

## **THE MAIN FEATURES OF THE HAMBURG RULES AND THE HAGUE-VISBY RULES**

The application of the Hague-Visby rules firstly focuses to document. The rules apply only bill of lading or any similar document of title,<sup>1</sup> other than charterparties and a waybill. The Rules do not apply non-negotiable documents, because these documents are not a document of title. However, straight bill of lading is an exception of this rule. According to Mr. Milligan is that, “even if the parties contemplated the issue of a straight bill of lading, such a bill would be a bill of lading or similar document of title within the meaning of the Hague-Visby rules.”<sup>2</sup>

Second important thing for the Hague-Visby Rules is the voyage. The rules apply only to export voyages from in contracting states’ port or bills issued in a contracting state. However, under the Hamburg Rules, the parties can apply both inward and outward voyages. It can also be described as an improvement on the Hague-Visby Rules.

According to COGSA 1971 article I[e] defines, “carriage of goods covers the period from the time when the goods are loaded on to the time they are discharged from the ship.” This rule’s mean is that, the article does not cover the whole period of the carrier’s responsibility. However article II of the COGSA 1971 mentions that, “... under every contract of carriage of goods by sea the carrier, in relation to the loading ..... of such goods, shall be subject to the responsibilities and liabilities...” This means, the carrier is responsible for the loading period. The confusion arises from this point, whether the responsibility of the carrier covers the whole period of loading or not. So Devlin J held that, “‘loading’ covers the entire operation of loading and not just that part that is performed once the goods cross the ship’s rail.”<sup>3</sup>

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<sup>1</sup> COGSA 1971 Art. 1[b]

<sup>2</sup> The Happy Ranger [2002] E. W. C. A. Civ. 694

<sup>3</sup> Pyrene co. ltd. V Scindia Navigation co ltd [1954] 2 Q. B. 402

Furthermore, the contract of carriage is always concluded before the bill of lading is issued. The bill of lading must cover the whole terms of the contract. Otherwise the bill of lading would not be evidence of the contract. According to the Devlin J. that, “whenever a contract of carriage is concluded, and it is contemplated that a bill of lading will, in due course, be issued in respect of it, that contract is from its creation “covered” by a bill of lading, and is therefore from its inception a contract of carriage within the meaning of the rules and to which the rules apply.”<sup>1</sup>

Another main feature of the rules is that, the carrier’s duty is to make the ship seaworthy. According to the COGSA article III [1], the carrier is required to exercise due diligence to make a ship seaworthy before and at the beginning of the voyage. The carrier will be responsible not to exercise due diligence. When any loss or damaged occurred as a result of unseaworthiness, the carrier would have to prove that he has exercised due diligence to make a ship seaworthy. The exercise due diligence is a personal obligation of the carrier and it cannot be delegated.

The Hamburg Rules apply to all contract of carriage by sea except charterparties.<sup>2</sup> This approach differs from Hague-Visby Rules which apply only “contracts of carriage covered by a bill of lading of any similar document of title.”

It can be said for the Hamburg Rules that they extend their application of the rules. It is not important for them, whether a bill of lading or non-negotiable receipt is issued. It can operate in any contract of carriage to carry the goods from one port to another. Whereas it can be argued that, the Hague-Visby rules apply a bill of lading or any similar document of title. Resulting from that, the Hague-Visby rules restrict their application of the rules by operating only bill of lading or any similar document of title.

The Hamburg Rules also determined to responsibility of the carrier for the goods. The carrier shall be responsible throughout the entire period “during which the carrier is in

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<sup>1</sup> Pyrene co. ltd. V Scindia Navigation co ltd [1954] 2 Q. B. 402

<sup>2</sup> Hamburg rules art. II [3]

charge of the goods at the port of loading, during the carriage and at the port of discharge.”<sup>1</sup> This means, the carrier’s responsibility is covered the full period of the carriage. And also there is no confusion the responsibility of the carriers under the Hamburg Rules. However, as I mentioned before, it is narrowed under the Hague-Visby rules which are not covered the full period of the carriage.

Under the Hamburg Rules, the carrier is divided into the contractual carrier and the actual carrier. The Hamburg Rules imposed the liability to the contractual carrier. According to the Hamburg Rules article X [1], the contractual carrier still remains responsible the whole carriage. This means, his responsibility is including performance of the actual carrier. However, the carrier can exclude his liability for loss or damage happened to the goods under the supervision of the actual carrier. In contrary to that, under the Hague-Visby Rules, there is only single carrier. It can be the shipowner or the charterer. One of them can be liable, if any loss or damaged happened to the goods during the carriage.

The Hamburg Rules introduced unified system of liability. This means, the carrier’s liability based on fault. The carrier is responsible his own fault or his servants and agents fault caused the loss or damage to the goods.<sup>2</sup> Once the goods were damaged while they were in charge of the carrier, the carrier should be liable. However, if he proved that he took all necessary measures to prevent the damage or loss, he would not be liable any more, even if the loss or damage were happened to his servants or agents fault. On the other hand, the Hague-Visby Rules introduced a list of exceptions of liability of the carrier, but it does not in fact involve fault on the part of the carrier.

Resulted from unified system of liability, under the Hamburg Rules, the carrier must provide a seaworthy ship the whole period of the carriage. So the carrier must take all necessary measures to prevent the damage or loss and its consequences. However, under the Hague-Visby Rules, this duty of the carrier was limited. His duty only to exercise due diligence, but at the same time he was required to look after to the goods carefully

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<sup>1</sup> Hamburg rules art. IV [1]

<sup>2</sup> Hamburg rules art. V [1]

throughout the carriage. It made unclear the carrier's duty under the Hague-Visby Rules. On the other hand, the introduction of the unified system of liability which based on the fault, made the carrier's duty much clear.

Furthermore, under the Hague-Visby Rules article III [2] that, "the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." This rule imposes to the carrier which has to take all necessary measures to prevent the damage or loss occurred to the goods. However, in contrary to that, article IV [2] mentions a list of exceptions which the carrier shall not be liable for the damage or loss under these exceptions. As a matter of fact, these two articles conflicts each other and another problem comes to the light is that how to deal with the burden of proof. In practice, the court generally finds it difficult to interpret to these provisions.

On the other hand, The Hamburg Rules have introduced a new measure to resolve this problem. They adopted a unified burden of proof rule. According to the rule, the burden of proof is on the carrier, because the carrier's liability shall be based on fault in all cases of loss or damaged to the goods.

As I mentioned before, the burden of proof is on the carrier under the Hamburg Rules. However, there are two exceptions of this rule.<sup>1</sup> Under these exceptions the claimant has to prove that the damaged or loss was resulted from carrier or his agent or servants fault.

First exception of the rule is the fire. Where the goods are damaged or lost as a result of fire, the carrier will be liable if the claimant can prove that the fire arose from the "fault or neglect on the part of the carrier, its servants, or agents."<sup>2</sup> However, the burden of proof must be on the party who is most likely to have knowledge of the facts. In this case, it could be difficult for the claimant to prove the fire, because it was happened by fault of the carrier. And also his goods has already been lost or damaged. On the other hand, as a carrier, it is also difficult to establish the precise origin of the fire at sea.

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<sup>1</sup> Hamburg rules V [4]-[5]

<sup>2</sup> Hamburg rules V [4]

In addition, there are a little difference about fire exception between the Hague-Visby Rules and the Hamburg Rules. Under the Hague-Visby Rules, same as the Hamburg Rules, the claimant is under a burden of proof to prove that the fire occurred on account of the fault or privity of the carrier. However, in this case, when the claimant proved that the fire happened as a result of unseaworthiness of the vessel, the carrier would not be rely on the fire exception.

Second exception of this rule is the live animals. The live animals can have a special risk such as sickness of infection which does not possible to be known by the carrier. Thus, where the carrier can prove that the damage was caused by such a risk, then the claimant has to prove that the carrier was negligent. On the other hand, the Hague-Visby Rules are not applicable to the live animals, but the parties of the contract can have liberty to negotiate the terms of the carriage of such cargo.

The Hamburg Rules do not make any difference between deck cargo and any other cargo. Whereas it can be argued that, deck cargo was separated from any other cargo under the Hague-Visby rules. So as to make a deck cargo, some conditions have to be met. First one is the cargo must be put on a deck and second one is that, this situation has to be shown on the face of the bill of lading.

There is no specific definition made for deviation under the Hamburg Rules. However, it was only mentioned the article V [6] 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 measures to save property at sea.” Contrary to the Hague-Visby rules, this provision is much narrower than given by the Hague-Visby rules. The Hague-Visby rules allow to the carrier to make a reasonable deviation.<sup>1</sup>

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<sup>1</sup> COGSA 1971 art. IV [4]

In addition, any deviation is made under the Hamburg Rules, the carrier has to prove that, “all measures has been taken to prevent the loss or damage to the goods, otherwise he will be responsible all loss or damaged.”

The Hamburg Rules impose two years limitation period to bring any action relating to the carriage of goods.<sup>1</sup> However, this period is one year under the Hague-Visby Rules. In contrary to the Hamburg Rules, the one year period under the Hague-Visby rules, is a very short time for the cargo owner to take an action against the carrier.

Moreover, the Hamburg Rules made an improvement for the shipment of dangerous goods. According to the Hamburg Rules, “the shipper must mark or label in a suitable manner dangerous goods as dangerous,<sup>2</sup> and also he must inform the carrier of that,<sup>3</sup> finally the bill of lading must include an express statement that the goods are dangerous.<sup>4</sup> On the other hand, under the Hague-Visby Rules, the shipper can only put to the dangerous goods with the consent of the carrier.

According to the two rules, the carrier’s another duty is to issue shipping documents. This is also an obligation to the carrier. A main difference between two rules is that, under the Hamburg Rules, these documents much more detailed than the documents under the Hague-Visby Rules.

According to the Hamburg Rules article 16 that, the bill of lading has an evidential effect. However, it made a chance from the Hague-Visby Rules which the carrier has to record the apparent condition of the goods on the bill of lading, if he fails to record it; he is deemed to have recorded on the bill of lading.<sup>5</sup>

Another improvement is that, the Hamburg Rules made a specific provision for jurisdiction. However, the Hague-Visby Rules do not contain any specific jurisdiction.

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<sup>1</sup> Hamburg rules art 20 [1]

<sup>2</sup> Hamburg rules art. 13 [1]

<sup>3</sup> Hamburg rules art 13 [2]

<sup>4</sup> Hamburg rules art 15 [1]

<sup>5</sup> Hamburg rules 16 [2]

In conclusion, The Hamburg Rules made several important improvements on the Hague-Visby rules. They achieved a great uniformity to the Carriage of Goods by Sea than do the Hague-Visby rules. Such as, they introduced a port to port responsibility of the carrier than being a tackle to tackle period of responsibility under the Hague-Visby rules. As I mentioned during the study, the Hamburg Rules sorted out many problems or confusions, which was accommodated in the Hague-Visby Rules. Moreover, the court sometimes was having difficulties to interpret the Hague-Visby Rules. On the other hand, The Hamburg Rules were not ratified by many of the trading countries. Even if the Hamburg Rules made several improvements, they associated some problems in its structure. For instance, the rules did not mention anything about the independent contractor so they are not under the umbrella of the Hamburg Rules.

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