarely be accepted by bank. The bank, which holds a letter of credit from the consignee in favor of the shipper, will only be authorized to pay out against a clean bill of lading. An offer by shipper to give a Letter of Indemnity in exchange for clean bills must be firmly rejected. Ship masters and agents have no authority to accept them in exchange for clean bills of lading. In bulk shipments the type of bill to be used and the authority to sign it is often specified in the charterparty. The charterparty may require the master to sign bills as presented by charterer. Where the charter party provides that the master is to sign clean bills, "clean" in this context has been held to mean that the bill shall not be endorsed for demurrage due at the loading port and the master's duty to endorse, if necessary, for the apparent order and condition of cargo remains unaffected. A master who signed a clean bill of lading under duress was freed from the eventual consequences. There is no lien on the cargo for demurrage unless it is expressly stated in the bill of lading. If it is so provided and demurrage is incurred but not paid at the loading port, the bill of lading is to be endorsed if the lien is to be preserved. A similar problem arises when the bill of lading provides that freight is prepaid or payable in advance. If the freight has not been so paid, the lien on the cargo is not enforceable [3].

Delivery of the cargo may be claimed on arrival by presenting a delivery order signed by vessel's agents. This will indicate that consignee has surrendered the original bill of lading and paid all the outstanding charges. However, agents should be careful not to issue ship's delivery orders in favor of persons other than a named consignee as such orders do not pass the rights and liabilities of the bill of lading on to the buyers. The custom authorities will want to see the cargo manifest and the bill of lading to check quantities being carried. The master has take the greatest care that these two documents are not only accurate but agree with each other [5]. If the manifest is less than either the bill of lading or actual quantity on board customs will presume an intention to smuggle the undeclared amount. If the bill of lading figure is greater than the quantity on board they will regard that as evidence that the excess has already been smuggled ashore. In both cases the ship may be heavily fined. It should be clear that the bill of lading is a complex document and that the master's role in connection with it is important [4].

3.4 Conditions of carriage of goods by the sea – comparison of applicable rules

Carriage of Goods by Sea, in particular, the rights and immunities of the carrier is but an aspect of Maritime Law which generates litigation. Attempts have constantly been made to create some form of legal uniformity within the area of Carriage of Goods by Sea, on an international level.

Although the Hague Rules were successful, conditions, time and progress in the area necessitated a modernisation of such Rules. This brought about the Hague-Visby Rules. The latest International Convention on Carriage of Goods by Sea is the Hamburg Rules (1978) [5]. Notwithstanding the fact that the Rules intended to replace its predecessors and promote uniformity, these on the contrary, created a great deal of uncertainty in the shipping industry. The urge for a comprehensive and unambiguous set of rules governing the rights and immunities of the carrier was strongly felt. Dissatisfaction, with all international regimes on the matter, led to a number of countries adopting or attempting to adopt their own law on Carriage of Goods by Sea, such as Australia, Canada, the US and the Scandinavian countries thus placing international uniformity in serious jeopardy.

After six years of deliberations, the General Assembly of the United Nations approved and adopted on December 11, 2008, the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (hereafter referred to as "the new Convention"). A signing ceremony has been scheduled for September 2009 in Rotterdam, The Netherlands.

The new Convention approaches the scope of application quite differently from previous regimes. For example, the Hague and Hague/Visby Rules employ what may be termed as a "documentary approach" to the scope of application, where the type of document determines whether or not those rules apply. The Hamburg Rules use a "contract approach" and apply to contracts of carriage between a carrier and shipper, irrespective of the type of document used as evidence of a contract.

In contrast, the new Convention has a hybrid scope of application, combining the "contract approach" of the Hamburg Rules with a "trade approach". Contractually, the new Convention applies to all contracts of carriage where the carrier, against the payment of freight, has agreed to carry the goods from one place to another, provided the carriage includes an international sea leg. With respect to the "trade approach", the new Convention applies to contracts in both the liner and non-liner trades, but not to charterparties or alternate contracts for use of a ship or space on it. However, the Convention does apply to contracts of carriage in the non-liner trade but only when a transport document has been issued.

3.5 Liability of contracting carrier and performing party

The Hague and the Hague/Visby Rules define the carrier as the person who enters into a contract with the shipper. The Rules do not address the question of the performance of the carriage, if entrusted by the contracting carrier to another party and how they apply to the latter. The Hamburg Rules distinguish the contracting carrier from the actual carrier and make the former responsible in principle for the performance of the whole carriage. The new Convention defines the carrier as a person who enters into a contract of carriage with a shipper but does not require the carrier to actually perform the carriage. It also distinguishes among those parties who perform various activities on behalf of the carrier, differentiating a performing party as either a maritime performing party or a non-maritime performing party. For the purposes of the new Convention, a performing party is someone, other than the carrier, who agrees to take on any of the carrier's responsibilities with respect

to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods. A maritime performing party includes ocean carriers, feeder carriers, and stevedores that work within the port area, marine terminal operators and port authorities to the extent that they may be involved in the handling of the cargo in the port. Their inclusion in the new Convention provides substantive liability rules for all parties that perform, or undertake to perform, the contracting carrier's obligations for the port-to-port aspect of the carriage. Under the new Convention, all maritime performing parties automatically enjoy the same per package and per kilo limitation benefit as the carrier [6].

3.6 Carrier's Obligations

As with all cargo liability regimes, the carrier's overriding obligation is to carry the goods to the place of destination and deliver them to the consignee in accordance with the terms of the contract. The new Convention extends the carrier's obligation under Hague/Visby to exercise due diligence in keeping the ship seaworthy not only prior to and at the beginning of the sea voyage, but during the whole voyage. The carrier is also required to properly crew, equip and supply the ship throughout the voyage.

3.7 Limitation of Liability

The Hague Rules provide a limit of carrier's liability of \$500 U.S. dollars per package or unit, unless the shipper declares the actual value of cargo or the parties agree to a higher limit before the shipment. This limit of liability applies "in any event", including when the carrier is in breach of the Rules [6]. The Hague/Visby Rules raised that limit of liability to the greater of 666 Special Drawing Rights⁷ (SDRs) or 2 SDR's per kilogram. The Rules also provide that where a container, pallet or similar article of transport is used to consolidate the goods, the number of packages or units is deemed to be the number of packages or units enumerated in the bill of lading. Moreover, the carrier cannot limit its liability if the damage to the goods resulted from an act or omission of the carrier with the intent to cause damage [7].

The limitation of liability was raised further under the Hamburg Rules to the greater of 835 SDRs per package or 2.5 SDRs per kilo. The Hamburg Rules also introduced a limit of liability of the carrier for delay in delivery of two and a half times the freight payable for goods that are delayed, but in any case not exceeding the total freight payable under the contract of carriage [6]. The new Convention further raises the limitation of liability for loss or damage of the cargo to the greater of 875 SDRs per package or 3 SDRs per kilo. The limitation of liability for delay remains unchanged from the Hamburg Rules' limit of two and half times the freight payable. However, the carrier or a performing party is not entitled to benefit from the limitation of liability if it is proven that damage or delay was caused by their personal acts or omissions done with reckless intent to cause damage [6].

3.8 Shipper's Obligations

The new Convention requires the shipper to provide the carrier with all the information, instructions and documentation required for the proper handling and carriage of the goods. The shipper must deliver the goods to the carrier, ready for carriage and able to withstand their loading, handling, stowing, lashing and securing and unloading. The shipper is liable to the carrier for any loss or damage sustained by the carrier if the carrier proves that the damage was caused by a breach of the shipper's obligations.

3.9 Notice of loss

The Hague and the Hague/Visby Rules provide that notice of loss or damage must be given in writing to the carrier within three days of delivery. Under the Hamburg Rules, the notice period is extended to 15 consecutive days after the day when the goods were handed over to the consignee. For a loss resulting from delay in delivery, a notice must be given in writing to the carrier within 60 days under the Hamburg Rules [6]. The new Convention provides that notice of loss or damage must be given at the place of delivery within seven working days after the delivery of the goods [8]. For loss resulting from delay in delivery, no compensation is payable unless notice of loss is given to the carrier within 21 consecutive days of delivery of the goods.

3.10 Deficiencies in the Contract of Carriage Particulars – Identity of the Carrier

In the past, claims for damages or loss to cargo could be difficult to pursue within a limitation period if the carrier was identified incorrectly or not at all in the contract of carriage. Under the new Convention, if the contract of carriage fails to identify the carrier, but names a ship, then the registered owner of that ship is presumed to be the carrier [9]. The registered owner can defeat this presumption by proving that the ship was under charter at the time and by providing the claimant with the name and address of the person/company that was responsible for the ship at the time of the loss or damage [6, 15].

4 Conclusion

With the completion of the new Convention, it appears to be even less likely that the Hamburg Rules would receive the level of international support necessary to become a viable alternative for Slovakia. It will be recalled that the new Convention, as the latest attempt at achieving uniformity of international law on carriage, was born of out concerns that the disparate national laws and international regimes lacking widespread support "constituted an obstacle to the free flow of goods and increased the cost of transactions."

The new Convention appears to have the backing of many important maritime nations and could come into force soon, especially if the United States decides to sign the Convention, subject to ratification, at the September 2009 signing ceremony in Rotterdam. Nonetheless, it remains to be seen if the new Convention will become more popular than any of its predecessors and if it will restore international uniformity of law for carriage of goods by sea and achieve its goal to prevent increased cost of transactions due to plethora of liability regimes for carriage of goods [1]. There is no doubt that the new Convention, like the Hamburg Rules, will elicit views both pro and con, depending on the standpoint of those directly affected by the Convention. Thus, it is the overall assessment of the new Convention that is likely to be the key indicator of whether or not the new Convention is, indeed, a viable alternative to the Hague/Visby Rules.

5 Discussion

The Hague and Hague/Visby Rules have no provisions regarding jurisdiction. The Hamburg Rules provide that the claimant may choose to initiate a court action in any of four listed jurisdictions, all with some connection to the contract or the carriage (e.g., place of business of the defendant, ports of loading or discharge or place where the contract was

made). However, after a claim has arisen, the parties to the claim may agree on the place to institute a legal action (i.e., a jurisdiction clause) [10].

Although the new Convention designates four options as a competent court where a claimant may institute proceedings, these may be overridden by an exclusive jurisdiction clause in the contract of carriage as agreed between the carrier and the shipper. It should be noted that third parties to a volume contract (e.g., consignees) are bound to any exclusive jurisdiction clause in a contract of carriage [11]. Should the claimant wish to file suit against the maritime performing party, rather than the contracting carrier, the action must be filed in a competent court situated within the domicile of the maritime performing party or the port where the goods were received or delivered by the maritime performing party [12, 13]. However, it is important to note that the jurisdiction provisions in the new Convention are only binding on a Contracting State if that State indicates its intention to be bound by those provisions at the time of ratification or anytime thereafter, e.g. upon accession.

The development and level of international regulation of maritime transport testifies to its importance and undeniable complexity. There is a certain multiplicity of international agreements on a global scale. The most widespread and oldest are the so-called The Hague Rules of 1924 (Hague Rules, International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924), which were subsequently amended by the 1968 Protocol and apply in parallel under the designation Hague-Visby Rules, International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, First Protocol, 1968 / Second Protocol, 1979). The third international extension is the set of rules expressed in the UN Convention on the Carriage of Goods by Sea, also known as the Hamburg Rules of 1978 (Hamburg Rules, United Nations Convention on the Carriage of Goods by Sea). Another contractual document is the United Nations Convention on Contracts for the International Carriage of Goods by Sea (in whole or in part) - Rotterdam Rules (Rotterdam Rules, United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008). Given the plurality of internationally valid and practically used documents governing the field of maritime transport, the question of a potential solution to the conflict between these conventions is becoming more important [14]. This is a complex issue, and therefore the authors have only tried to indicate some of the basic possibilities that may arise. The situation, which can be demonstrated in this respect in a simplified way at the confluence of the regulation valid in the Czech Republic / Slovakia - ie the Hamburg Rules - and the Hague Rules. Assume that State A is a party to the Hague Rules while State B of the Hamburg Rules. In this case, there may be a conflict of conventions for the following reasons:

- the bill of lading is issued in State A and the port of loading is in State B,
- the bill of lading is issued in State A and the port of unloading is in State B,
- the bill of lading is issued in State A and one of the ports of unloading available for selection is in State B,
- the bill of lading is issued in State A, but at the same time contains the so-called Paramount clause in favor of the Hamburg rules [16, 17].

The simplest solution to the conflict of conventions is the explicit expression of the will of the contracting parties; in its absence, one of the following principles can be used (in the order in which they are listed):

- maximum benefit rule,
- special adjustment rule,
- the rule of applying a later adjustment.

In the case of the first two criteria, it is necessary to proceed on a case-by-case basis and therefore a universally valid answer cannot be provided. This is offered in the third case and speaks in favor of the Hamburg rules [18, 19]. However, the use of this alternative is

linked to the impossibility of applying either of the two previous ones. The above example as well as the possible solutions are significantly simplified and do not by far reflect all the eventualities that may occur in practice. There is no one-size-fits-all solution and the end result depends on many aspects arising both from the specifics of each case and the provisions of the conventions themselves and to a large extent on the nature and location of the relevant decision-making body.

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