Liability of the Sea Carrier in the International Carriage of Goods by Sea

by

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To my mother, Alaweya, who motivated me to attain success from the early childhood.

To my husband, Osama, whom without whose assistance and encouragement I can not manage with practical and academic lives.

To my kids: Lamis, Ashraf, Rami and the youngest, Aseel, whose presence is a new existence to my life.

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Abbreviations

AC: Appeal Cases

Art: Article

c.i.f: cost, insurance, freight

SDR: Special Drawing Right

Sup Ct: Supreme Court

UNCTAD: United Nations Conference on Trade and Development.

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Preface

During my work as a lawyer in Port Sudan, I noticed the scarcity of the Sudanese legal materials on carriage by sea. Also I observed that the lawyers refer repeatedly to the Egyptian works although the Hague/Visby Rules, the widely wide world applied convention, is based on the English common law principles. From my practice before Port Sudan Civil Courts, I felt that so many issues on carriage by sea need to be discussed and clarified.

On the other hand, Sudan is not a party to any of the carriage by sea conventions and there is endeavor to enact a relatively modern legislation i.e. the Bill of the Maritime Code ١٩٩٩, but the Bill has not yet been passed by the legislature. Therefore its provisions need to be examined and verified.

All these factors indicate a very poor concern for the carriage by sea in the law circles in Sudan, although the sea carriage has a great effect on the international trade and the national economy in the first place, in addition to my own desire to know much more about this branch of law. All these encourage me to devote my thesis to the topic of liability of the sea carrier, with reference to the two international conventions on carriage by sea, namely, the Convention of Unification of Certain Rules Relating to Bills of

Lading as amended by ١٩٦٨ protocol i.e. the Hague/Visby Rules, and the United Nations Convention on Carriage of Goods by Sea ١٩٧٨ i.e. Hamburg Rules.

In the thesis I dealt with provisions of the Hague/Visby Rules as construed by the English courts. Thus I referred to so many ancient and modern English cases. I compared the provisions of the Hague/Visby Rules with the provisions of the carriage of Goods by Sea Act ١٩٥١, which adopts the Hague Rules, and with the Bill of ١٩٩٩. I faced a real problem in referring to Sudanese cases, since the reported cases on carriage by sea are markedly few. Therefore, I relied on my own translation of the unreported cases, which are collected by M. Ali Khalifa, in his book, Ahma Elgadaya Elbarhria. Again I faced the problem of cases to be referred to so as to construe the Hamburg Rules because of two reasons: First, it is a relatively new convention, having come into in force in ١٩٩٢. Secondly, most of the countries which are contracting states to it are civil law countries and even English law countries which signed the convention such as U.S.A, have not incorporated it into their national laws. Hence, I referred to the provisions of the Hague/Visby Rules as applied by English courts and compared them with the provisions of Hamburg Rules.

To complete this work I referred to the classical books of the common law i.e. Carver, Carriage by Sea and Scrutton, On Charterparties and Bills of lading. Also I depended on some new publications i.e. new edition of John Wilson on Carriage of Goods by Sea and the newest work of Professor Gaskell, Bill of Lading Law and Contracts. Also I referred to the distinguishable opinions of the Canadian Professor Tetley, Marine Cargo Claims and some Canadian and American cases. I do respect his serious efforts to construe the Hague/Visby Rules fairly strict to achieve some sort of equitable allocation of risks between shipowners and cargo owners.

This thesis is divided into four chapters:

Chapter One defines the term "Carrier". It discuses the obligations of the carrier under the Hague/Visby Rules and the general exception to those obligations, in comparison to the basis of liability under Hamburg Rules.

Chapter Two discusses the scope of liability of the carrier.

Chapter Three considers the limits of liability and limits of actions.

Chapter Four summarizes conclusions and makes recommendations.

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Abstract

The subject matter of this thesis is the liability of the sea carrier in the international carriage of goods by sea.

Chapter One: discuses the nature of liability of the sea carrier under the Hague/Visby Rules and Hamburg Rules. The Hague/Visby Rules define the term "Carrier" as including the owner or the charterer who enters into contract of carriage with the shipper, while Hamburg Rules widen the definition to include any person by whom or on whose name contract of carriage of goods by sea has been concluded with a shipper.

The Hague/Visby scheme of liability is built on specific obligations by which the carrier is bound, i.e. the obligation to issue a bill of lading, obligation to exercise due diligence, to provide a seaworthy ship and the obligation of care of cargo. The failure of the carrier in the fulfillment of the obligations will expose him to cargo claims by shippers or cargo owners in cases of loss or damage to cargo. He will be held as liable for damages unless he proves that he is exempted form liability by virtue of one of the seventeen exceptions provided for in Article IV. The most significant of them are: fire; perils of the sea; force majeure, nautical fault; acts and omissions of the shipper.

Hamburg Rules introduce a relatively simple scheme of liability based on the "presumed fault" by the carrier his agents or servants. Thus in cases of loss or damage to cargo the carrier is held to be liable unless he proves that he, his servants and agents were not at fault.

Chapter Two: considers the scope of liability under the Hague/Visby Rules. They cover bills of lading which are issued in contracting state or which incorporate the Rules by paramount clause. They cover the international outward carriage only. While under Hamburg Rules it is immaterial whether or not a bill of lading has been issued. The Rules cover contract of carriage concluded in a contracting state or if the port of loading or port of discharge is in a contracting state. Moreover if the optional port of discharge is in a contracting state. Similarly, it can be incorporated by paramount clause in the bill of lading. Hamburg Rules cover the inward and outward international carriage.

The period of application under the Hague/Visby Rules is limited from the time of loading till the time of discharge, i.e. "tackle to tackle" period, while Hamburg Rules cover the entire voyage until the goods are handed over or put in disposal of the cargo owner.

The Hague/Visby Rules do not provide for liability in cases of delay in delivery. They exclude the live animals and deck cargo from the

definition of goods. While Hamburg Rules provide for liability of carrier in cases of delay in delivery. They bring all cargoes under their umbrella. Thus they provide for liability of the carrier in cases of live animals and deck cargo. Both conventions provide for liability for shipment of dangerous cargoes. The well known doctrine of deviation under the common law is still in use under the Hague/Visby Rules. It operates to hold the carrier as in a fundamental breach of contract unless he proves that he deviates to save life or property at sea. Hamburg Rules do not recognize the doctrine of deviation.

Chapter Three: considers the limits of liability and limits of actions. The same system of calculating the limit of liability is valid under both conventions, i.e. the dual system of per package, per kilo. The former is for goods with high value compared to their weight, while the latter is suitable for bulk cargoes.

Although the Hague/Visby Rules introduce a provision for calculating limit of liability in containerized goods, i.e. according to the items enumerated on the bill of lading, the position is still ambiguous. The unit of account is Poincare franc which is replaced by the additional Protocol ١٩٧٩ by the Special Drawing Right (SDR) and so forth under Hamburg Rules.

The limits should be broken when the carrier is in default of negligence, recklessness or intentional acts.

Moreover, the carrier cannot be benefited by the limits of liability under the Hague/Visby Rules if he is in default i.e. in cases of fundamental breach of contract such as deviations or stowage on deck without shippers consent.

The Hague/Visby Rules avail to the cargo owner a one year period to institute his claim against shipowner in cases of loss or damage to his cargo. Hamburg Rules extend the time bar to be two years and to cover the carriers claims and cargo owners too. This time bar covers the judicial and arbitral proceedings. A notice for loss is required in both conventions before the claim can be instituted, unless a joint survey is done by the master or crew member and the cargo owner or his agent.

Chapter Four: recommends that Sudan should adhere to the Hague/ Rules and to take part in the efforts to amend them.

الخلاصة

بالنظر للأهمية المتعاظمة للنقل البحري في التجارة الدولية فأن هـذا البحـث يتناول مسئولية الناقل في النقل البحري الدولي للبضائع. وذلك بمناقـشة النـصوص المنظمة لمسئولية الناقل البحري في الاتفاقية الدولية الخاصة بتوحيد بعض القواعـد المتعلقة بسندات الشحن المعدلة ببروتوكول سنة ١٩٦٨م المعروفة اصطلاحاً بقواعـد لاهاي فسبي، ومقارنتها باتفاقية الأمم المتحدة لنقل البـضائع بـالبحر لـسنة ١٩٧٨م والمعروفة اصطلاحاً بقواعد هامبورج. ذلك مع مناقشة نصوص قانون نقل البـضائع بالبحر لسنة ١٩٥١ باعتباره يطبق قواعد لاهاي قبل التعديل. وعلى ضوء ذلك سيتم تناول نصوص مشروع القانون البحري السوداني لسنة ١٩٩٩م بالنقـاش والتعليـق للنظر في مدى اتساقه مع قواعد لاهاي فسبي.

لقد عرفت قواعد لاهاي فسبي كلمة ناقل باعتبارها تشمل مالـك الـسفينة أو مستأجرها والذي يبرم عقد نقل مع شاحن. بينما عرفت قواعد هامبورج "ناقل" بأنـه كل شخص أبرم عقداً أو أبرم باسمه عقد مع شاحن لنقل بضائع بحراً. وقد أتت قواعد هامبورج باصطلاح جديد هو "الناقل الفعلي" وعرفته بأنه كل شخص عهد إليه الناقل

تنفيذ نقل البضائع أو بتنفيذ جزء من هذا النقل، وكذلك أي شخص آخر يعهد إليه بمثل هذا التنفيذ.

تحدد القاعدة ١ من المادة الثالثة من قواعد لاهاي فسبي التزامات الناقل بـأن يبذل الجهد الواجب حتى تصبح السفينة صـالحة للإبحـار، وأن يزودهـا بالرجـال والمعدات بشكل ملائم قبل وفي بداية الرحلة وتتطلب القاعدة ٢ من المادة الثالثة مـن الناقل أن يقوم "بشكل ملائم وبعناية بتحميل البضائع المنقولـة ومناولتهـا وتـستيفها وحملها وحفظها ورعايتها وتفريغها". فيما تخضع المادة الرابعة هذه الالتزامات لسبعة عشر استثناءاً يعفى بموجبها الناقل من المسئولية في عدد من الحالات أهمها حـالات تلف أو هلاك البضاعة بسبب مخاطر البحر، القوة القاهرة، الخطأ الملاحـي وخطـأ الشاحن. وقد تعرضت هذه النصوص لنقد واسـع تركـز فـي تعقيـدها وفـي أن الاستثناءات كثيرة ومتداخلة وبعضها لا ضرورة له بالنظر لتطـور صـناعة النقـل البحري مثل الإعفاء من الخطأ الملاحي.

وقد اعتمدت قواعد هامبورج مبدأ الخطـأ أو الإهمـال المفتـرض كأسـاس لمسئولية الناقل. إذ يسأل الناقل عن الخسارة الناتجة عن هلاك البضائع أو تلفهـا، إذا وقع الحادث الذي تسبب في الهلاك أو التلف أو التأخير أثناء وجـود البـضائع فـي

عهدته، ما لم يثبت الناقل أنه قد أتخذ هو أو مستخدموه أو وكلاؤه جميع ما كان مـن المعقول اتخاذه لتجنب الحادث وتبعاته.

تنص المادة الأولى (هـ) من قواعد لاهاي فسبي على أن مدة مسئولية الناقـل تمتد من وقت تحميل البضائع على ظهر السفينة وحتى الوقت الذي يتم فيه تفريغهـا من السفينة. والمتعارف عليها اصطلاحا من "المرفاع إلى المرفاع". وتكمـل المـادة السابعة هذه القاعدة بأن تجيز للناقل التعاقد خارج مسئوليته الإلزامية للفترة الزمنيـة السابقة على تحميل البضائع على ظهر السفينة وفيما بعد تفريغها منها. بينما تعتبـر المادة ٤ من قواعد هامبورج الناقل مسئولاً عن البضائع خلال المدة التي تكون فيهـا البضائع في عهدته. وتعرف هذه المدة بأنها "اعتباراً من الوقـت الـذي يتلقـى فيـه البضائع في ميناء الشحن" وحتى الوقت الذي يقوم فيه بتسليم البـضائع فـي "مينـاء التفريغ".

إن قواعد لاهاي فسبي تلزم الناقل بإصدار سند شحن يثبـت ضـمن بيانـات أخرى وزن البضاعة أو كميتها أو عددها كما يثبت فيه الحالة الظـاهرة للبـضاعة. وهي تنطبق على كل الرحلات الدولية من موانئ الدولة المتعاقدة والمغطاة بسند شحن أو إذا نص سند الشحن على انطباق القواعد بتضمين شرط بارامونت. ولـذلك فـأن قواعد لاهاي فسبي تعتمد في تطبيقها على إصدار سند شحن ولا تنطبق في حـالات

النقل التي لا يصدر فيها سند الشحن ولا يتصور صدوره. أما قواعد هامبورج فـلا تتطلب لانطباقها إصدار سند شحن بل أنها تنطبق على عقد النقل البحري مطلقاً سواء أصدر سند شحن أم لا.

تنص المادة ٥ (١) من قواعد هامبورج على مسئولية الناقل عن التأخير فـي تسليم البضائع. وتنص المادة ٥ (٢) على أن التأخير في التسليم يقع أولاً "إذا لم تسلم البضائع في حدود المهلة المتفق عليها صراحة". وتنص أيضاً على أنه إذا لم يذكر في العقد وقت تسليم محدد أو فترة محددة ينبغي تسليم البضائع "في حدود المهلـة التـي يكون من المعقول تطلب أتمام التسليم خلالها من ناقل يقظ مع مراعاة ظـروف كـل حالة". لا تقدم قواعد لاهاي فسبي أحكام بشأن المسئولية عن التأخير.

كما أن قواعد لاهاي فسبي لا تغطي وفقاً لأحكام المـادة الأولـى (ج) نقـل الحيوانات الحية ولا النقل المتفق عليه على سطح السفينة. بينما تتناول المـادة ٥ (٥) من قواعد هامبورج نقل الحيوانات الحية وتخضعها لقاعدة "الخطأ المفترض" إذا أثبت الناقل أنه التزم بتعليمات الشاحن الخاصة بنقلها. كما أن المـادة (٩) تقـدم أحكامـاً مفصلة لمسئولية الناقل عن البضائع المشحونة على السطح وتخضعها أيـضاً لمبـدأ الخطأ المفترض.

تشتمل الاتفاقيتان على أحكام مفصلة حول شحن البـضائع الخطـرة، المـادة الرابعة (٦) من قواعد لاهاي فسبي والمادة ١٣ من قواعد هامبورج، وهـي تعطـي الناقل الحق في التخلص من البضائع الخطرة أو إزالة خطورتها بـدون أن يـستحق تعويضاً من الشاحن في حالة شحن البضائع الخطرة بعلمه أو موافقته. أما في حالات شحنها بدون علمه أو موافقته فمن حقه التخلص منها أو إزالة خطورتها مع مطالبتـه للشاحن بالتعويض عن أي تلف ينجم عن شـحنها للـسفينة أو للبـضائع الأخـرى المشحونة عليها.

تأخذ قواعد لاهاي فسبي بنظرية مسئولية الناقل في حالات (الانحـراف عـن المسار) والمتعارف عليها في القانون العام الإنجليزي والتي تعتبره السوابق المفـسرة لها إخلالاً أساسياً بالتعاقد يمنع الناقل من الاستفادة من الدفوع والاستثناءات القانونيـة المكفولة له إلا إذا كان بغرض إنقاذ الأرواح أو البضائع فـي البحـر. أمـا قواعـد هامبورج فلا تتناول نظرية (الانحراف عن المسار) بشكلها المعروف. وذلك يعني أن القواعد قد ألغت نظرية الانحراف وأن الانحراف لا محل له من القواعد إلا بقدر مـا يتسبب في هلاك أو تلف البضائع.

تعتمد قواعد لاهاي فسبي نظاماً ثنائياً لحساب المسئولية عن كل طرد أو عـن كل كيلو غرام. وقد حددت قواعد لاهاي فسبي حدود مسئولية الناقل بـ ـ ١٠٠ جنيـه

إسترليني ذهب عن كل طرد أو وحدة شحن. وقد استعاض برتوكـول فـسبي عـن التقويم بالجنية الإسترليني بحدود مقومة بالفرنك بونكاريـة ثـم اسـتبدل برتوكـول ١٩٧٩م، المعمول به حالياً، الفرنك بونكارية بحقوق السحب الخاصـة. وقـد حـدد برتوكول ١٩٧٩م مسئولية الناقل بـ٦٦٦,٦٧ من حقوق السحب الخاصة، كما يحدده صندوق النقد الدولي، عن كل طرد أو وحدة أو وحدتين عن كل كيلو غـرام أيهمـا أكبر. وقد أبقت المادة ٦ (١) (أ) من اتفاقية هامبورج على النظام الثنائي للحساب عن كل طرد أو عن كل كيلو غرام والذي أنشأه برتوكول فسبي. وتحدد أقصى مـسئولية للناقل بما يعادل ٨٣٥ (وحدة حسابية) عن كل طرد أو وحدة شـحن أو ٢,٥ (وحـدة حسابية) عن كل كيلو غرام.

وفقاً للمادة ٥ (ج) من قواعد لاهاي فسبي والمادة ٨ (١) من قواعد هامبورج فأنه لا يحق للناقل الاستفادة من تحديد المسئولية إذا ثبـت أن الهـلاك أو التلـف أو التأخير في التسليم قد نتج عن فعله أو تقصيره أو أرتكبه بقـصد أو بإهمـال وعلـم باحتمال أن ينتج الهلاك أو التلف. أضف إلى ذلك فأن السوابق المفسرة لقواعد لاهاي فسبي تحرم الناقل من الاستفادة من حدود المسئولية في حالات الإخـلال الجـوهري بالتعاقد مثل التلف أو الهلاك بسبب الشحن غير المأذون على السطح أو الانحـراف عن المسار.

تنص قواعد لاهاي فسبي على مدة عام واحد لتقادم دعوى المسئولية المرفوعة من الشاحن على الناقل. وقد مددت قواعد هامبورج مدة التقـادم لعـامين وأدخلـت الدعاوى المرفوعة من الناقل على الشاحن في نطاق التقادم. وقـد عرفـت اتفاقيـة هامبورج الدعوى باعتبارها تشمل الإجراءات القضائية والتحكيم. وقد اشترطت كـل من الاتفاقيتين أن يتم أخطار الناقل بالتلف أو الهلاك قبل أن يتم رفع الـدعوى إلا إذا تم مسح مشترك للبضاعة من قبل الشاحن والناقل أو من يمثلهما.

Chapter One

Nature of Liability of the Sea Carrier

In this chapter I will consider the nature of liability of the carrier. I will define (the carrier), and then discuss his duties which are: obligation to issue a bill of lading, obligation to provide a seaworthy ship, obligation of care of cargo and the exceptions to those obligations. Reference will be made to both Hague/Visby Rules and Hamburg Rules. An attempt will be made to compare and contrast these two conventions.

١- Definition of the Carrier:

The Carriage of Goods by Sea Act ١٩٥١ as well as the Hague and Hague/Visby Rules[١] define the "carrier" as including "the owner or the charterer who enters into contract of carriage with a shipper". This is not particularly clear or exhaustive definition. Hence in most cases the difficulty of identifying the carrier has arisen, because the carrier is rarely identified in the bills of lading. Normally the bill of lading is signed by the master or on his behalf, and such a bill of lading, binds the owner of the vessel for whom the master acts, and he assumes responsibilities as the carrier. The only exception appears to be the case where the master is

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[١]- Art. ١ (a).

employed directly by a demise charterer and there is a clear notice that the master is the servant of the charterer alone. Even when the charterer signs

as agent for the master the owner is still bound, because the master is the employer or in effect agent of the owner. On the other hand, the charterer is identified as the carrier when there is a demise charter or when the charterer contracts in his own name with the shipper, making his own private arrangements with the owner for the carriage. As in Baumoll Manufacture Von Carl Scheibler v. Furness [٢٢], the Charterparty provided for the hire of the ship for four months, the charterer to occupy the ship's store and pay for the master and crew, insurance and maintenance of the ship to be paid by the shipowners who reserved power to appoint the chief engineer. The master had signed bills of lading in respect of goods shipped by shippers who were ignorant of the charterparty. It was held that the charterparty amounted to a demise because the possession and control of the ship vested in the charterer. The shipowner was therefore not liable for the loss of the goods. It would seem that the charterer is common carrier and accepts in the charterparty some of the responsibilities of the carrier under the Hague Rules. Usually the charterer is responsible for loading, stowing, discharging during the course

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٢٢- (١٨٩٣), ٦٨ L.T.

of the voyage and is therefore carrier within the definition of the Rules. One gathers that under The Hague Rules the charterer can be identified as a carrier whenever it acts as such, and this is a question of fact to be decided on the facts of each case[٣].

The joint and several liabilities of owners and charterers were specifically addressed in the Canadian case of Canstrand Industries ltd v. The " Lara S"[٤], in which a bill of lading was on charterer's form and had at the top the charterer business style "Kimberly line ". The bill of lading was signed "Kimberly line "by charterer`s port agent for the Master". The port agent had written authorization from the Master to sign the bills of lading on his behalf. On these facts the trial judge found the charterer was in fact contracting party to the bill of lading and liable as a carrier. She further found that under Canadian law because the vessel was not under time charter and the bills of lading were signed on behalf the master that the shipowner was liable as a carrier. The trial judge referred to professor Tetley's opinion that both the charterer and shipowner should be jointly liable as carriers.

Under Hamburg Rules Article ١ "carrier" means "any person by whom or in whose name contract of carriage of goods by sea has been

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[٣] - Tetley, Marine Cargo Claims, ٥٠-٥١ (١٩٦٥).

[٤] - ١٩٩٣) ٢ F.C.R.٥٥٣.affirmed (١٩٩٤) F.C.J.No .١٦٥٢.

concluded with the shipper". “The carrier" under Hamburg Rules may include the shipowner, charterer or agent of the shipowner, thus it is wider than the definition of the “carrier “ under the Hague/Visby Rules, but the real contribution of Hamburg Rules is the definition of the “actual carrier" in Article ١ (٢). It means "any person to whom the performance of the carriage of goods, or of part of carriage of goods by sea has been concluded with the carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea”. If we read this definition in the light of the provision of Article ١٠[٥] we note that the actual carrier assumes the responsibility of the contracting carrier for the part of carriage performed by him therefore both of them may be liable jointly and severally.

One of the shortcomings of The Draft Bill of ١٩٩٩ is that it does not define “the carrier", but it provides in section ١٦٩ that the provisions of the Hague/Visby Rules should prevail if it conflicts with the provision of the Bill. Thus one can gather that the definition of The Act of ١٩٥١ will continue to be in use under the Bill of ١٩٩٩.

٢- Obligations of the Carrier under the Hague/Visby Rules:

[٥] - Art ١٠ (١) provides” When the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty clause under the contract of carriage by Sea to do so, carrier nevertheless remains responsible for the entire carriage …. etc.

i. Obligation to issue a bill of lading:

Article III rule ٣ of the Hague/Visby Rules requires the carrier to issue, on demand, to shipper a bill of lading which shows:

١. The leading marks necessary to identify the goods.

٢. The number of packages or pieces or the quantity or weight of the cargo.

٣. The apparent order and condition of the goods.

Such representations of facts have an important commercial effect. First, they form a basis of any cargo claim by the receiver in cases of short delivery or damage. Secondly, where the goods have been sold c.i.f under the terms of such contract payment has to be made against delivery of documents. The buyer is entitled to reject the documents if the description of goods in the bill does not correspond with their description in the sales invoice. Similarly, the terms of the c.i.f contract might entitle the buyer or the bank to insist on the production of a "clean bill", i.e. a bill containing an unqualified statement that the goods had been shipped in good order and condition. Thirdly, such statement of facts might seriously affect the negotiability of the bill in the hands of consignee, since the goods would not readily be saleable in transit if the bill disclosed that they have been shipped in a damaged condition.

a- Statement as to leading marks:

For a long time it was established in the common law that the leading marks which the shipowner or his employees is to insert in the bill is that of commercial significance which were essential to identity of the goods.[٦] In Parson V. New Zealand Shipping Co,[٧] frozen carcases of lamb were shipped and the bill signed by the shipmaster's agents, described the goods as "٦٢٢x, ٦٠٨ carcases, ٤٨٨x ٢٢٦ carcases". On arrival some carcases were found to be marked ٥٢٢x and others ٣٨٨x. The endorsees of the bill claimed that the shipowners were estopped from denying the statement in the bill and were liable for failing to deliver the carcases shipped. It was held by the majority of the Court of Appeal, that the description of the goods in the bills of lading did not affect or denote the nature, quantity or commercial value of the goods, and that the shipowners were not precluded from showing that there was a mistake in the description, and that the goods formed a portion of those in fact shipped. As against the shipowner the master has no apparent authority to insert statement indicating the quality of goods, since in the majority of cases he clearly does not possess the commercial knowledge or expertise necessary to conduct an adequate check on their accuracy[٨]. Thus

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[٦]- John F. Wilson, Carriage of Goods By Sea, ١٢٢ (٤th ed. ٢٠٠١).
[٧]- (١٩٠١) IKB ٢٤٨; cited in Ivamy, Case Book on Carriage by Sea, ٤٧ (٢nd ed. ١٩٧١).
[٨]- Wilson, supra note ٦, at ١٣٣.

in Cox v. Bruce[٩], in which bales of jute were shipped with marks indicating the quality of the jute, the bill wrongly described the bales as bearing different marks indicating a better quality. The endorsees of the bill claimed the difference in value from the shipowner. The Court of Appeal held that the shipowner was not estopped from denying the statement in the bill as to quality, for it was not the master's duty to insert quality marks.

However, the statements concerning the leading marks can be inserted only on demand of the shipper which are required by the Hague/Visby Rules, Article III Rule ٣, to be in writing. The shipper can demand such marks to be acknowledged by the shipowner provided that "they are stamped or otherwise shown clearly upon the goods …… in such a manner as should ordinarily remain legible until the end of the voyage"[١٠].

Hamburg Rules provide in Article ١٥ rule ١ (a) that the bill of lading must include inter alia …… "(a) the general nature of the goods, the leading marks necessary for the identification of the goods". It can be observed that Hamburg Rules, in this respect, are broadly similar to the Hague/Visby Rules, since the expression "general nature" may be construed similarly to Article III rule ٣ of the Hague/Visby Rules. The main variation between the two Rules, however, is that Hamburg Rules consider the statement as to

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٩- (١٨٨٦)١٨ QBD ١٤٧; cited in Ivamy, supra note ٧, at ٤٩.
١٠- Art. III r.٣.

"leading marks" as duty of the carrier, which he is to fulfill without a demand by the shipper as the case with the Hague/Visby Rules. The shipper is merely required to furnish the particulars necessary for identification of the goods shipped[١١]. It is worth mentioning that the Carriage of goods by Sea Act ١٩٥١ is typically similar to the Hague/Visty Rules, and is also the case with The Bill of ١٩٩٩ Section ١٧١.

b. Statement as to quantity:

Article III rule ٣ (b) of the Hague/Visby Rules provides that the shipper can demand the carrier to issue a bill showing either the number of packages or pieces, or quantity, or weight, as the case may be, as furnished in writing by the shipper. The carrier is under no obligation to issue a bill presumably to acknowledge the quantity of the goods shipped, unless requested by the shipper, and the burden of proving such request rests with the shipper. The choice of which of the three methods of quantifying cargo to acknowledge, rests with the carrier, though presumably his choice would be influenced by the information supplied by the shipper. The carrier, however, is not obliged to acknowledge more than one particular and can disavow knowledge of the other. So in Oricon V. Intergaan[١٢], two bills to which the Hague/Visby Rules applied acknowledged receipt of ٢٠٠٠

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[١١]- Willson, supra note ٦. at ١٣٢.
[١٢]- (١٩٦٧) ٢ Lloyd's Rep, ٨٢; cited in Ivamy, supra note ٧ at ٦١.

packages and ٤٠٠٠ packages containing copra cake. A clause in them stated, "Contents and condition of contents, measurement, weight unknown, any reference to these particulars is for calculating freight only". The bill also stated under the heading description of the goods, said to weigh gross ١٠٥,٠٠٠ Kgs, and said to weigh ٢١٠,٠٠٠ respectively. It was held that the bills of lading were prima facie evidence of the number of packages shipped, but were no evidence whatever of their weight.

The obligation imposed on the carrier is, however, subject to two provisos. First, he is not bound to acknowledge the above facts if either he has reasonable grounds for suspecting that the information supplied by the shipper is inaccurate, or he has no reasonable means of checking it, as for example if the goods are delivered to him in a sealed container. Secondly, the shipper in return is deemed to have guaranteed the accuracy of the information supplied by him, and he is required to indemnify the carrier in the event of the latter suffering loss as a result of its inaccuracy.

The position under Hamburg Rules is slightly varied. Article ١٩ (٩) provides "The bill of lading must include, inter alia, the following particulars: … The number of packages or pieces and the weight of the goods or their quantity otherwise expressed". Certainly the choice of carrier

completely depends on the kind of the goods shipped, whether it is shipped in bulk, packed in packages, containerized or shipped in unpacked pieces.

As far as the Carriage of Goods by Sea Act ١٩٥١ is concerned no difference with the Hague/Visby Rules could be observed, Article III Rule ٢ (c). Similarly the Bill of ١٩٩٩ section ١٧١ (٦) is not different.

c. Statement as to condition of the goods:

The third type of statements required by the Hague/Visby Rules, Article III rule ٣ (c), to be inserted in the bill of lading is representation by the shipowner as to condition in which the goods were shipped. This refers merely to their apparent condition in so far as the carrier, his agents or employees are able to judge by reasonable outward inspection. The shipowner agent will normally state in the bill any damage which is observed during such examination and be under an obligation to deliver the goods at their destination in the same condition as that received, subject to the contractual exceptions. If there is no clause or notation in the bill modifying or qualifying the statement that the goods were "shipped in good order and condition" the bill is a clean one. Such an admission creates an estoppel as between the shipowner and an endorsee for value of the bill[١٣]. Thus in Compagnia Naviera Vas Congada V. Churchil & Sim[١٤], in which the master had signed bills of lading for timber as "shipped in good order and condition to be delivered in the like order and condition". The timber had before shipment become badly marked and stained by petroleum, and thereby commercially depreciated. The plaintiff had become endorsees for the bills for value, on assumption that timber was in condition as described,

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[١٣] - Carver, Carriage by Sea, ٧٣ (١٢th ed. ١٩٧١).
[١٤] - (١٩٠٦)١ KB ٢٣٧.

and they claimed from the shipowner the depreciation in value caused by the stained condition which must have been apparent on shipment. It was held that since the shipowners had failed to deliver the timber in good order and condition, they were estopped from denying that it was shipped in good order and condition. It must be remembered, however, that the estoppel will operate in respect of defects which would be apparent on reasonable inspection by the carrier or his agents. Thus in Silver v. Ocean Steamship Co[١٥], cans of frozen eggs were shipped under a bill, which stated that they were shipped "in apparent good order and condition". When the cans arrived at port of discharge, some were found in damaged condition, being gashed or punctured whilst others only had pin hole perforations. It was held that the shipowner were estopped as against endorsees of the bill from showing that the cans had gashes which have been apparent when the goods were loaded, but they were entitled to show that they had perforations which would not have been apparent on reasonable examination.

As already noted, under Article III rule ٣ (c) of the Hague/Visby Rules, the shipper is entitled to demand the issue of the bill incorporating statements as to apparent order and condition of the goods when received by the carrier. It seems that the acknowledgement should also relate to apparent

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[١٥] - (١٩٣٠)١ KB ٤١٦; cited in Ivamy, supra note ٧, at ٤٥.

capacity of the packing to survive the anticipated voyage, as well as to packing which was satisfactory but is damaged. Such a bill is prima facie evidence of receipt of the goods if the bill has been transferred to a third party acting in good faith.[١٦]

Article ١٦ rule ٣ (b) of Hamburg Rules provides "proof of the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on description of the goods therein". It seems as if Hamburg Rules revive the rule of the "detrimental reliance" in common law, which would invariably be present either because the shipment formed part of an international sale and the purchaser was induced to pay the contract price by presentation of the clean bill, or because the consignee of the bill obtained delivery of the goods by presenting the bill and paying the required freight.[١٧]

Article ١٦ of the Rules, however, provides that if carrier has reasonable grounds to suspect the accuracy of the particulars concerning weight, number of pieces or quantity of the goods shipped, he may insert a reservation specifying these inaccuracies. The same rule operates if the

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[١٦]- Wilson, supra note ٦ at ١٣٠; Nicholas Gaskell and Regina Asaroiotis, Yvonne Baatz, **Bills of Lading Law And Contracts**, ٢١٤ (٢٠٠١).

[١٧]- Scrutton, **on Charterparties and Bills of Lading**, ١٠٨-١١٠ (١٩TH ed. ١٩٨٤).

carrier has no means to check the accuracy of the same, he has to state the ground of his suspicion on the bill.

As far as the Carriage of Goods By Sea Act ١٩٥١, is concerned, it comes in line with the Hague Rules i.e. it provides in Article III rule ٤, that statement as to apparent order and condition of the goods shipped, is prima facie evidence of receipt by the carriers of the goods as therein described has already been amended by the Visby Protocol ١٩٦٨ to the effect that it deems the statement of apparent good order and condition as a conclusive evidence when the bill has been transferred to a third party acting in good faith. The Sudan courts, however, come in line with the Hague/Visby amendment. An illustration is Hano Express V. Dan Fodio Benevolent Corp[١٨]. In this case ٧٨٧ packages included ٤٧٢٢ pipes had been shipped, from Jedda port to Port Sudan, on board the vessel "Hano Express". A clean bill of lading had been issued and endorsed to the plaintiffs for value. On delivery it appeared that ٩٢٥ pipes had been damaged. The defendants, carriers, contended that the damage resulted from the defective packing of the cargo. The Supreme Court held that the clean bill of lading is a conclusive evidence in the hands of endorsees regarding the good order and condition of the cargo shipped. So the carrier could not deny that the cargo was damaged on board.

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[١٨]- Sup. Ct Red Sea circuit No ١-١٩٩٧, cited in M. Ali Kalifa, **Important Sudanese Cases in Maritime law**, ٣٠٣ (١٩٩٩).

Fortunately, the Draft Bill of ١٩٩٩ section ١٧٩ (٢) adopts the same rule as amended by the Hague/Visby Rules, regarding the conclusiveness of the bill of lading in the hands of consignee or endorsee.

ii. Obligation to provide a seaworthy ship:

Article III of the Rules provides. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

(a) Make the ship seaworthy.

(b) Properly man, equip and supply the ship.

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

The obligation of the carrier embraces the three distinct aspects of seaworthiness recognized under common law, namely the physical condition of the ship, the efficiency of the crew and equipment, and the seaworthiness of the vessel.

Article III requires the carrier to exercise due diligence to provide a seaworthy ship "before and at the beginning of the voyage." The phrase has been interpreted as covering the period from at least the beginning of the loading until the vessel starts on her voyage. In Maxine Foot wear co ltd v.

Canadian Government Merchant Marine[١٩], the plaintiff's cargo was lost when the defendants' vessel had to scuttle before it could set sail in contractual voyage. After the cargo had been loaded an attempt was made, under the supervision of the ship's officer, to thaw ice in three scupper holes by use of an oxyacetylene lamp. The cork insulation on the pipes ignited and the fire rapidly spread, with the result that the vessel had to be scuttled. The owners sought to rely on the fire exception in Article IV rule ٢ (b) under which they would not be responsible for the consequence of fire unless it resulted from "the actual fault or privity" of the owners, which it clearly did not in this case. It was held, however, that the loss resulted from a breach of the seaworthiness obligation in Article III rule ٢ (b) since the carrier's obligation to exercise due diligence continued throughout the entire period from beginning of the loading until the ship sailed. The negligence of the carrier's servants which caused the fire occurred during this period and constituted a failure to exercise due diligence for which the carrier was liable.

Should the shipowner exercises due diligence to make his ship seaworthy in all respects before she sails on her voyage, he will not be liable under this Article if defects develop on the voyage or arise during a call at an

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[١٩] - (١٩٥٩) A C ٥٨٩ at ٦٠٣.

intermediate port. The term "voyage" has been construed as covering the entire voyage covered by the bill of lading, irrespective of calls at intermediate ports. The charterparty doctrine of stages, under which the vessel is required to be seaworthy at the commencement of each stage, does not apply here [٢٠]. So in leesh River Tea co v. British India Steam Nav. co[٢١], a vessel was held not to be unseaworthy within the meaning of Article III when cargo was damaged by the surreptitious removal of a storm valve cover plate by a person unknown while the vessel was calling at an intermediate port.

The undertaking of seaworthiness requires not merely that the shipowner will do and has done his best to make the ship fit, but that the ship really is fit in all respects to carry her cargo safely to its destination, having regard to the ordinary perils to which such a cargo would be exposed on such a voyage. The "ordinary perils" may include such treatment of the ship and cargo, as the local law of a port of call must expose to the cargo shipped. One test of seaworthiness is: would a prudent owner have required that the defect should be made good before sending his ship to sea, had he known of it? If he would, the ship was not seaworthy. The undertaking of seaworthiness involves not only that the ship is herself fit to encounter the

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٢٠ - Gaskell . supra note ١٦, ٢٣٣.
٢١ - (١٩٦٦) ٢ Lloyd's Rep ١٩٣.

perils of the voyage, but also that she is fit to carry the cargo safely on that voyage. Insufficiency of the master or crew or lack of skills may constitute unseaworthiness, also the shipowner must provide the ship with all necessary documents for the voyage. The seaworthiness also comprises a duty to have on board suitable loading and discharging tackle for the ordinary purposes of loading and discharging[٢٢].

The obligation of seaworthiness under the Hague Rules was taken from Harter Act ١٨٩٣, and it was not an absolute one. Article III of the Rules requires the shipowner to exercise “due diligence" to make the ship seaworthy. The standard imposed by this obligation has been interpreted by the courts as being roughly equivalent to that of the common law duty of care, but with important difference that it is a personal obligation that can not be delegated, but if the carrier employs some other person to exercise due diligence and the delegate is not diligent, then the carrier is responsible, irrespective whether that person is a servant of the carrier, independent contractor, or even a Lloyd’s surveyor[٢٣].

Professor Tetley defines the Seaworthiness as “a vessel in such a condition, with such equipment, and manned by such a master and crew, that

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[٢٢] - Scrutton, supra note ١٧, at ٨٤ – ٩٠.
[٢٣] - Wilson, supra note ٦, at ١٩١ – ١٩٢.

normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage[٢٤].

The definitive interpretation of due diligence is provided by the case of The Muncaster Castle[٢٥], in which a consignment of ox tongue had been shipped from Sydeny under a bill of lading which incorporated the Hague Rules. During the voyage the cargo was damaged by water entering the hold via the inspection covers on storm valve. Some months earlier, a load line survey of the vessel had been undertaken in Glasgow by reputable firm of ship repairs, during which there had been an inspection of the storm valve under supervision of a Lloyd`s surveyor. After the inspection had been completed, the task of replacing the inspection covers on the storm valve had been delegated to a firm employed by the ship repairers. Owing to the negligence on his part in tightening the nuts holding the covers, they loosened during the subsequent voyage allowing water to enter the hold and damage the cargo. Despite the fact that there had been no negligence on the part of the carrier in that he had delegated the work to a reputable firm, it was held that the carrier was liable for breach of the obligation to exercise due diligence.

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[٢٤] - Tetley, supra note ٣, at ٩٣ – ١٠١.
[٢٥] - (١٩٦١) Lloyd's Rep ٥٧.

Some difference of opinion exists as to the incidence of the burden of proof relating to the exercise of due diligence. Article IV rule ١ provides that "the carrier shall not be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on his part to make the ship seaworthy as defined in Article III rule I. The rule then continues to state that whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article. The general assumption to be drawn is that no onus is cast on the carrier in relation to proof of due diligence until the other party has first established that the vessel was unseaworthy and that his loss was attributable to that fact[٢٦] . The alternative view is provided by Tetley, who argues that on policy the burden of proof in both cases should rest with the carrier, who is usually the only party to have access to the full facts. In his opinion such a construction is contrary to the spirit of the Rules and to the express wording of Article III rules I and ٢.[٢٧]. The case law on balance tends to favour the majority view. Thus in The Hellenic Dolphin,[٢٨] a cargo of a asbestos was found, on discharge to have been damaged by sea water. It was later

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[٢٦] - Carver, supra note ١٣, at ١٠٥; Wilson, supra note ٦, at ١٩٣ – ١٩٤.
[٢٧] - Tetley, supra note ٣, at ٣٧٥ – ٣٧٦.
[٢٨] - (١٩٧٨) ٢ Lloyd's Rep ٣٣٦.

established that the sea water had gained access to the hold through a four feet long indent in the ship's plating, of which the shipowner had been previously unaware. No evidence was available as to whether damage to the vessel had been inflicted before or after the cargo had been loaded. In this circumstances the trial judge allowed the shipowner to rely on the exception of perils of the sea since, in his opinion and in the absence of evidence to the contrary, the type of damage involved was a classic example of damage caused by a peril of the sea.

The shipowner would only be prevented from relying on the exception if the shipper could prove that the loss resulted from the vessel being unseaworthy "before and at the beginning of the voyage".

As far as Carriage of Goods by Sea Act ١٩٥١ is concerned it has a similar provision to the Hague's in Article III, as well as The Draft Bill of ١٩٩٩ in Section ١٨٥. The burden of proof is provided for in Article IV rule I of the Carriage of Goods by Sea Act ١٩٥١.

iii- Obligation of care of cargo:

The third duty imposed on the carrier by the Hague/Visby Rules relates to the care of cargo. Article III rule ٢ provides that: "Subject to the provisions of Article ١V, carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods delivered".

This Article has been construed as requiring from the carrier the exercise of a standard roughly equivalent to that of reasonable care. So much is apparent from the inclusion of the word “carefully" in the definition, but the addition of “properly" raises the question as to whether the draftsmen of the Rules intended a higher duty of care. The point was considered by the House of Lords in Albacora v. Westcott and Laurence line[٢٩], a case in which a consignment of wet salted fish had been shipped at Glasgow for Genoa. The crates were marked “keep away from engines and boilers”, but otherwise no special instructions for carriage were given by the shippers. It was subsequently established that fish of this type could not be safely carried on such voyage without refrigeration, although this fact was unknown to the carrier. On arrival at Genoa the cargo was found to have deteriorated substantially in quality as a result of bacterial action and the question was whether it had been carried “properly" within the meaning of Article III. In answering this question in the affirmative, the court expressed the view that properly meant in accordance with a sound system in the light of all knowledge, which the carrier has or ought to have about the nature of the goods. It was held that the respondents did adopt a sound system. They had no reason to suppose that the goods required any different treatment from that

[٢٩] - (١٩٦٦) ٢ Lloyd’s Rep ٥٣.

which the goods received. So in absence of any breach of duty under this Article, the carrier was accordingly allowed to rely on the defense of inherent vice.

The wording of Article III rule ٢ implies a continuous obligation on the carrier running from “tackle" to “tackle" i.e. from the commencement of the loading to the completion of discharging, it is a strict obligation and nothing in the Rules referring to due diligence to care for cargo. It will be noted that the duty of care required to be exercised by the carrier is expressly made subject to the provisions of Article IV. This reference to the catalogue of exceptions listed in Article IV rule ٢ that can be raised as a defense to the carrier. Once the cargo owner has proved that the goods have been lost or damaged in transit, the onus shifts to the carrier to bring the cause of damage within one of the exceptions listed in Article IV rule ٢ (a) – (p)[٣٠] .

The Carriage By Sea Act ١٩٥١ imposes a typical obligation on the carrier as provided for in Article III rule (٢) as well as The Draft Bill of ١٩٩٩, in section ١٨٥ (٢).

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[٣٠] - Wilson, supra note ٦, at ١٩٦ – ١٩٧; Tetley, supra note ٣, at ١٦٩ – ١٧٤; Gaskell, *supra* note ١٦, at ٢٧٨.

٣- The Hague/Visby Exceptions:

The earlier bills of lading did not contain any exceptions at all. The first provision of this kind was “the danger of the sea only excepted". The list of exceptions were enlarged, Scrutton enumerated about sixty clauses, which exempt carrier from liability[٣١].

Article IV rule ٢ of the Hague/Visby Rules lists seventeen exceptions. The carrier is permitted to surrender the protection afforded by these exceptions in whole or in part[٣٢], but he is not allowed to add to this list.

i- Fault in navigation or management of the ship:

This exception covers errors in navigation or in the management of a ship, nautical fault, has a long history dated back to the nineteenth century. It was frequently incorporated into bills of lading long before the advent of the Hague and Hague/Visby Rules. In its basic form, designed merely to provide protection for errors of navigation, the exception is inapplicable once negligence on the part of the carrier is established. However it is more commonly drafted to cover situations in which negligence is involved. The modern version first appeared in statutory form in section ٣ of the United States Harter Act ١٨٩٣. The exception covers fault in both the navigation and management of the ship. Little difficulty has been experienced in

[٣١] - For the full list see scrutton, supra note ١٧, at ٢١٠ – ٢١٧
[٣٢] - Art. V.

interpreting the phrase “faults of navigation”. Thus it has been to cover cargo damage where due to the negligence of the master or crew, the vessel struck a reef, ran aground or collided with another vessel. Tetley’s view is that error in navigation and management of the ship is an erroneous act or omission the original purpose of which was primarily directed towards the ship, her safety and well- being, or towards the venture generally.[٣٣] Many problems have been encountered in seeking to distinguish fault in the management of the ship, which falls within the exception, from the carrier’s duty under Art III rule ٢ to take proper care of the cargo. Each case must be decided on its own facts, but uncertainty has arisen because the same negligent act frequently affects both the safety of the vessel and the safety of the cargo. In such circumstances the courts tend to have regard to the property primarily affected by the conduct in question. Thus negligent stowage, or the failure properly to secure the cargo during discharge, is conduct primarily directed towards cargo care and any resultant damage is not covered by the exception[٣٤]. Similarly, in Gosse Millerd v. Canadian Government Merchant Marine[٣٥], a vessel had to go into dock for repairs and the hatches were left open to provide ease of access. Owing to failure to

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[٣٣] - Tetley, supra note ٣, at ١٠٣.
[٣٤] - Wilson, supra note ٦, at ٢٦٢ – ٢٦٤; Scrutton, supra note ١٧, at ٢٤٦ – ٢٤٩.
[٣٥] - (١٩٢٩) A C ٢٢٣.

replace the tarpaulins, rainwater penetrated the hold and damaged the cargo of tinplate. In view of the House of Lords, as the tarpaulins were provided to protect the cargo, the conduct in question related to the care of cargo rather than management of the ship.

Conversely, where the primary objective is the safety of the vessel, it is immaterial for this purpose that the negligent conduct also affects cargo. So in the Canadian case of Kalamazoo Paper co v. Cpr Co[٣٦], a vessel was seriously damaged after hitting a rock and was beached in order to prevent her sinking. The cargo owners claimed for cargo damage alleging negligence on the part of master and crew in failing to use all available pumping facilities in order to keep the water level down after the vessel had grounded. The Supreme Court of Canada held that, in the circumstances, the use of the pumping machinery affected the general safety of the ship and consequently the actions of the crew fell within the management of the ship exception.

This exception has been the target of considerable criticism from cargo interests, as it affords a protection to sea carrier which is not available in any other transport convention. Moreover, the modern technology makes

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[٣٦]. ٢ DLR ٣٦٩ (١٩٥٠) -

it easy to eliminate errors in navigation, and to control the ship by the owner whenever it is.

ii- Fire:

The Hague/Visby exception relating to fire excludes the carrier from responsibility for loss or damage arising or resulting from fire “unless caused by the actual fault or privity of the carrier". Consequently, while a carrier is not liable for fire damage resulting from the negligent conduct of his servants or agents, for whose acts he would otherwise be vicariously liable, he will loose the protection of the exception where he is personally at fault. The presence or absence of such a fault is a question of fact to be decided on the circumstances of each case[٣٧]. As an example reference may be made to Lennard`s Carrying Co. ltd v. Asiatic Petroleum Co. ltd.[٣٨] A ship was sent to sea in an unseaworthy state, and as a result she stranded and her cargo was destroyed by fire. The vessel belonged to a limited company of which Lennard was a director. His name was registered in the ship’s register, and he took an active part in her management. It was held that Lennard was an agent of the company and not merely a servant. There was a presumption that his action was the action of the company itself. The

[٣٧] - Wilson, supra note ٦, at ٢٦٤ – ٢٦٥; Scrutton, supra note ١٧, at ٢٣٧ – ٢٣٨.

[٣٨] - (١٩١٤-١٥) All ER .Rep ٢٨٠; cited in Ivamy, supra note ٧, at١١٧.

company could not therefore exclude its liability for loss by fire, for it had not been shown that the loss had occurred without its actual fault or privity.

The carrier in order to exculpate himself under Article IV rule ٢ (b), first must prove the cause of the loss i.e. that fire caused the loss. In proving that fire caused the loss, it should be noted that fire means a flame and not merely heat. After proving the cause the carrier must show that he exercised due diligence before and at the beginning of the voyage to make the vessel seaworthy in respect of the loss. The burden of proving the cause of the loss and due diligence is on the carrier. It is not clear from the Rules who then has the burden of proving the fault or privity of the carrier, but the United States jurisprudence based on the U.S Fire Statute section.(١٨٢ ٤٦ US Code) places the burden of proof on the cargo claimant[٣٩].

iii- Perils of the Sea, and similar exceptions, force majeure:

It covers any damage to cargo caused by risks peculiar to the sea, or to the navigation of a ship at sea, which cannot be avoided by the exercise of reasonable care. Thus it extends to loss resulting from vessels running aground in fog, being driven onto rocks in a gale, or even colliding with other vessels, provided that the owner of the vessel carrying the cargo was not at fault. Thus in Wilson Sons & Co V The Owners of the cargo, the Xantho,[٤٠] a bill of lading containing an exception of “perils of the sea" had been issued. The vessel on which the cargo had been loaded came into

[٣٩] - Tetley, supra note ٣, at ١١١ - ١١٢.
[٤٠] - (١٨٨٧) ١٢ App cas ٥٠٣; cited in Ivamy; supra note ٧, at ١٠٧ – ١٠٨.

collision with another ship, and damage to the goods resulted. It was held that the collision was a "peril of the sea" within the meaning of the exception. On the other hand the exception refers only to perils of the sea and not perils which could equally be encountered on land or on any other form of transport. Accordingly, unlike "act of God"[٤١] it does not extend to damage caused by rain, lighting or fire or to loss resulting from rats or cockroaches contaminating the cargo[٤٢]. The exception can also be invoked to cover consequential loss arising from action taken to counteract a peril of the sea, as in the Canadian case of Canada Rice Mills V. union Marine Ins[٤٣]. A cargo of rice suffered heat damage as the result of periodic closing of ventilators and hatches during the voyage to prevent the incursion of sea water during a storm. It was held that the damage can be regarded as the direct result of the peril.

Generally the question of peril of the sea is bound up with due diligence to make the vessel seaworthy for the voyage in question,[٤٤] i.e. that the test of seaworthiness is whether the ship is reasonably fit to carry the cargo, which she has undertaken to transport, considering the season and waters to be traversed. For example, hatches must be especially tightly

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[٤١] - For the meaning of "act of God "see p ٢٨ infra.
[٤٢] - Wilson, supra note ٦, at ٢٥٤; Scrutton, supra note ١٧, at ٢٢٧ – ٢٢٨.
[٤٣] - (١٩٤١) AC ٥٥.
[٤٤] - Gray J. in The Silva. (١٨٩٨) ١٧١ U S ٤٦٢ at ٤٦٤.

secured and cargo carefully stowed for a voyage. If hatches leak or cargo breaks loose one can conclude that the vessel was not seaworthy and there was no peril, and the burden of proving a peril of the sea is on the carrier. He can introduce the "log book" of the vessel to prove heavy wind for instance.

The Hague/Visby Rules have a number of exceptions similar to perils of the sea; in fact, they are, in effect perils of the sea. They are act of God Article IV rule ٢ (d) ; act of war, Article IV rule ٢ (e); act of public enemies Article IV rule ٢ (f) ; act or restraint of princes, rulers or people, or seizure under legal process, Article IV rule (٢) (g) Quarantine restrictions, Article IV rule ٢ (h); strikes or lock – outs or stoppage or restraint of labour from whatever cause, whether partial or general, Article IV rule ٢ (f); riots and civil commotions, Article IV rule ٢ (k); saving or attempting to save life or property at sea, Article IV rule ٢ (l). These similar exceptions follow the same rules of proof as perils of the sea. They are frequently joined together under the general exception "force majeure". Most of the similar exceptions are self – explanatory, for example, war, riots and quarantine.

a- Act of God:

This exception can only be invoked where the damage or loss is solely attributable to natural causes independent of any human intervention, and that it could not have been prevented by any amount of foresight, pains and

care, reasonably to be expected from him. Thus the damage caused by storm, frost, lightning or high wind would fall within this exception even though they may be relatively common occurrences[٤٥]. An example of a case of act of God "exception" is Nugent v. Smith[٤٦], in which a common carrier, took on board a mare of E`s .No bill of lading was signed. Partly by more than ordinarily bad weather, partly by the conduct of the mare, without any negligence by the crew, the mare was seriously injured. It was held that the shipowner was not liable for injuries resulting from these concurrent causes, which he could not by reasonable care and foresight have prevented, and was accordingly protected by the exception of act of God. In Siordet v. Hall[٤٧], it was held that the exception did not cover the act of negligence by the master. In this case the goods were shipped under a bill of lading excepting the "act of God". The vessel having to start next morning, the captain filled his boiler overnight, and frost came on, the tubes burst, damaging the goods.

b- Act of war and act of "public enemies":

The exception "act of public enemies" provided for in Article IV rule ٢ (f), is designed to cover acts committed by states, or their subjects, with

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[٤٥] - Scrutton, supra note ١٧, at ٢٢١ – ٢٢٢; Wilson, supra note ٦, at ٢٥١ – ٢٥٢.
[٤٦] - (١٨٧٦) ICPD ١٩.
[٤٧] - (١٨٢٨) ٤ Bing ٦٠٧.

whom the sovereign is at war. It bears the same meaning of the common law exception of the Queen's enemies and it is traditionally justified on the ground that otherwise the carrier would have no recourse since the parties involved are outside the jurisdiction of the national courts. Thus in Russell V. Niemann[٤٨], in which F, merchants in Russia, shipped wheat on a ship belonging to A, a subject of the Duke of Mecklenburg, to England under a bill of lading containing an exception "The Kings enemies". The Duke was at war with Denmark and the ship was captured by the Danes. It was held that the exception certainly included enemies of the ship owner's sovereign, and the shipowner was therefore freed. The exception also extends to reasonable steps taken by the carrier to avoid an imminent threat of such action as, for example, deviation into a neutral port to avoid capture. The meaning of the exception "act of war" provided for in Article IV rule ٢ (e),is not clear, but presumably the two phrases together i.e. act of "public enemies" and "act of war" cover the action of any belligerent and of pirates also[٤٩].

c- Arrest or restraints of princes, rulers or seizure under legal process:

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[٤٨] - (١٨٦٤) ١٧ CB ١٦٣.
[٤٩] - Scrutton, supra note ١٧, at ٢٢٣.

It covers any active and forcible intervention by a government or state authority in time of peace, which prevents or interferes with performance of the carrier's obligations under a contract of carriage. It includes restrictions on trade, embargoes, blockade or application of customs, quarantine regulations, confiscations of goods as contraband and so forth[٥٠]. Thus in Miller V. Law Accidents Insurance Co[٥١], the claim was under a policy on cattle from Liverpool to Buenos Aires. When the cattle were shipped, a decree was in force at Buenos Aires forbidding the entry of animals suffering from contagious diseases or coming from countries where such diseases prevailed. The cattle were inspected on arrival by Argentine officials, and were found to be diseased. On the following day the ministry issued a general order forbidding the discharge of any cattle arriving from the United Kingdom. The ship therefore left the dock at Buenos Aires with the cattle, and they were transshipped outside the port, and landed at Montevideo. It was held that the loss of the voyage to Buenos Aires was by "restraints of people".

Conversely, the exception does not operate when facts known to the ship owners existed before the beginning of the voyage, which showed that

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٥٠ - Carver, supra note ١٣, at ١٥٠; Wilson, supra note ٦, at ٢٥٧; Scrutton, supra note ١٧, at ٢٢٣ – ٢٢٥.

٥١ - (١٩٠٣)١ KB, ٧١٢.

the ship was inevitably doomed to become subject to restraint, which was not an exceptional but arose by reason of the general law of the country in question. In Ciampa V. British India steam Nav. Co[٥٢] a cargo of lemons loaded at Naples for London was severely damaged while being subjected to process of eradication in Marseilles as required by a decree of French government. The shipowners were aware that such action was likely to be taken as the vessel had a foul bill of health having originally sailed from a plague- ridden port. It was held that the damage was not caused by "restraint of princes"

The phrase "seizure under legal process" in Article IV rule ٢ (g) covers the ordinary judicial process i.e. when goods were detained as a result of civil action[٥٣]. The only one restriction on the scope of the exception that it applies purely to judicial proceeding and to acts of state authorities and not to non- governmental bodies such as mobs, rebels or guerrillas.

d- Quarantine restrictions:

This exception refers normally to restriction put on a ship not to discharge goods, crew or passengers for a specific period of time, normally forty days, because of spread of epidemic diseases in the port of loading or

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[٥٢] - (١٩١٥)٢ KB ٧٧٤.

[٥٣] - The exception before the advent of the Hague Rules did not cover judicial proceeding, see Carver, supra note ١٣, at ١٥٢.

in intermediate port at which the vessel has call. This exception is unlikely to have much significance.[٥٤]

e- Strikes or lockouts:

This exception is provided for in Article IV rule ٢ (i) from the Hague /Visby Rules. Strike has been defined in the law as "a general concerted refusal by workmen to work in consequence of an alleged grievance"[٥٥]. Since that time it has been more broadly interpreted to extend to a sympathetic strike where the workers involved have no personal grievance with their employers, and to a case where the refusal to work a night shift involved no breach of contract on the part of work force.

On the other hand the withdrawal of labour must retain some connection, however tenuous, with an industrial dispute and consequently the exception has been held to cover a stoppage of work by miners through fear of cholera, or the refusal of crew to sail because of the possibility of attack by enemy submarines[٥٦]. An attempt to reconcile these cases and produce an all-embracing modern definition was made by Lord Denning M R in New Horizon[٥٧], in which a strike is defined as "a concerted stoppage of work by men done with a view to improving their wages or condition or

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[٥٤] - id, at ٢٤٩.
[٥٥] - By Sanky J. in wllows Bros v Naamloose (١٩٥١) com cas; ٥٢٣ at p ٢٥٧.
[٥٦] - Wilson, supra note ٦, at ٢٥٩ – ٢٦٠.
[٥٧] - (١٩٧٥) Lloyd's Rep, ٦٤١.

giving vent to a grievances, or making a protest about something or other, or supporting or sympathizing with other workmen in such endeavor. It is distinct from a stoppage, which is brought about by an external event or by apprehension of danger".

The exception covers not only loss caused directly by the strike itself, but also consequential loss resulting from the after effect of the stoppage. So the charterers in Lenis v. Bank (No٢)[٥٨], could rely on the exception where loading had been delayed owing to congestion following a strike which had been settled before the chartered vessel reaching the loading port.

f- Riots and civil commotions:

Riots refer to riots in the strict sense of the criminal law, and "civil commotions" have been defined in reference to insurance policies, as "an insurrection of the people for general purposes, though it may not amount to a rebellion. It does not cover an organized conspiracy to commit criminal acts, such as suffragette activities, without any actual commotion or disturbance[٥٩]. The phrase is used to indicate a stage between a riot and a civil war, but civil commotions may, technically, be a riot. The carrier will only be protected by this exception if the disturbance actually causes the loss

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[٥٨] - (١٨٧٤) ٣٠ LT.

[٥٩] - London and Manchester plate Glass v. Heath (١٩١٣) ٣ KB. ٤١١.

or damage in question[٦٠]. In The Village Belle,[٦١] the exception included "civil commotion, strikes, riots, and stoppage of train ….. etc". The port of loading was Bilbao, and that place was at the time threatened by Carlist forces which cut the railway for some days. It was held that to excuse the charterer for delay in the loading, it was not sufficient to show a general civil disturbance, and a stoppage of the railway for a short period. It must be shown that there was a disturbing cause of such a character as to prevent and that it did actually prevent, the loading. Although the aforesaid case discussed facts relating to charterparty, the exception of "riots and civil commotions" has the same effect in the carriage covered by a bill of lading.

g- Saving or attempting to save life or property at sea:

This exception is self-explanatory. It covers any measures taken by the master to save lives or property at sea. The exception covers cases in which the ship deviates to save life or property at sea, to be excused as ustifiable deviation. So the well-known doctrine of deviation[٦٢] does not operate to hold such an act as fundamental breach of contract on the part of the carrier, but the liberty to deviate to save life or property has been held not to extend beyond the necessity of the particular case. In an American

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٦٠ - Carver, supra note ١٣, at ٢٤٩.
٦١ - (١٨٧٤) ٣٠ LT ٢٣٢.
٦٢ - A deviation is an intentional change in geographical route of the planned voyage see pp ٦٨ - ٧١ infra.

case, The Emily[٦٣], a steamer carrying cargo from San Francisco Coos Bay found another steamer on the rocks, and having towed her off, took her in to a harbour, where she was pumped out, and lay safe, but in a position which might become dangerous. Tugs were there which could tow her into San Francisco, but the salving steamer took her to that port. It was held that it was unjustifiable deviation.

iv- Inherent defect:

This exception is provided for in Article IV Rule ٢ (m) of the Hague /Visby Rules, to the effect that the carrier is not liable for loss or damage which results exclusively from some inherent quality of the cargo carried.

Tetley draws attention that the English translation omits the phrase "hidden defects" which means defects not from the nature of the cargo, and which cannot be discovered by the carrier or his servants on shipment[٦٤]. The exception is most frequently invoked in the case of perishable goods such as fruit or fish which in the normal course of events are likely to deteriorate in quality during transit. It also covers the inevitable wastage associated with the carriage of bulk cargo such as oil or grain, provided that such reduction in volume falls within the customary tolerance recognized in the trade .Also certain liquids are known to ferment during carriage, while metal goods are

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٦٣ - (١٨٩٦) ٧٤ Fed Rep. ٨٨١.
٦٤ - Tetley, supra note ٣, at ١٣٥.

capable of rust damage[٦٥]. Thus in Albacora v. Westcott & Laurence line ltd[٦٦] where a consignment of wet salted fish is shipped at Glasgow for Genoa, the carrier was not held liable for the deterioration in quality of goods during transit since he had not been told by the shipper that the fish required refrigeration .He was allowed successfully to rely on the exception of inherent vice.

Also in East West Produce co v. SS. Nordnees,[٦٧] onions were held to be unfit for a long voyage at the end of the season through tropical climates from Melbourne to Vancouver. The carrier proved proper stowage and care.

The fact that damage to goods arises out of their inherent nature, however, constitutes no defence to the carrier if it is aggravated by the carrier negligence. When a clean bill of lading has been issued estoppel usually arises, or in other words the carrier is usually prevented from proving, as against a third party relying on the clean bill of lading, that there was any defect. However in the case of inherent defect, the carrier is not estopped by his clean bill of lading.

v- Acts and faults of the shipper:

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[٦٥] - Wilson, supra note ٦, at ٢٥٣; Scrutton, supra note ١٧, at ٢٢٦ – ٢٢٧.
[٦٦] - (١٩٦٦) ٢ Lloyd's Rep. ٥٣.
[٦٧] - (١٩٥٩) Exch.. ٣٢٨.

In considering the exception of acts and faults of the shipper a distinction should be drawn between acts which invoke the exception and free the carrier from any liability and others which give the carrier specific rights against the shipper. The Hague Rules include provisions dealing with cases in which the carrier is responsible to third parties consignees to any damage or loss of cargo. He has the right of recourse against the shipper if the damage in question was caused by acts or omissions of the shipper[٦٨]. Again, this exception does not deal with the fault of the shipper in cases of shipment of dangerous cargoes. The Rules include separate proviso in this matter in Article IV rule ٦. Specific examples of this general exception contained respectively in Article IV rule ٢ (n) i.e. insufficiency of packing and (o) inadequacy of marks.

[٦٨] - As in the case of inaccurate particulars describing marks, number quantity or weigh furnished by the shipper to be stated in the bill provided for in Art III r ٥.

a- Insufficiency of packing:

Sufficient packing is normal packing or customary packing in the trade. Such packing invariably prevents all but the most minor damage under normal conditions of care. Some objects are normally tied in bundles without other packing, while other objects such as automobiles are not packed at all. Nevertheless what is customary is sufficient packing.[٦٩] Thus in the American case of The Silversandal,[٧٠] a consignment of rubber has been crashed in transit, the carrier invoked the exception of insufficient packing. It was held that rubber could have been packed to avoid all crushing damage, but this would have been too expensive and thus prohibitive. The bales of rubber also could have been stowed in a particular manner to avoid all crushing, but this could have been too expensive for the carrier. The court found both the stowage and packing customary and relieved the carrier.

Many cases of insufficiency of packing will be obvious on shipment. It is advisable for carrier to note the precise details on the bill of lading, but if the carrier issued a clean bill of lading, he is subsequently estopped from raising the exception of insufficient or defective packing. So in Silver v. Ocean Steamship Corp[٧١], clean bills were issued in respect of consignment

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[٦٩] - Tetley, supra note ٣, at ١٤٠.
[٧٠] - (١٩٤٠) AMC ,٧٣١ at p ٧٣٤
[٧١] - (١٩٣٠)١ KB ٤١٦.

of frozen Chinese eggs, which were shipped in ١٦ ٤٢ tins, loaded on trays of ٨٤ tins each, without being protected by any form of packing. When many tins arrived at their destination severely damaged, the carrier was estopped from invoking the exception against a consignee who had relied in good faith on the clean bills.

b- Insufficiency or inadequacy of marks:

This exception refers to marks and markings on cargo being so unclear or insufficient that cargo is lost, mixed, misdelivered or damaged. Loss or damage caused by inaccuracy of marks is not covered by this exception. The burden is on the carrier to show that marks were insufficient[٧٢]. Thus in Sandeman & Sons v. Tyzack and Branfoot Steamship Co ltd[٧٣], a consignee of bales of jute claimed that six of his bales were missing. It was found that ١٤ bales belonging either to that consignee or to others were missing and that ١١ bales were available without any marks. Upon failure of the carrier to invoke the exception of insufficient marking, it was held that the consignee was entitled to claim for his six bales not delivered, and was not obliged to accept that any of the unmarked bales belonged to him.

vi- Latent defects:

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[٧٢] - Tetley, supra note ٣, at ١٣٠; Gaskell, supra note ١٦, at ٤٥٦.
[٧٣] - (١٩١٣) Ac. ٦٨٠.

Article IV rule ٢ (p) of The Hague/Visby Rules provides "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from latent defects not discoverable by due diligence". This exception known as latent defects refers only to defects in ship and not in cargo. According to Carver[٧٤], "A defect is said to be latent when it can not be discovered by person of competent skill using ordinary care. A defect is not latent if it is discoverable by reasonable methods". Accordingly one can gather that the words" not discoverable by due diligence" in this exception add nothing to the expression latent defects". As in The Falls city,[٧٥] in which a vessel was dry-docked and appeared to be scaling. The hull was actually cracked and was painted with a long handled paintbrush ٢٠ feet long. A surveyor said there was no scaling and no crack, but he walked around down below. It was held that this was not a latent defect.

vii- The catch- all exception:

Article IV rule ٢ (g) of the Hague/Visby Rules provides "Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from, any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to

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[٧٤] - Carver, supra note ١٣, at ٢٥١.
[٧٥] - (١٩٤٤) Lloyd's Rep.١٧ at p ١٩.

show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage". The effect of this general exculpatory provision that the carrier can avoid liability for any damage or loss not falling within the named exception provided that he can establish that it occurred without his own fault or[٧٦] privity and it did not result from any fault or neglect on the part of the carrier, his servants and agents. An independent contractor such as stevedores engaged by the carrier is regarded as servant or agent of the carrier in this context. An example of a carrier successfully discharging this burden of proof is provided by Goodwin, Ferreira &co V. Lamport &Holt,[٧٧] where a crate, being lowered into lighter, broke open and its contents fell out damaging bales of cotton yarn already stowed in the lighter. The carrier avoided liability by establishing that the lid of the crate had been insecurely fastened on shipment and that the incident had involved no lack of care on the part of his servants or agents.

If cause of the loss is inexplicable, it is impossible for the carrier to prove that his fault had not contributed to the loss or damage. Problems have also arisen with regard to the applicability of the exceptions to cases of

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[٧٦] - It was held in Hourani v. Harrison (١٩٢٧) ٣٢ law cas ٣٠٥. that the word" or" in Article Iv rule (٢) (q) must be read "and"

[٧٧] - (١٩٢٩) ٣٤ LILR ١٩٢.

pilferage and theft. The carrier could not invoke the exception under Article IV rule ٢ (q) where there had been theft of cargo by the carriers servants or even by employees of a firm of stevedores engaged by the carrier to discharge the cargo. The courts draw a distinction between thefts committed in the course of employment and thefts which had no connection with the work the independent contractors were engaged to perform.[٧٨] Thus in Leesh River Tea Co V. British India SN Co,[٧٩] where damage to cargo resulted from the theft of a storm valve cover by stevedores employed by the carrier to discharge a cargo of tea at Port Sudan. The carrier satisfied the court that the theft had involved no negligence on the part of the ship's officers and crew, but the question still remained as to whether he had to take responsibility for the acts of stevedores who, admittedly, were independent contractors. It was held that there was a distinction between thefts committed in the course of employment i.e. thefts of cargo, and thefts which had no connection with the work of the independent contractors were engaged to perform. Accordingly the carrier is allowed to exclude liability relying on the exception provided for in rule ٢ (q) to defeat the cargo owners claim.

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[٧٨] - Tetley, supra note ٣, at ١٥٤ – ١٥٨; Wilson, supra note ٦, at ٢٦٦ – ٢٦٨; Carver, supra note ١٣, at ٢٥٢ – ٢٥٣.

[٧٩]- (١٩٦٦)٢ Lloyd's Rep ١٩٨.

Concerning the exceptions under the Carriage of Goods by Sea Act ١٩٥١ and The Draft Bill of ١٩٩٩, no difference can be observed between the ١٩٥١ Act and the Hague/Visby Rules exceptions as duly explained, Article IV (Rights and Immunities rule ٢ provides for the same seventeen exceptions of the Hague/Visby Rules.

As far as the Bill of ١٩٩٩ is concerned, although it incorporates the Hague/Visby Rules,[٨٠] but it is inconsistent with the Rules in two respects: first, it includes nineteen exceptions instead of seventeen. This is not permitted by the Rules, under which the carrier may surrender any of his immunities and to increase his liabilities, but he is not allowed to diminish his responsibilities[٨١]. Secondly, the Bill in section ١٨٧ (١) (a) excludes liability of the carrier in case of unseaworthiness of the ship beyond the standard provided for in section ١٨٥. This is contrary to the basis of liability under the Rules by which the carrier is bound to provide a sea worthy ship at the beginning of the voyage. In cases of loss or damage to cargo, the burden is on him to prove that the ship is seaworthy. If he failed to discharge the burden, he is deprived from invoking any exception included in the bill of lading, which means that the unseaworthy is regarded as a fundamental breach which operates as a bar to the exceptions. So to include such a

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[٨٠] - S. ١٦٩.
[٨١] - Art. (v) of the Hague/Visby Rules.

provision under the exceptions is confusing and unnecessary. Moreover, the Bill includes under section. ١٨٧ (١) the exception of “criminal act" instead of “act of public enemies” provided for in Article IV rule ٢ (f) of the Rules. As we mention, that it is not allowed to add to the list of the exceptions under the Rules. So the “criminal acts” either to be categories as “act of public enemies” or may be exempted by the catch all exception in Article IV rule ٢ (q),[٨٢] in cases of theft or pilferage done by the servants of the carrier. If the “criminal acts” in the Bill are construed to mean piracy or robbery, those acts exempted namely under the common law before the advent of the Hague Rules. The Rules exculpate such acts, in cases which are regarded as perils of the sea only.[٨٣]

Finally the Bill exculpates the carrier from liability for saving or attempting to save life or property at sea in section. ١٨٧ ١ (p) similar to Article IV rule ٢ (٤), but it provides repeatedly in section ١٨٧ ١ (r) to exclude any deviations for saving or attempting to save life or property at sea or deviation for any other reasonable cause”.

This subsection refers to the liability of the carrier under the doctrine of deviation. It is contrary to the Hague/Visby Rules to be included as an exception. It can be provided for separately.

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[٨٢] - See p ٤٠ supra.
[٨٣] - See p ٥٧ supra; scrutton, supra note ١٧, at ٢٣٠.

٤- Basis of liability Under Hamburg Rules:

In framing uniform and comprehensive test of carrier liability, the draftsmen of Hamburg Rules have adopted the argument long advanced by cargo interests that the carrier liability should be based exclusively on fault and that a carrier should be responsible without exception for all loss of, and damage, to cargo that results from his own fault or the fault of his servants or agents. This statement of basic liability is drafted in Article ٤ (١) in the following terms: "The carrier is liable for loss resulting from loss of or damage to the goods as well as for delay in delivery, if the occurrence which caused the loss, damage, or delay took place while the goods were in his charge as defined in Article ٤, unless the carrier proves that he, his servants or agents, took all measures that could reasonably be required to avoid the occurrence of its consequences".

The draftsmen of Hamburg Rules were seeking to overcome some of the inconsistencies arising from the ambiguous wording in the Hague/Visby Rules. Under the latter, the obligation of the carrier to provide a seaworthy ship was limited to a duty to exercise "due diligence" while he was required to look "properly and carefully after the cargo throughout the carriage". Thus Hamburg Rules introduce uniform test of liability based on fault. Unfournately the search for the uniformity of construction is not assisted by

the introduction of variations in phraseology such as occur later in Article ٥ when reference is made to “fault or neglect" of the carrier rather than to “all measures that could reasonably be required” which raises an identical question of duty of care intended in both cases. Further confusion is caused by the annexing to the convention a common understanding “that the liability of the carrier under the convention is based on the principle of “presumed fault or neglect”[٨٤].

Further attempt to achieve uniformity and simplicity that the Hamburg Rules adopt a unified burden of proof rests on the carrier. The justification is to place the burden of proof on the party most likely to have knowledge of the facts. Only in the case of damage caused by fire is the burden shifted away from the carrier, presumably for the reason that it is difficult to establish the precise origin of a fire at sea that in the majority of cases it tends to originate with the cargo[٨٥].

Finally, the fact that the Hamburg Rules, being in force only on ١/November of ١٩٩٢, and that it has not been ratified by any major maritime nations such as the United Kingdom, makes its uniform test of liability need more time to be tested and verified on practical basis.

٥- Conclusion:

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[٨٤] - Wilson, supra note ٦, at ٢١٤ – ٢١٦.
[٨٥] - Art. ٥ (٤).

The Hague/Visby Rules define the "carrier" as including the owner or the charterer who enters into contract of carriage with a shipper. While Hamburg Rules define the "carrier" as any person by whom or in whose name contract of carriage of goods by sea has been concluded with a shipper. This definition may include the shipowner, charterer or agent of the shipowner. Thus the definition of "carrier" under Hamburg Rules is wider than that of the Hague/Visby Rules.

The Hague/Visby scheme of liability is built on specific obligations by which the carrier is bound i.e. the obligation to issue a bill of lading, on demand of the shipper with certain particulars, the obligation of exercising due diligence to provide a seaworthy ship before and at the beginning of the voyage and the obligation of care of cargo i.e. properly and carefully load, handle, stow, carry, keep and discharge the goods. These obligations are subjected to seventeen exceptions by virtue of which the carrier is completely exempted from liability for loss or damage to cargo. The relatively long list of exceptions has encouraged many critiques, most of them focused on that some of them are ambiguous and interrelated and others are obsolete for example “the nautical fault" exception. Hamburg Rules introduce a new scheme of liability based on the "presumed fault", that whenever there is loss or damage to cargo, the carrier is presumed to be

at fault except if he reputed the burden by proving that the loss or damage to cargo is not resultant from his fault or privity of him or his agents or employees, but the Rules exempt the case of fire from this presumption.

Many authorities regard this scheme of liability as easier and more just to the cargo interests.

Chapter Two

Scope of liability of the Sea Carrier

In this chapter I will pinpoint the scope of liability of the sea carrier. Hence, the issues of documents and types of carriage covered by both Hague/Visby and Hamburg Rules will be outlined. Also period of responsibility under both conventions will be considered. Finally provisions which consider the responsibility of the carrier in particular cases will be focused, compared and contrasted in both conventions.

١-Types of Carriage Covered by the Rules:

i- Under The Hague/Visby Rules:

The basic formula for application of the Rules focuses on the document covering the carriage contract rather than on the contract of carriage itself. Thus Article ١ (b) states that the Rules are applicable "only to contracts of carriage covered by a bill of lading or any similar document of title in so far as such document relates to the carriage of goods by sea".

From the above it would appear that the Rules are not designed to cover contracts of carriage which envisage the issue of waybill or other non-negotiable document i.e. straight bill, since these do not constitute documents of title. Nor would the Rules apply to charterparties, or even

bills of lading issued under charterparty, at least so long as such bills remain in the hands of the charterer. Once the bill is assigned to a third party, the position will change and the Rules will operate from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

On the other hand, the English courts construe Article ١ (b) of the Rules, to take effect in cases when the parties envisage that the contract of carriage will be covered by a bill of lading, even though, in the event no such document is in fact issued. This was established in Pyrene Co ltd V. Scandia Navigation Co[٨٦], where a consignment of fire tenders had been delivered alongside the vessel for shipment. While one of the tenders was being lifted aboard by the ship's tackle it fell back onto the dockside and was seriously damaged. The remaining tenders were loaded safely and the bill of lading which was eventually issued made no reference to the damaged tender. When the carrier sought to limit his liability under Article ١V rule ٥ of The Hague Rules, the shipper argued that he was unable to do so because the carriage of the damaged tender was not "covered by a bill of lading". It was held that the important factor was whether the parties, in contracting,

[٨٦] - (١٩٥٤) ٢ QB ٤٠٢; cited in Ivamy, **Case Book on Carriage by Sea**, ٥٧ (٢nd ed ١٩٧١).

envisaged the issue of a bill of lading and not whether one was in fact actually issued.

As far as the geographical scope of application is concerned, Article X of the Rules provides that "The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different states if:

a. The bill of lading issued in a contracting state, or.
b. The carriage is from a port in a contracting state, or.
c. The contract contained or evidenced by the bill of lading provides that these Rules or legislation of any state giving effect to them are governing the contract, whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person".

The wording of Article x clearly envisages an international contract of carriage "between ports in different states". Two of the situations specified in Article x satisfy the basic requirement that a bill of lading be issued, namely, where the bill is issued in a contracting state and also where the bill expressly incorporates the Rules, irrespective of the geographical location of the port of loading in either case. The third alternative refers simply to carriage from a port in a contracting state. The position under the Carriage of Goods by Sea Act ١٩٥١ is similar. It provides in Section ٢: "subject to the

provisions of this Act, the rules set out in the schedule hereto shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in the Sudan to any other port whether in or outside Sudan". It is clear from the above quotation that the Act covers the outward carriage of goods only. Hence the inward carriage is outside the scope of application of the Act. It is mainly governed by the provisions of the bill of lading which are widely varied according to the convention prevailing in the state of loading, and the state of issuing the bill of lading in the first place.

Unsuccessfully, the Draft Bill of ١٩٩٩ omits to provide for the scope of its application, but since it adopts the Hague/Visby Rules according to section ١٦٩, it can be inferred that it covers, similar to its predecessors, the outward carriage of goods by sea only.

ii- Under Hamburg Rules:

The Hamburg Rules are to apply, according to Article ١ (b), to contracts of carriage by sea which are defined as "any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another". Where the contract envisages some form of multimodal carriage, the application of the Rules will be restricted to the sea leg. This approach differs from that of either the Hague or the Hague/Visby Rules

which concentrate on "contracts of carriage covered by a bill of lading or any similar document of title". So far as the Hamburg Rules are concerned, it is immaterial whether a bill of lading or a non-negotiable receipt is issued, and the definition of "bill of lading" in Article ١ (٧) is worded accordingly. The new convention, however, follows its predecessors in that its provisions are not applicable to charterparties or to bills of lading issued pursuant to them unless such bill "governs the relation between the carrier and the holder" i.e. it has been issued or negotiated to a party other than the charterer.

The Hamburg Rules according to Article ٢, are applicable to all contracts of carriage of goods by sea between two different states if, according to the contract, either the port of loading or the port of discharge is located in a contracting state, if the goods are discharged at an optional port of discharge stipulated in the contract and that port is in a contracting state, or if the bill of lading or other document evidencing the contract is issued in a contracting state. In addition to those cases, the Hamburg Rules apply if the bill of lading or other document evidencing the contract of carriage provides that the rules are to apply.

٢- Period of responsibility:

i- Under the Hague/Visby Rules:

Article ١ (c) states that carriage of goods does not necessarily refer to performance of the entire contract, but merely relevant to that part of contract relating to sea transport for example sea leg of the intermodal carriage. This period is normally known as "tackle to tackle" period, that is from the time when the ship tackle is hooked onto the cargo at the port of loading until the hook of the tackle is released at the port of discharge. Thus in Pyrene Co V. Scandia Navigation Co[٨٧] whilst a fire tender was being loaded on board a vessel in London, but before it had crossed the ship's rail, it was dropped and damaged through the negligence of the stevedores employed by the shipowners. No bill of lading was ever issued, but the shipowners claimed that they could limit their liability under the Hague Rules because transaction under which the goods were shipped was a "contract of carriage covered by a bill of lading" within the meaning of Article ١(b). It was held that this contention was correct. It is clear that the carrier assumes liability, not only during actual carriage, but also during the loading and discharge operations, as where the cargo falls back dock side while being lifted aboard with the ship's tackle, or where it falls into the sea while being discharged into lighters, as in Goodwin Ferreira & Co V.

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[٨٧] - id.

lamport & Holt Ltd[٨٨], in which the plaintiff's goods (bales of cotton yarn) had been discharged into a lighter. A case containing iron pipes which was being lowered into the lighter broke and the pipes fell out and holed her. Seawater flowed in and damaged the plaintiff's goods. It was held that discharge of the plaintiff's goods was not completed while other goods were being loaded into the same lighter and that the Rules therefore applied.

Article VII provides that the parties are free to negotiate their own terms in respect of care of cargo before loading and after discharge. It is difficult to state what law applies after discharge. It may be the law of the place where the bill of lading was issued, the law which the bill of lading invokes, the law of country of discharge or the custom of the port of discharge[٨٩]. It has been submitted, however, that no matter what is law, the carrier is under duty to load and discharge carefully[٩٠]. As in The Astir[٩١], where damage occurred to iron plates from a leaky drum of acetic acid stowed on top of them. After discharge, sound plates were mingled with the damaged ones. It was held that the carrier was liable for damage which occurred while discharging as the result of mingling defective cargo with sound cargo.

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٨٨ - (١٩٢٩) ٣٤ LILR ١٩٢.
٨٩- Tetley, Marine Cargo Claims, ١٧٦ (١٩٦٥).
٩٠ - Art . III r (٢)
٩١ - (١٩٤٥) AMC ١٠٦٤.

The Act of ١٩٥١ provides for the same period of "tackle to tackle" in Article I "carriage of goods" covers the period from the time when the goods are loaded onto the time when they are discharged from the ship". Article VII gives the parties the liberty to negotiate their own contract for the period before loading and after discharge. The courts in the Sudan normally apply the laws and regulations of the port in this respect. The Owners of Charching Vessel V. Hatim Abed El Bagi[٩٢], may give a good illustration. The plaintiff's claimed damages for electrical apparatus shipped by them on the vessel "Charching" and sank after it had been discharged on a lighter in Port Sudan. On Applying the General Regulation of the Port Corporation, the Supreme Court held that the port authority is not liable, although the lighter belonged to it, and that the process of discharging in lighter is generally within the sea carriage period, which was completed only when the goods were delivered to consignee. Thus the carrier is liable for damages. It can be noticed that the decision in this case considers liability of the carrier to cover not only the sea carriage which was completed by discharging the cargo, but it extends to the actual delivery of the cargo by the consignee. The Bill of ١٩٩٩ comes in line with the decision in "Charching" case and imposes liability on the carrier from the time he

[٩٢] - Supreme Court decision, No ١٤٦٣./١٩٩٣; cited in M. Ali Khalifa, Ahma Elgadya Elbahria , ٦٣٩ et seq (١٩٩٩).

undertakes the cargo on his charge until the time it has been delivered to the consignee[٩٣]. The question is whether such a provision is contrary to the Hague/Visby Rules? The answer may be in negative in the sense that once the Rules do not provide for the time before loading and after discharge that means no bars are imposed by the Rules on the national legislation to provide for “before loading" and “after discharge" periods.

[٩٣] - s. ١٨٧ r. (١) and s. ١٩٤.

ii- Under Hamburg Rules:

Hamburg Rules are designed to operate throughout the entire 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"[٩٤].

Article ٤ (٢) deems the carrier to be in charge of the goods in a number of circumstances, for example, where they have been taken over from the shipper, its agents or port authority. The carrier remains in charge until the goods are delivered to the consignee or placed at its disposal or handed over to port authority. Article ٤ rule ٢ (b) (ii) allows the carrier to "deliver" by placing the goods at the disposal of the consignee "in accordance with the contract". Finally it is clear that this provisions is designed to overcome the existing "before loading" and "after discharge" problem under the Hague/Visby Rules.[٩٥]

٣- Specific provisions for particular cases:

i- Liability for delay:

The Hague/Visby Rules contain no specific provision for the recovery of loss caused by delay in delivery of the cargo. If delay results in physical damage to the goods, for example, by deterioration in quality, loss may be

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[٩٤] - Art. ٤ (١).

[٩٥] -John F. Wilson, **Carriage of Goods by Sea**, ٢١٣-٢١٤ (٤th ed ٢٠٠١); Nicholas Gaskell, Regina Asariotis and Yvonne Baatz, **Bills of Lading Law and Contract**, ٢٦٤ – ٢٦٥ (٢٠٠١).

recoverable under Article III rule ٢, which imposes a general duty of care in handling the cargo. The position is not clear with regard to purely economic loss, such as loss of market. Some countries expressly provide for the recovery of such loss in their maritime codes,[٩٦] while the English authorities tend to support the notion that there can be liability for delay under the contract where this is within the reasonable contemplation of the parties, according to the test of Haedley V. Baxendale[٩٧].Thus in The Subro Valour[٩٨] it was held that under the Hague/Visby Rules there can be liability for consequential loss, including that caused by delay, although it does not appear that there was argument on whether such losses were covered by the Rules themselves.

Hamburg Rules in order to remove all doubts and to bring carriage by sea in line with the three other modes of international transport[٩٩] expressly provide that the carrier is liable for loss resulting from delay in delivery unless he can discharge the standard burden of proof i.e. that neither he nor

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[٩٦] - e.g. Art.١٣٠ of the Swedish Maritime code and Art ١٤٩ of the Merchant Shipping code of USSR

[٩٧] - (١٨٥٤) ٩ Exch ٣٤١.

[٩٨] - (١٩٩٥)١ Lloyd's Rep. ٥٠٩.

[٩٩] - See Art. ١٩ of Warsaw convention (١٩٩٩) The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods .See similar provisions in Art .١٧ (i) of the CNR (Road) convention in ١٩٥٦ and Art .٢٧ (i) of CNR (Road) convention ١٩٦٢.

his servants or agents were at fault[١٠٠] Article ٥ (١) (٢) defines delay as occurring when the goods have not been delivered at port of discharge within the time agreed in contract of carriage. One practical difficulty is that few bills specify any time of arrival. Article ٥ (٢) continues by reference to the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case. Professor Gaskell criticizes the provision on the basis that it is controversial and carriers feared open– ended liability, and it may encourage carriers to insert sort of clauses that states "it is hereby agreed that the time for delivery of the goods shall be six months from the date of shipment"[١٠١].

As far as the Carriage of Goods by Sea Act ١٩٥١ is concerned, no difference is observed if it is compared to the Hague/Visby Rules i.e. no provision for liability for delay is included. But the decisions of the Sudan courts tend to entitle the cargo owner to damages in cases of delay in delivery, which result in economic loss or in damage to cargo. Two cases may illustrate this tendency. In Jameel Kababa & Son's Co ltd and other V. Curtead earges (vessel)[١٠٢] in which the plaintiffs shipped ٦ ٣٠٠ tons of cement on ١٢ October ١٩٩٦, from a port in China to be delivered at Port

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١٠٠ - Art. ٥ (١).
١٠١ - Gaskell, supra note ١٠, at ٣٤٢ – ٣٤٣.
١٠٢ - province ct No ١٧٧ / ١٩٩٧; cited in M. Ali Khalifa, supra note ٧, at ٢١٤ et seq.

Sudan. The ship delayed, and cargo had not been delivered to plaintiffs till ٢٢ February ٩٧. On a claim for damages, the court held that they are entitled to damages for delay. Two comments may be stated about this decision. First, the court did not specify which international convention was to be applied, whether the Hague/Visby Rules or Hamburg Rules. In spite of that it applied Hamburg Rules although Sudan has not signed or acceded to it. The second comment is that the court did not examine whether the damage was within the contemplation of the parties at the time of the contract or not i.e. the test of "remoteness of damage" which is well established in law of contract jurisprudence in Sudan courts[١٠٣]. The second decision is the Owners of "Mermaid" V. The Unified Overseas Projects,[١٠٤] in which the correspondants shipped on ١٢ April ١٩٩٣, ٢٥٠٠ Metric tons of (Eljeer Elmatfi) from Ras Elkhma to Port Sudan, to be delivered on June ١٩٩٣. Delivery had been delayed till ٣١ October ١٩٩٣. Correspondents claimed damages for delay of delivery. It was held that the correspondents were entitled to damages for the cargo damaged as the result of delay, and rejected the claims for other losses, which resulted from delay. The Court of Appeal in reversing the decision of the District Court successfully relied on

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[١٠٣] - Mohamed Salih Ali, **Eltaleeg Ala Gannon Elagood Elsudani**, Volume ٢, ١٩٤ et seq (Undated).

[١٠٤] - Ct. of App. No. ١٨٠/١٩٩٥; cited in M. Ali Khalifa, supra note ٧, at ٢٢٩ et seq.

the principle of "remoteness of damages" although no mention of it in the merits.

The Bill of ١٩٩٩ based on the tendency of the courts in Sudan to entitle cargo owners for damages in cases of delay in delivery, introduces a provision to the effect, section ١٩٦ which imposes liability on the carrier for delay in delivery, and it exempts delay resulting from any of the acts included in section ١٨٧.[١٠٥] Section ١٩٦ deems that the carrier is delayed in delivery if the cargo has not been delivered in the time in which the prudent carrier does in the similar circumstances. One can gather that the wording of section ١٩٦ of the Bill of ١٩٩٩ is extended to the carrier liability in cases of delay beyond the consequential loss authorized in English decisions that apply the Hague/Visby Rules. Nevertheless, the courts in Sudan may restrict the scope of liability, on application, of the Bill to the consequential loss in accordance with the general principle of "remoteness of damage" and the jurisprudence on the application of the Hague /Visby Rules in other jurisdictions.

ii- Dangerous goods:

The Hague/Visby and the Hamburg Rules contain special provisions dealing with dangerous goods. It should be noted that in Article ١٣ of

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[١٠٥] - The general exceptions.

Hamburg Rules the shipper is required to mark or label dangerous goods appropriately and the meaning of "dangerous goods is not defined. The Hague and Hague/Visby Rules deal in Article IV rule ٦ with "goods of inflammable, explosive or dangerous nature to shipment". "Goods of a dangerous nature" connotes goods "which either actually causes physical damage or which pose a threat of physical damage to the ship or to other cargo on board"[١٠٦], whereas under the common law contraband that may cause the vessel to be detained or delayed has been held to be dangerous cargo.[١٠٧] Where goods are shipped without notice of their dangerous qualities the shipper will be liable for any damage resulting either to vessel or to any other cargo on board.

The orthodox view is that such liability is strict and in no way dependent on the knowledge available to the shipper as to the nature of the goods. This view stems from the majority decision in Brass V. Mail Land[١٠٨] where a consignment of bleaching powder containing chloride of lime corroded the casks and damaged other cargo in the hold. The majority of the court took the view that the shipper would be liable even though he was unaware of the dangerous nature of the goods. Although there is a strong

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[١٠٦] - Per Hirst LJ in **The Giannis N K** (١٩٩٨) ١ Lloyd's Rep ٣٣٧.
[١٠٧] - Carver, **Carriage by Sea**, ٥٩٩ (١٢th ed ١٩٧١).
[١٠٨] - (١٨٥٦)٢٦ LJQB ٤٩.

dissenting opinion to the judgment in this case, it seems much more just and expedient that the loss occasioned by the dangerous qualities of the goods and the insufficient packing should be cast upon the shipper than upon the shipowner as a matter of allocation of risk. The situation, however, has been greatly clarified by the recent decision in The Giannis NK[١٠٩], in which a cargo of groundnuts extraction meal pellets had been shipped in Dakar for carriage to Dominican Republic under a bill of lading incorporating the Hague Rules. On arrival at the port of discharge the cargo was found to be infested with khapra beetle, although the infection had not spread to cargo of wheat in an adjacent hold, but the health authorities in Dominican Republic ordered the shipowner either to jettison both cargoes at sea, or to return to port of loading. The shipowner then commenced proceedings against the shippers of groundnuts cargo under Article IV rule ٦ of the Hague Rules for damages for delay and other costs, together with an indemnity to cover any claims by the owners of the cargo of wheat. The House of Lords in holding that the shipper of groundnuts was liable to damages established two important remarks. First, that the expression "goods of dangerous nature" should be given abroad interpretation and not be restricted "ejusdem generis" to goods of an "inflammable" or explosive nature. Nor should its

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[١٠٩] - (١٩٩٨) ١ Lloyd's Rep ٣٣٧; cited in Wilson, supra note ١٠, at ٣٧.

application be confined to goods which are liable to cause direct physical damage to the vessel or other cargo. Secondly, liability under Article IV rule ٦ was strict. It deserves attention that this decision widens the scope of what may constitute "dangerous goods" and imposes a heavier liability upon the shipper.

Under both the Hague/Visby and Hamburg Rules, there are two distinct situations: First, when the dangerous goods shipped without the carrier being informed properly, and he is ignorant of its dangerous character.[١١٠] Second, when the dangerous goods are shipped with consent or knowledge of the carrier, and they turn out to become a danger to the ship or cargo. In the first occasion the carrier has the right to dispose of the goods without compensation and to be indemnified by the shipper against any damage resulting from such shipment whether to the ship or to the other cargoes. In the second occasion the carrier is merely allowed to render the goods harmless or dispose of them without compensation, but he is not entitled to claim an indemnity from the shipper[١١١].

The ١٩٥١ Carriage of Goods by Sea Act includes a typical provision with typical numbering to Article IV rule ٦ of the Hague/Visby Rules. A single divergence is observed under section ١٨٣ of the Bill of ١٩٩٩ that the

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[١١٠] - Article IV r. ٦ of the Hague/Visby Rules and Article ١٣ of Hamburg Rules.
[١١١] - Gaskell, supra note ١٠, at ٤٧٤.

carrier is under a duty to prove that he was ignorant of the nature of the dangerous goods shipped, and that he would have declined from shipment if he had known the dangerous nature of the goods.

iii- Deck cargo:

Under the Hague and Hague/Visby Rules Article I (c), deck cargo is apparently treated in the same way as live animals, i.e. it is excluded from the list of goods covered by the Rules, so that the carrier would be free to make his own contractual terms in respect of them. However, deck cargo is only taken outside the Rules where, it is stated in the bill as being carried on deck, and it is so carried. In Sveska Traktor V. Maritime Agencies Ltd[١١٢], in which a consignment of tractors had been shipped from Southampton under a bill, which conferred a liability on the carrier to stow the cargo on deck. When one of the tractors was washed overboard during the voyage, the shipowner sought to rely on a clause in the bill excluding his liability for loss or damage to deck cargo. it was held that a standard liberty clause allowing cargo to be stowed on deck would not of itself take the carriage of that cargo outside the Rules, unless there was also a statement, usually on the face of the bill, that the goods may be carried on deck and they have

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[١١٢] - (١٩٥٣) ٢ QB ٢٩٥.

actually been so carried. Also in The Nea Tyhi[١١٣], it was held that an on deck stowage of timber, contrary to an express under deck clause on the bill, was a breach of contract, but the carrier was still entitled to rely on the Hague Rules package limit. It must be noted that the mere fact that it is customary in the trade for certain cargoes, such as timber or inflammable goods to be carried on deck is irrelevant to the question of the applicability of the Hague/Visby Rules, although it may indicate the implied consent of the shipper for carriage on deck.[١١٤]

The effect of carriage on deck without first obtaining the consent of the shipper traditionally amounts to a fundamental breach of contract of carriage which prevents the carrier in event of loss or damage to cargo, from relying for protection on any of the contractual terms and exceptions. If such a breach of contract is to be avoided, the shipper must have consented either expressly or impliedly, to the stowage of his cargo on deck. Some authors argue[١١٥] that the inclusion of a general liberty clause in the bill of lading might suffice for this purpose, or even a clause to the effect that "carrier permitted to stow on deck unless shipper objects" provided that the shipper has sufficient notice of the clause at the time of shipment. Similarly, consent

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١١٣ - (١٩٨٢) Lloyd's Rep ٦٠٦.
١١٤ - Wilson, supra note ١٠, at ١٨٢: Gaskell, supra note ١٠, at ٣٢٩ – ٣٣٠.
١١٥ - id.

would normally be implied where it is customary in the trade to ship certain types of goods on deck. Examples of such cargoes include timber, certain types of inflammable or other dangerous goods and more importantly, containers carried on specially designed containers ship. They argue that their opinion has support in British cases.[١١٦] Moreover there are often good commercial reasons for the absence of any clear statement to the deck carriage on the face of the bill of lading, as in the case of containers. The final location of each container will be dependent on a variety of factors including the possible dangerous nature of its contents, the trim of the ship or merely the time of its arrival at the dock side. On the other hand, this view is strongly contested by Tetley,[١١٧] who argues that the presence of printed liberty clause in a bill of lading is insufficient to constitute implied consent unless it is accompanied by a clear statement on the face of the bill that the goods have in fact been shipped on deck. In his view the liberty clause is no more than an option, while the absence of a clear statement in the bill amounts to an assurance that the option has not been exercised.

Under Hamburg Rules, deck cargo is treated as normal cargo subject to the Rules. The Rules make the sensible distinction between shipments on deck contrary to an express under deck obligation and carriage on deck

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[١١٦] - Nea Tyhi case supra note ٢٨.
[١١٧] - Tetley, supra note ٤, at ١٩٣ – ١٩٧.

without express permission. Under Article ٩ (١) carriage on deck is permitted in accordance with an agreement with the shipper, the usage of the particular trade, or by statutory rules. It is clear from Article ٩ (٢) that a liberty clause would be such an agreement. In absence of such a statement the carrier has to prove an agreement, but cannot do so in respect of a third party. If there is deck stowage without permission the carrier will be liable for the loss or damage resulting from deck stowage, (for example heavy weather damage) even where it is not at fault. If there is deck stowage contrary to an express under deck agreement the carrier will lose the right to limit.[١١٨]

Both the Carriage of Goods by Sea Act ١٩٥١ and the Bill of ١٩٩٩ are in line with the Hague/Visby Rules. The Act of ١٩٥١ states a definition of "goods" which excludes the deck cargo from the application of the Act. The Bill of ١٩٩٩ devotes a single section with the same provision to deck cargo, instead of excluding it from definition of goods.[١١٩]

iv- Live animals:

"Live animals" is the second kind of goods which is expressly excluded from the application of the Hague/Visby Rules in Article ١ (c). and similarly Article (١) c. of the Act of ١٩٥١ and section ١٩٥ of the Bill of

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١١٨ - Gaskell, supra note ١٠, at ٣٣٠ - ٣٣١.
١١٩ - s. ١٩٥ (b).

١٩٩٩. So in this case the parties are free to negotiate their own terms of carriage. The exclusion is justified by the peculiar risk attached to the carriage of live animals arising from the inherent propensities of the animals involved. Few carriers would regularly carry large numbers of animals, although there is a thriving trade in sheep to the Middle East and the Sudan is one of the live animals' exporters. Such “bulk” shipments in specialized ships are likely to be made on the basis of special terms, but the Hague/Visby Rules may be contractually incorporated to such carriage i.e. by inclusion of clause paramount in the bill of lading.[١٢٠]

Hamburg Rules adopt the policy of bringing all cargoes within the scope of its application, and then making special provision when necessary. With respect to live animals, Article ٥ (٥) states that “The carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage". The carrier is not liable if he proves that he has complied with any special instructions given to him by the shipper respecting the animals. On the other hand, if there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents, then the carrier is liable for such loss or damage.

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١٢٠. Gaskell, supra note ١٠, at ٣٢٥.

This provision alters the general "reversed" burden of proof under Article ٥ (١) by requiring the cargo owner to prove that loss resulted from fault of the carrier. However, to raise the presumption that loss was caused by inherent risks the carrier must first prove that it followed the instructions of the shipper about carrying of animals. It seems that the first sentence is the overriding principle, so that fault or neglect in the final phrase should be read subject to it[١٢١].

V- Deviation:

It is an ancient doctrine of common law under which the carrier was regarded as guilty of fundamental breach of contract, in cases of geographic departure from the contractual route of the voyage. As a result it will be deprived from protection of exceptions and limits of liability as in Joseph Thorley V. Orchis Co.[١٢٢] In this case, goods was shipped under a bill of lading, which contained an exception of negligence of stevedores in discharging the ship. The ship deviated from the voyage described in bill of lading. The cargo was damaged by the negligence of the stevedores in discharging the cargo. It was held that the deviation deprived the shipowners of the benefit of the exception and he was liable for the damage. In

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١٢١- Carver, supra note ٢٢, at ٦٢٤ – ٦٢٩; Scrutton, **on Charterparties and Bills of Lading,** ٢٥٩ – ٢٦٧ (١٩th ed ١٩٨٤).

١٢٢- (١٩٠٧)١ KB ٦٦٠.

common law it was always a defense if a ship deviated in order to save life, but it was not justifiable to deviate to save property, for example, by taking another ship in tow[١٢٣]. Article IV rule ٤ of the Hague/Visby Rules was specifically enacted to widen the rather narrow justifications permitted under common law. It provides "Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom". The paragraph makes no attempt to define the concept of deviation, but merely specifies the types of deviation which are justifiable under the Rules. Presumably there is no intention to disturb the well-established common law principles. English courts have, however, experienced some difficulty in interpreting the phrase "any reasonable deviation". It is generally accepted that what constitutes a reasonable deviation is to be treated as a question of fact. Thus in Stage Line V. Foscolo Mango & Co[١٢٤], a vessel on a voyage from Swan Sea to Constantinople made a slight deviation to St lves to land two engineers who had been taken on board for the purpose of testing her fuel – saving apparatus. On leaving St lves, the vessel ran aground and the cargo was lost.

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١٢٣ - Carver, supra note ٢٢, at ٦٢٤-٦٢٩; Scrutton, supra note ٣٦, at ٢٥٩-٢٦٧.
١٢٤ - (١٩٣٢) AC ٣٢٨.

It was held that this was not a reasonable deviation and refused to allow the shipowner to rely on the protection afforded by the Hague Rules. It is relevant to note that the English courts adopt a very restricted interpretation to the term "reasonable deviation". Therefore there are remarkably few reported English cases in which a carrier has successfully invoked the defence. It is submitted that an English court could still deprive the carrier of right to rely on Hague Rules exceptions, under Article IV rule ٢, where there has been an unreasonable deviation, but the protection afforded by limit of the liability will apply in such cases[١٢٥].

Hamburg Rules ١٩٧٨ make no special provision for deviation whatsoever, and Article ٥ (٦), the equivalent of Article IV rule ٤ of the Hague Rules, does not mention the word. The general comprehensive liability scheme of the Hamburg Rules, simply regulates liability according to fault under Article ٥. If a deviation causes loss, the carrier will be liable unless it can disprove fault. There will be no need to ask whether there has been a technical deviation or not, as the requirement is that there must be a causative link between the carriers actions and any loss. It is to be noted, however, that Article ٥ (٦) has narrowed the justification for deviations provided for in Article IV rule ٤. of the Hague Rules. The carrier is now

[١٢٥] - Gaskell, supra note ١٠, at ١٩٨; Wilson, supra note ١٠, at ٢٠.

excused from liability where loss, damage or delay results from any measures to save life or from “reasonable measures to save property at sea” It is submitted that, as a matter of interpretation, the Hamburg Rules ١٩٧٨, should not be made subject to the doctrine of deviation, unless there is a clear provision to the contrary in the contract[١٢٦].

The carriage of Goods by Sea Act ١٩٥١ includes similar provision to the Hague/Visby in Article IV rule (٤). We can find no authority that the Sudanese courts recognize the doctrine of deviation. The Bill of ١٩٩٩ contains the same provision as one of the exceptions in Article ١٨٧ rule (w). We have already criticized the inclusion of addition exceptions as it is not permitted under the Hague/Visby Rules Article v. The draftsmen of the Bill might have been affected by the absence of the doctrine of “deviations” in the practice of Sudan courts to the extent that they felt it makes no difference to be included as an exception instead of provided for independently, in spite of that no one can say that the doctrine is completely unknown in our courts. Most of the bills of lading normally include clauses as liberty clauses, for example, concerning the “deviation" and its effect to the contract of carriage by sea.

٥- Conclusion:

[١٢٦] - id at ١٩٩; id at ٢١٧ – ٢١٨.

The Hague/Visby Rules are basically designed to be applied to bill of lading or similar document of title. Thus the Hague/Visby Rules do not apply to non-negotiable bills of lading i.e. waybills and straight bills, but it can be contractually incorporated. Conversely, the Hamburg Rules generally apply to contracts of carriage by sea "whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another". It is immaterial under Hamburg Rules whether a bill of lading or a non-negotiable receipt is issued.

The new convention, however, follows its predecessors in that its provisions are not applicable to carriage covered by charterparty or by bill of lading issued in pursuant to it in the hands of the charterer, except if there is a provision to that effect included in the bill of lading or the charterparty.

The geographical scope of application of the Hague/Visby Rules envisages an international contract of carriage "between ports in different states". It covers the bill of lading issued in a contracting state or where the carriage is from a contracting state, also where the bill expressly incorporates the Rules.

The application of Hamburg Rules is similarly restricted to international contracts of carriage by sea. The range of voyages covered by Hamburg Rules is roughly similar to those enumerated by the Hague/Visby

Rules, with one important divergence i.e. that it covers both inward and outward carriage.

The application of both conventions is merely relevant to the sea transport only for example sea leg of intermodal carriage. This period is restricted from "tackle to tackle" under Hague/Visby Rules. Hamburg Rules extend the period to cover the entire carriage, from the time when the goods have been taken over from the shipper until the goods are delivered to the consignee or placed at its disposal.

The Hague/Visby Rules do not provide for liability for delay in delivering the goods. The courts applying the rules, generally, used to indemnify cargo owner for consequential loss. Hamburg Rules fill this gap by expressly providing that the carrier is be liable for loss resulting from delay in delivery unless he can discharge the standard burden of proof i.e. neither he nor his servants or agents were at fault.

The Hague/Visby Rules define dangerous goods as "goods of inflammable, explosive or dangerous nature to shipment". No such definition is found under Hamburg Rules. Both conventions distinguish between two situations: When the dangerous cargoes are shipped with notice of their dangerous qualities and when such notice is lacking. In the first situation the carrier is entitled to dispose of them or to render them harmless

without being liable to damages for the shipper. In the second situation the carrier has the right to dispose of them without compensation, but in addition he is entitled to damages for any resultant damage in the ship or in the other cargoes on board.

The orthodox view is that such liability is strict and in no way dependant on the knowledge available to the shipper as to nature of the goods.

The deck cargoes and the live animals are excluded from the list of goods covered by the Hague/Visby Rules. Thus the carriers are free to make their own contractual terms in respect of them. Deck cargo is only taken outside the Rules where it is stated in the bill as being carried on deck and it is so carried. There is a considerable debate whether the liberty clause or usage of trade may constitute an agreement for a cargo to be carried on deck. The effect of carriage on deck without the actual or implied consent of the shipper traditionally amounts to fundamental breach of contract of carriage, which deprives the carrier from relying on the contractual terms or exceptions. Hamburg Rules regard the deck cargo as under deck cargo subject to the Rules. It deems that there is permission for a cargo to be carried on deck: if there is an agreement to this effect or if the usage of the trade or the statutory law permits such carriage.

Deviation, i.e. geographical departure from the contractual route of the voyage, is justifiable according to the Hague/Visby in cases of deviations to save life or property at sea, or any other reasonable cause. Otherwise deviation is deemed to be an infringement of the Rules and breach of contract of carriage. The question of whether a deviation is reasonable or not is a question of fact. If the deviation is unjustifiable under the Rules the carrier is deprived, according to the English courts, from relying on the Hague/Visby exceptions, and the protection afforded by limit of liability. No mention of the doctrine of deviation under Hamburg Rules, but if a deviation causes loss or damage, the carrier will be liable according to the principle of the “presumed fault".

Chapter Three
Limits of Liability and Limits of Actions

This chapter discusses limitation of liability under the Hague/Visby Rules and Hamburg Rules. It will discuss limitation of liability generally and in cases of containers; the scope of application of the Rules; the monetary unit; unit of account and cases in which limits should be broken. Finally it considers the limitation of actions under both conventions in two facets “notice of loss" and “time bars”.

١- Limits of Liability:

The concept of limitation of liability dates back to the sixteenth century and was originally designed to encourage investment in shipping. While the justification for its continued retention nowadays is less evident. It still serves two useful purposes: First, it protects a carrier from the risk associated with cargoes of high-undisclosed value. Secondly, it realizes cheaper and uniform freight rates by establishing a standard level of liability. Two problems face the draftsmen of an international convention seeking to establish a formula for limitation of liability, i.e. selection of an appropriate quantities unit of goods by which to calculate the carrier’s

overall liability and to agree on a monetary unit on which to base the minimum liability.

i- Limits of liability Under the Hague/Visby Rules:

Article IV rule ٥ of the Hague Rules limits the liability of the carrier to ١٠٠ gold values, per package or unit unless the nature and value of the goods had been declared in the bill before shipment. Article IX Para (١) states that the monetary units mentioned in the convention were to be taken to "gold value". The United Kingdom in implementing The Hague Rules in Carriage of Goods by Sea Act ١٩٢٤ initially interpreted the figure as ١٠٠ Sterling, while many other signatories to the convention converted the amount into equivalent sums in their own currencies. Inflation over succeeding years has resulted in these limits now bearing little relation to the actual damage suffered by cargo owners, but few states have seen it fit to amend their respective figure in the light of this development. Problems have also arisen in many countries in interpreting the term "package" and "unit" as used in the formula. What constitutes a "package"? Is size relevant and is it essential that the article carry some form of wrapping? Again is the term "unit" intended to refer to a shipping unit, such as crate, package or container, or would it equally apply to freight unit i.e. the unit of measurement used to calculate the freight? There is little authority on these points in English law. The issue has attracted little litigation probably due to the fact that the terms" package" and "unit" have been used interchangeably,

the word" unit" having been interpreted as meaning "shipping unit" while there has been considerable ligitation in United States. In Falconbridge V. Chemo,[١٢٧] a tractor was held to be package as it was the physical unit which was being shipped. In, The Nea Tyhi,[١٢٨] the package limit was applied to crates of ply wood and it was held that an on deck stowage of timber, contrary to an express, under deck clause on the bill, was a breach, but the carrier was still entitled to rely on The Hague Rules package limit. In Bekol B.V.Terracina Shipping Corporation,[١٢٩] it was held that for the purposes of the Hague Rules, bundles of timber were packages, as opposed to the individual pieces of timber within each bundle. In this case timber was banded with steel straps and the bills of lading described the goods as "x bundles stc (said to contain) y pieces".

The Protocol of ١٩٦٨ i.e. the Hague/Visby Rules, retained the "package or unit" limitation of liability for the 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 produces the higher amount. Presumably the old case law interpreting the terms "package or unit" will still be valid, while the alternative limitation

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[١٢٧] - (١٩٧٣) ٢ Lloyds Rep ٤٦٩.

[١٢٨] - (١٩٨٢) Lloyds Rep ٦٠٦.

[١٢٩] - (١٩٩٦) ٢Lloyd`s Rep ٥٣.

“per kilo of the gross weight” will be particularly relevant in the case of bulk cargoes. Tetley suggests that, what is package is a question of fact to be decided by the court, and he accepts the American term of “customary freight unit” as an interpretation to the term “unit” under the Hague Rules. He thinks that it is a way of clarification as it seems to be much more explicit term than “unit”[١٣٠]. Finally he defines a unit as to be “some unpacked object". Usually, the unit is described on the bill of lading, for example “one lift van”, “one uncrated automobile”

a- Containers:

In The River Gurara[١٣١], the English courts had to consider, for the first time, the application of the Hague Rules limits to containers, A vessel on a voyage from west Africa had run a ground on the coast of Portugal and later sank with total loss of cargo .Much of the cargo was containerized and was shipped under bills of lading incorporating the Hague Rules. Many of the containers had been stuffed privately by the shippers and were covered by bills stating that they were “said to contain" a given number of items such as pallets, crates, cartons or bags. The point at issue was whether the cargo owner’s right of recovery was limited to £١٠٠ per container or £١٠٠

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[١٣٠] - Tetley, **Marine Cargo Claims**, ٢٣٥ – ٢٣٧ (١٩٦٥).

[١٣١] - (١٩٩٦) ٢ Lloyd's Rep ٥٣.

per individual item listed on the bill. The Court of Appeal adopted the United States approach in holding that, where the contents of the container were individually listed in the bill, each item would prima facie constitute “a package" for limitation purposes.

The problem of containers has been solved by new Article IV rule ٥ (c) introduced by the Hague/Visby Rules, which reads “where a container, pallet or similar article of transport used to consolidate goods, the number of packages or units enumerates in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit”.

The adoption of this formula is certainly in the right direction, but certain ambiguities remain which require clarification. First, what is meant by a “similar article of transport … used to consolidate goods"? Would a roll on/roll off lorry or wagon fall within this category? Secondly, an interpretation of the phrase “units enumerated in the bill of lading” will be required. Does this mean units as listed by the shipper or only those acknowledged by the carrier as required by Article III rule ٣ (b)? In respect of the latter it will be remembered that no acknowledgment as to quantity of cargo shipped is required from the carrier unless he has reasonable

opportunity to check. As a substantial proportion of containers are now packed and sealed by the shipper before delivery to the carrier, it is only to be expected that the carrier will take advantage of this provision for his own protection by endorsing the bill “said to contain” or “contents unknown". If the container in question should subsequently be lost overboard without any further opportunity of inspecting its content, what is the extent of the carrier’s liability? The wording of the Article suggests that, even in such an event, the units of limitation will be the items listed on the bill and not the container itself, and this should certainly be the result in cases where the carrier has adjusted the freight in response to such itemization. Thus doubt remains as to whether the new container formula will be of any material benefit to the cargo owners[١٣٢].

b- Monetary Unit:

So far as the monetary unit of limitation is concerned, the drafters of the Hague/Visby Rules abandoned the Pound Sterling in favour of Poincare franc in an attempt to devise a “currency” which would retain its value during a period of inflation. The franc was defined in Article IV rule ٥ (d) as “a unit consisting of ٦٥,٥ milligrams of gold of millesimal fineness ٩٠٠” and it was further provided that the date of conversion of the sum awarded

[١٣٢] - John F. Wilson, **Carriage of Goods by Sea**, ٢٠٣ – ٢٠٤ (٤th ed ٢٠٠١).

into national currencies should be governed by the law of the court seized of the case. Article IV rule ٥ (a) provides that the limit of liability is ٦٦٦ ٦٧ units of account per package or unit or units of account per kilo of gross weight of the goods lost or damaged whichever the higher. The Poincare franc has in turn been replaced as the unit of account by the Special Drawing Right, (SDR) as defined by the International Monetary Fund, as the result of the Additional Protocol of ١٩٧٩.

Two further problems associated with the operation of the Hague/Visby limitation rules remain to be discussed, namely, the scope of application of the rules i. e what types of claims they intended to cover and whether the protection is afforded to the carrier only or may be extended to other parties engaged by him in performance of the contract of carriage? Secondly, in what circumstances will the carriers conduct prevent him from invoking the protection of the limitations provisions?

c- Scope of application:

The common law doctrine of privity of contract prevents a person who is not a party to contract from relying on its provisions for protection against any claim brought against him. In Scruttons V. Midland Silicenes[١٣٣], the House of Lords refused to allow a firm of stevedores engaged by the

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[١٣٣] - (١٩٦٢) AC ٤٤٦.

carrier to invoke the protection of the Hague Rules limitation provision when sued for negligently damaging the cargo during the discharging operations, on the ground that he could not be regarded as a party to the contract of carriage. It should be noted that Article IV bis rule I provides that the overall defenses and limits of liability provided by the Rules apply whether the action brought against the carrier is founded on contract or

tort, while rule ٣ stipulates that should the cargo owner institute separate proceedings against the carrier and his servant or agent in respect of the same damage, the aggregate amount recoverable shall not exceed the limit provided by the Rules[١٣٤].

d- Breaking the limits:

Article IV rule ٥ (e) of the Hague/Visby Rules introduced a new provision, which provides a test for breaking the limits. The introduction of an express provision ought to remove any argument that the carrier can lose the right to limit on any other basis, such as deviation or stowage of cargo on deck contrary to an express agreement. Despite this wording, the general view was that the carrier could not rely on the limitation provisions if he was in a fundamental breach of contract, as for example, where he had deviated from the agreed course, or stowed the goods on deck without shipper's consent.

Moreover, the carrier, under Article IV rules ٥(e), loses the right to limit "if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result. For definition of recklessness, according to Wilson, the definition of the Air Convention i.e. Warsaw Convention

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[١٣٤] - Wilson, supra note ٦, at ٢٠٥ – ٠٦.

Article ٢٥, may be applied here, “It is sufficient for

recklessness that a person should act regardless of the possible consequences of his acts[١٣٥]. While a dissenting opinion states that there are subtle differences and similarities between the tests in various conventions and care has to be taken in comparing them[١٣٦].

Whatever the exact meaning of "recklessness", if the test of Article ٢٥ of the of Warsaw Convention is accepted, the cargo owner is required to prove the actual knowledge of the carrier, not only imputed, that the damage will probably and not only possibly result as a consequence of his act. If the same test is applied to the Hague/Visby Rules the burden of proof on the claimant will be, no doubt, formidable one.

ii- Limits of liability under Hamburg Rules:

Despite the strong arguments to the effect that the retention of the principle of limitation of liability was no longer justifiable, the drafters of Hamburg Rules preferred such retention on the ground that it was of benefit to both shipper and carrier in that it enabled the latter to calculate his risks in advance and to establish uniform and cheaper freight rate. Three aspects of the formula require special consideration, namely, the appropriate unit of cargo, a suitable monetary unit of account and scope of application.

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[١٣٥] - Id, at ٢٠٦.

[١٣٦] -Nicholas Gaskell, Regina Asariotis and Yvonne Baatz, Bill of Lading Law and Contracts, ٥٣٠ (٢٠٠١).

a- Unit of cargo:

The Hamburg Rules maintain the dual per package/ per kilogram system established in the Visby Protocol. The purpose of this system is to take account of the fact that the value/weight rations of goods carried by sea differ markedly. As sea cargo ranges from cargo such as bulk commodities, which have a low value relative to their weight, to cargo such as complex heavy machinery, which has a much higher value /weight ratio. Under this system, the relative low limit of ٢،٥ units of account per kilogram would apply to items carried in packages or other shipping units[١٣٧]. The breakeven point is ٣٣٤ kilograms, if a package or shipping unit is under that weight, the per package limit would apply, above that weight, the kilogram limit would apply. By these provisions Hamburg Rules undoubtly resolved the conflict between "shipping" and freight unit", and they introduce a system to the interests of high value, light weight cargo[١٣٨]. So far as container limitation is concerned Hamburg Rules have adopted the Hague/Visby solution preferring to construe the shipping units as the individual items listed in the bill of lading or other document evidencing the contract of carriage. If the contents of the container or pallet are not separately listed,

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[١٣٧] - Art . ٦ .١ (a).

[١٣٨] - The common understanding adopted by the U. N Conference on the Carriage of Goods by Sea ١٩٧٨; Wilson, supra note ٦, at ٢١٩.

then the container or pallet together with its contents are

treated as a single shipping unit. In the case of loss or damage to the container or pallet itself, this will be treated as a separate unit for limitation purposes, provided that it is not owned or supplied by the carrier[١٣٩].

Article ٦ (I) (b) imposes a specific limit for claims for delay against the carrier. This limit is to an amount equivalent to two and half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage by sea. The contract in question here will be the bill of lading and not a charterparty, (except if in the unlikely event of charter incorporating Hamburg Rules). Further under Article ٦ (١) (c) the aggregate liability of the carrier for delay and damage to the same goods cannot exceed Article ٦ (١) (a) limit, above[١٤٠].

b- The Unit of Account:

The draftsmen of Hamburg Rules rejected the Poincare franc as the unit of account in favour of Special Drawing Right (SDR) as defined by the International Monetary Fund. Article ٢٦ provides that the relevant units of account be converted into the national currency of a state according to the value of such currency at the date of judgment or the date agreed upon by the parties. Where states are members of the International Monetary Fund,

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[١٣٩] - Arts . ٦ .٢ – (a) – (b).

[١٤٠] - Gaskell, supra note ١٠, at ٥٢٣; Wilson, supra note ٦, at ٢١٩.

the conversion of (SDR) units into the appropriate national currency

will be in accordance with the rules of the Fund. Where they are not members the method of calculation will be determined by the state itself. It was recognized, however, that the law of certain states may not permit a calculation to be made on this basis, in which case such a state may use the Poincare franc as the basic unit of account.

In cases where the (SDR) is the appropriate unit of account, Article ٦ (١) (a) provides that the carrier's liability is limited to an amount "equivalent to ٨٣٥ units of account per package or other shipping unit, or ٢,٥ units of account per kilogram of gross weight of the goods lost or damaged, whichever is higher". Alternatively, in those states permitted to use the Poincare franc, the corresponding limitation would be ١٢،٥٠٠ and ٣٧,٥ monetary units respectively. These figures represent a ٢٥ percent increase on the limits presently prescribed in the Hague/Visby Rules.

c- Scope of application:

While the Hague/Visby Rules entitle the carrier to limit his liability for cargo damage within the permitted amount "in any event", this phrase has now disappeared from the corresponding limitation clause in the Hamburg Rules. In its place the unqualified statement that the liability of the carrier "is limited" to the amount specified without any further reservation except that contained in Article ٨, which specifically denies the carrier the

right to limit his liability for any loss, damage or delay which results from an act or omission of the carrier "done with intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result". A similar clause bars a servant or agent of the carrier from invoking the limitation clause to cover his personal liability where he has displayed a similar intent or recklessness. It remains to be seen how the courts would interpret this formula for breaking the liability limits and to what extent it would extend to situations formerly covered by the doctrine of fundamental breach, for example, whether deviation from the agreed course would constitute a conduct appropriate to fulfill the requirements of this article, whereas it is clearly not the intention that unauthorized deck stowage per se should have this effect. The only guideline provided by the Rules is to be found in Article ٩ (١) which provides that "carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of Article ٨[١٤١].

The Carriage of Goods by Sea Act of ١٩٥١ adopted the ancient limits introduced by the Hague Rules. It provides in Article IV rule ٥ "Neither the carrier nor the ship shall in any event be or become liable for any loss or

[١٤١] - Wilson, supra note ٦, at ٢٢١.

damage to or in connection with goods in an amount exceeding £s١٠٠ per package or unit …. etc". The shortcomings of this provision which encourage the limits to be amended twice, by the protocol of ١٩٦٨,

i.e. Visby Protocol and by the additional protocol of ١٩٧٩, instead of encouraging law reform by the legislature it resulted in the courts to dispense with the limitation rules completely.

The Bill of ١٩٩٩ includes similar rules of limitation to that of the Hague/ Visby Rules in section ١٩٣, but surprisingly and contrary to the Hague/Visby Rules the provision gives the official authority the right to specify the limit! What authority? And is the limit to be specified in each case? And why should the Bill ignore the limits of liability under the Hague/Visby Rules although it incorporates them in Article ١٦٩ (١)? No answer is available.

٢- Limits of Actions:

In case of loss or damage to cargo, it is normal for the shipper or consignee to seek damages available to him from the shipowner. Two situations can be distinguished: First, when the event causing the loss is covered by any of the exceptions provided for in Article III rules (a) – (q) of The Hague/Visby Rules, the claimant is entitled to damages subject to the limit of liability provided for in the Rules. The other situation is in cases of the shipowner being in default, i.e. as when the goods carried on deck without notifying the shipper or stating such a fact in the bill of lading, and in cases of deviation and negligence committed by the shipowner. In these

situations the shipowner is not entitled to limit liability and so the damages are to be estimated according to the normal rules in Hadley V. Baxendale[١٤٢], and all principles operate including remoteness of and mitigation of damage.

i- Notice of loss:

The Hague and Hague/Visby Rules Article III rule ٦ provides that unless notice of loss of, or damage to, the goods, indicating the general nature of such loss or damage, have been given in writing to the carrier or to his agent at the port of discharge before the goods are removed e.g. by the consignee, within three days, the removal will be prima facie evidence that the delivery has been in accordance with the bill. The notice of loss has been split into two parts for apparent and non – apparent loss respectively. In the former instance the notice must be given immediately at the time of discharge while in the later three days is available for the claimant to give such notice. It is accepted universally that bad order receipts are, in effect, notice in writing. There is one exception to the notice, and that is where there has been a joint survey or inspection. It should be noted that the joint survey must be "at the time" of receipt of the goods. It is to be noted

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[١٤٢] - (١٨٥٤) ٩ Exch ٣٤١.

moreover that the carrier and receiver are bound by the Hague/Visby Rules to give reasonable facilities for inspecting and tallying the goods.[١٤٣]

Hamburg Rules Article ١٩ is an equivalent provision, although it provides a one- day period in which to give notice, unless the damage was not apparent, in which case the period is ١٥ consecutive days after the goods were handed over to the consignee. Perhaps of more significance is Article ١٩ (٥) which requires notice in ٦٠ days after the handing – over if there is to be a delay claim. Article ١٩ (٧) requires the carrier to give notice to the shipper if it intends to make a claim against the shipper.

The Carriage of Goods by Sea Act ١٩٥١ contains a typical provision with typical numbering to that of the Hague/Visby Rules Article III rule ٦. Again no difference can be noted under the Bill of ١٩٩٩ section ١٩٣ except that, it gives the receiver three consecutive days without counting the holidays in cases of the non- apparent damage. As we noted before the Hague/ Visby is silent on whether the three days include the holidays or whether they are workdays. Normally the bill of lading includes a clause of how those three days are to be counted[١٤٤].

ii- Time bars:

[١٤٣] - Gaskell, supra note ١٠, at ٥٣١ – ٥٣٣: Tetley; supra note ٤, at ٢٢٧ – ٢٣٣.

[١٤٤] - e.g. P & O on Nedlloyd Bill include a clause of a notice within three working days. While ANL Tranztaz Bill of lading provides for a notice within three consecutive days.

a- Under the Hague/Visby Rules:

Under Article III rule ٦ of The Hague/Visby Rules the carrier is discharged from all liability in respect of loss or damage unless suit is brought within one year from the date of delivery of the goods, or the date when the goods should have been delivered, for example, where they have been total loss. Any clause that seeks to reduce this period will be contrary to the Rules and therefore null and void. The time limit can be extended by agreement between the parties after the cause of action has arisen.

Several points relating to this provision call for consideration:

First, the limitation period runs from the time the goods were delivered, or should have been delivered. The selection of the word “delivery" instead of “discharge” envisages some sort of constructive delivery to the consignee or his authorized agent before time will begin to run.

Secondly, the carrier is “discharged from all liability whatsoever in respect of the goods. This provision has been interpreted as covering not only the normal claim for cargo damage or loss, but also extending to claims arising from fundamental breach of contract by the carrier or from the type of misconduct listed in Article IV rule ٥ (e).

Thirdly, the term "suit" has been construed as including both litigation and arbitration proceedings. Thus in The Merak[١٤٥], the bill of lading incorporated the terms of the charterparty which included an arbitration clause. Unaware of this fact, the plaintiff brought a court action for cargo damage and by the time this action was stayed, the ١٢ months

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[١٤٥] - (١٩٦٥) ١QB ٢٢٣.

period has expired. It was held that the word" suit" includes arbitration proceedings and consequently the arbitration avenue was now time barred. Similarly, a narrow construction was applied to this requirement, that the suit must be brought within the relevant jurisdiction during this period.

Fourthly, the recent case of Clifford Maersk[١٤٦], has established that where the final day of limitation period falls on a Sunday or other day on which the office of the Supreme Court is closed, suit will be brought in time if the claim form is issued on the next day on which the office is open.

Finally, it is generally accepted that the effect of this provision was not only to bar the remedy but also to extinguish the right. Thus in Aries Tanker Corp. V. Total Transport[١٤٧], the defendants, in paying freight on receipt of cargo had made a deduction to cover short delivery. Two years later they were sued by the carrier for the balance of the freight and sought to serve a defense based on right of set- off. The court held that no such defense was admissible since any right on which it might initially have been based had been extinguished by the time lapse.

The Hague/Visby Rules, however, frequently provide for the carrier to be indemnified by a third party in the event of any successful claim being made against him. No such indemnity action can be launched until the initial

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[١٤٦] - (١٩٨٢) ٢ Lloyd's Rep ٢٥١.
[١٤٧] - (١٩٧٧) Lloyd's Rep ٣٣٤.

claim against the carrier has been concluded by judgment or settlement and this is unlikely to occur within the limitation period. Accordingly Article III rule ٦ bis provides that an action for indemnity may be brought outside the ١٢ – month's period if it is initiated within the normal limitation period of the court seized of the case. The paragraph provides that, in any event, a minimum period of three months shall be allowed from the time the party seeking the indemnity has settled the claim or has been served with process in the action against him.[١٤٨]

b- Under Hamburg Rules:

Under Hamburg Rules actions are time – barred if judicial or arbitral proceedings have not been instituted within a period of two years from the time the goods have been delivered or should have been delivered.[١٤٩] This limit applies irrespective of whether proceedings have been instituted by the cargo owner or the carrier. This compares with a period of ١٢ months under the Hague/Visby Rules applicable only to proceedings against the carrier or the ship, has been welcomed by cargo interests, since the one year limit of the Hague/Visby Rules is deemed as impractically shorter, and inconsistent with other international conventions on transportation[١٥٠]. The person against

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[١٤٨] - Wilson, supra note ٦, at ٢٠٧ – ٢١٠.
[١٤٩] - Art. ٢٠ (١).
[١٥٠] - UNCTAD Rep. December ١٩٨٧.

whom the claim is made may at any time, during the running of the limitation period extend that period by a declaration in writing to the claimant. Actions for indemnity may, of course, be instituted

outside the basic limitation period and in this respect the Hamburg Rules follow their predecessors in specifying a minimum extension of ٩٠ days from the date on which the party seeking the indemnity “settled the claim or has been served with process in the action against himself"[١٥١] Similar to the Hague/Visby Rules, the Carriage of Goods by Sea Act ١٩٥١, incorporating the Hague Rules, provides in Article III rule ٦ paragraph (٣): “In any event the carrier and the ship shall be discharged from all liability in respect of loss or *damage* unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered”. The Bill of ١٩٩٩ has a similar provision in section ١٩٨.

٣- Conclusion:

The Hague/Visby Rules retain the per package or unit limitation for the individual items of cargo of high value, So the definition of “unit" developed under the Hague Rules as “shipping unit" is valid here. Alternatively the Rules introduce a formula based on the weight of the cargo at the option of the shipper which is suitable for bulk cargoes i.e. per

[١٥١] - Art. ٢٠ (٥).

kilogram. Concerning the problem of containerized cargoes the Rules introduced a new proviso to solve the problem. Under this provision the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of limitation. In spite of this endeavor, some ambiguities remained on the question of containers.

In Considering the monetary unit of limitation, the Hague/Visby Rules abandoned the Pound Sterling adopted under the Hague Rules in favour of poincare franc, an amount not exceeding the equivalent of ٦٦٦,٦٧ units of account per package or unit of gross weight of the goods lost or damaged, whichever is higher. It is worth mentioning that an additional Protocol of ١٩٧٩ has in turn replaced the poncare franc by the special drawing right (SDR) as defined by the International Monetary Fund. The aforesaid rules of limits cover the acts of the carrier, his agents or servants, whether in tort or in contract, but they do not cover the act of any other persons who are not a party to the contract of carriage e.g. stevedores. Also the limits do not cover the act of the carrier which is done intentionally or recklessly with knowledge that damage would probably result.

Under The Hague/Visby Rules in case of loss or damage to cargo two situations must be distinguished: where the act of the carrier is covered with

one of the exceptions he is entitled to the limit of liability provided for under the Rules. But when the carrier is in default as in cases of carriage on deck without the consent of the shipper, deviation or negligence, the rules of limits of liability do not operate.

In cases of shortage or damage to cargo, the Rules require a notice to be served on the carrier or his agent before the suit can be instituted. If the damage is apparent the notice must be given immediately at the time of discharge, but if the damage is non – apparent three days are available for the claimant to give such a notice. When a joint survey or inspection effected no notice is required. Under Hamburg Rules the time available for notice in cases of apparent damage is one day while the period in cases of non – apparent damage is extended to fifteen consecutive days after the goods have been handed over to the consignee. Hamburg Rules added two important provisos i.e. they provide for ٦٠ days from the time of delivery available for notice in cases of delay and they require the same notice to be given in cases of claims to be brought by the carrier against the shipper, and this is so advantageous to the shippers' interest.

As far as the time bar is concerned, under the Hague/Visby Rules the carrier is discharged from all liability in respect of loss or damage unless suit is brought within one year from the date of delivery of the goods or

when the goods should have been delivered. Any clause to reduce this period is deemed to be null and void. An action for indemnity may be brought beyond the twelve months period if it is initiated within the normal limitation period of the court seized of the case. However a minimum period of three months from the time of settlement of the first claim is available to the indemnity claim. In comparison, under Hamburg Rules the time limitation is extended to two years from the time of delivery. It is important to say that the proviso applies the time bar for claims irrespective of whether proceedings have been instituted by cargo owner or carrier. The same period for indemnity claims is available under Hamburg Rules i.e. ٩٠ days.

Chapter Four

Conclusions and Recommendations

The conclusions reached in this study may be summarized as follows:

The Hague/Visby Rules establish a mandatory legal regime governing the liability of a carrier for loss of or damage to goods carried under a bill of lading. They cover period from the time the goods are loaded onto the ship until the time they are discharged, that is what is known as "tackle to tackle" period. According to their provisions, the carrier is liable for loss or damage resulting from his failure to exercise due diligence to make the ship seaworthy, to properly man, equip and supply the ship or to make its storage areas fit and safe for the carriage of goods. However, the Hague Rules contain a long list of circumstances that exempt the carrier from this liability. Perhaps the most significant of these exemptions discharges the carrier from liability if the loss or damage arises from the faulty navigation or management of the ship, i.e. the nautical fault.

The objective of the work, which resulted in the adoption of Hamburg Rules of ١٩٧٨, is to remove the existing uncertainties and ambiguities in the existing law, Hague/Visby Rules, and to establish a balanced allocation of responsibilities and risks between cargo interests and the carriers. Hamburg

Rules have achieved this objective in many respects. The most significant of them are:

i. Hamburg Rules are designed to govern the rights and obligations of the parties, carriers per se, to a contract of carriage regardless of whether or not a bill of lading has been issued. This is becoming increasingly important as more and more goods are carried under non-negotiable documents rather than bills of lading.

Hamburg Rules itemize the types of information required to be set forth in the bill of lading. Among other things, these include the general nature of the goods, the number of packages or pieces, their weight or quantity, and their apparent condition. The itemization is more extensive than that under the Hague/Visby Rules.

Moreover the carrier cannot, under Hamburg Rules insert a reservation to the effect that the weight or quality of goods is unknown except if he has no means of checking or if he reasonably suspects that they are inaccurate. He has to state the ground of such suspicion in the bill of lading. This will fairly limit the insertion of such reservations in bills of lading and consequently will save time and expenses to prove the quantity or weight of cargo in cargo claims.

ii. Nowadays, a carrier may enter into a contract of carriage by sea with a shipper but entrust the carriage or part of it, to another carrier. Shippers face difficulties because they have to seek compensation from the actual carrier. That carrier might be unknown to the shipper, might have effectively restricted or excluded his liability, or might not be subject to suit by the shipper in an appropriate jurisdiction. The Hague Rules do not deal with the liability of actual carrier, but the Hamburg Rules provide for the liability of the actual carrier in cases of loss, damage or delay which occurred in the part of the voyage entrusted to him. Otherwise both of the contracting carrier and the actual carrier are jointly and severally liable.

iii. The basis of carrier's liability under the Hague/Visby Rules was one of the principal concerns of the movement for reform that eventually resulted in Hamburg Rules. It is based on specific duties i.e. to issue a bill of lading, to provide a seaworthy ship and the duty of care cargo during the voyage. Those duties are subjected to seventeen exemptions. The long list of exceptions are derived from the exemption clauses that commonly appeared in bills of lading when the Hague Rules were adopted in early ١٩٢٠. Perhaps the most significant of these exceptions discharges the carrier from liability, if the loss or damage arises from the faulty navigation or management of the ship, the so - called "nautical fault" exception.

The original justifications for this liability scheme, and in particular the nautical fault exception, were the inability of the shipowner to communicate with and exercise effective control over his vessel and crew during long voyages at sea, and the traditional concept of an ocean voyage as joint adventure of carrier and owner of the goods. However, subsequent developments in communications and the reduction of voyages time have rendered those justifications obsolete. Hamburg Rules effect a more balanced and equitable allocation of risks and responsibilities between carriers and shipper, based on the principle of “presumed fault". It remains to note that the concept of the “presumed fault" is a civil law notion and it is unknown in the jurisdictions of the English common law. This fact makes the basis of liability under Hamburg Rules unwelcome in English common law countries.

iv. The Hague/Visby Rules cover only the period from the time the goods are loaded onto the ship until the time they are discharged from it, what is known as "tackle to tackle" period. They do not cover the time before loading and after discharge, while Hamburg Rules apply to the entire period the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.

v. Sea cargo carried on deck was traditionally subject to high risk of loss or damage. For this reason the Hague/Visby Rules do not cover goods carried on deck by agreement of the parties. However, developments in transport and packing techniques, and in particular containerization, have made it possible for cargo to be carried on deck with relative safety. It is common for containers to be stored on deck in modern containers ships.

Hamburg Rules take these developments into account. They expressly permit the carrier to carry goods on deck if the shipper so agrees, but also when such carriage is in accordance with the usage of the particular trade or if it is required by the law. The liability of the carrier for deck carriage is based on the same basis of under-deck carriage.

vi. Historically, sea voyages were subject to innumerable uncontrollable hazards, which frequently resulted in delays and deviations. Because of this unpredictability, the Hague/Visby Rules do not cover liability of the carrier for delay in delivery. However as a result of modern shipping technology, the proper charting of the oceans and the sophisticated and efficient methods of navigation, voyages have become less subject to delays and more predictable. Thus Hamburg Rules govern the liability of the carrier for delay in delivery in the same manner as liability for loss or

damage to the goods, i.e. in accordance with the principle of the “presumed fault".

vii. The Hamburg Rules maintain the dual per package/per kilogram system established under the Hague/Visby Rules. But the limits of liability under the Hamburg Rules are ٢٥ per cent higher than those established under the ١٩٧٩ Additional Protocol.

viii. The time bar for claims under Hamburg Rules is extended to two years instead of one year under the Hague/Visby Rules. This time bar covers claims instituted by the shipper against the carrier, but does not cover claims instituted by carriers against cargo owners. Under Hamburg Rules the time bar covers both types of claims.

ix. The Hamburg Rules offer the potential of achieving greater uniformity in the law relating to the carriage of goods by sea than do the Hague Rules. Firstly, since the Hague/Visby Rules apply only when a bill of lading is issued, the significant and growing portion of maritime transport in which bills of lading are not issued is not covered by them. Secondly even when the Hague/Visby Rules do apply, many aspects of rights and obligations of the parties to a contract of carriage are not dealt with. A question or issue that is not covered by the Hague/Visby Rules will be resolved by rules of national law, which often produces disparate solutions,

or by clauses in bills of lading, which may fairly favour one of the parties and which may be given effect to different degrees in national legal systems.

In spite of the noticeable progress which Hamburg Rules have achieved in the international legislation on carriage of goods by sea, there are some reservations, namely:

i. Hamburg Rules adopt the notions and concepts of the civil law for example "the presumed fault". Hence, they are not welcome in the English common law countries.

ii. The countries that apply the Hague Rules from the early ١٩٢٤, Sudan adopted them in ١٩٥١, find it difficult to abandon the wealth of precedents which are based on application of the Hague Rules and to turn to another system of law. Hence, many countries which acceded to Hamburg Rules such as United States and Australia can not enact them into their national legislations.

iii. Hamburg Rules need a long time to be examined and verified, and for their rules to be accommodated in the international carriage of goods by sea, while the defects of the Hague/Visby have already been pinpointed through the long time of their application.

iv. Hamburg Rules made a radical change in the concepts of carriage by sea which are well established for a long time and date back to

many centuries. This cause the major maritime countries, United king for example, to strongly to object its adoption. Thus instead of uniformity in carriage of goods by sea legislations Hamburg Rules create a new division.

For the aforesaid reasons the International Maritime Committee, in order to enhance the Hague/Visby Rules and in the same time maintain the same system of law, introduced proposals for amendments of the Hague/Visby Rules i.e. instrument of amendments.

The most significant amendments included in, are the following:

First, it widens the definition of "carrier" by including definition of "contracting carrier" and "performing carrier".

Secondly, it introduces basis of liability based on the fault and neglect of the carrier, and imposes on the carrier general duty of care of cargo although it retains the general exceptions provided for in the Hague/Visby Rules. The important amendment is that it abolished the exception of "nautical fault" and decreases the exceptions to six exceptions only.

Thirdly, it extends the period of responsibility of the carrier from time of receiving of goods to time of delivery. It covers the same geographical scope as that of Hamburg Rules.

Fourthly, it covers the contract of carriage and any transport document whether bill of lading or waybill or any other receipt.

Fifthly, it provides for liability for delay in delivery and deck cargo typically to the provision of Hamburg Rules.

Sixthly, in limits of liability it retains the dual system of per package; per kilogram, but it includes special provision to solve the problem of limit of liability in containerized goods.

Seventhly, it extends the time bar period to two years instead of one year under Hague/Visby Rules.

From the above conclusions the following recommendations may be made:

I recommend that Sudan should adhere to Hague/Visby Rules immediately.

I suggest that the Bill of ١٩٩٩ be revised so as to remove its inconsistencies with the Hague/Visby Rules, specifically, to include definition for "goods" and "carrier"; to revise section ١٨٧ so as to comply with Article VI of the Hague/Visby Rules which provides for the general exceptions to the liability of the sea carriers; to revise section ١٨٨ so as to provide for the limits of liability in Special Drawing Rights (SDR) provided for in the Additional Protocol of ١٩٧٩; and finally, to prepare an English version of the Bill.

In short, Sudan should take part in the serious efforts going on now to amend and modernize the Hague/Visby Rules by the International Maritime Committee.

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